The Republic of Trinidad and Tobago

IN THE COURT OF APPEAL

Civil Appeal No. P337 of 2018
Claim No. CV 2017-00720

Between
THE ATTORNEY GENERAL

Appellant

And

JASON JONES

Respondent

THE EQUAL OPPORTUNITY COMMISSION

First Interested Party

THE TRINIDAD AND TOBAGO COUNCIL OF EVANGELICAL CHURCHES

Second Interested Party

PANEL:

N. BEREAUX J.A.
C. PEMBERTON J.A.
V. KOKARAM J.A.

Date of delivery: 25th March 2025

APPEARANCES:
Mr. F. Hosein SC and Ms. K. Prosper instructed by Mr. V. Jardine and Ms. A. Murray, Attorneys-at-law for the Appellant

Mr. R. Drabble KC, Mr. R. Dass SC and Mr. A. Emmanuel instructed by Ms. M Narinesingh, Attorneys-at-law for the Respondent

Ms. L. Wong, Attorney-at-law for the First Interested Party

Mr. J. Jeremie SC instructed by Ms. A. Kallap, Attorneys-at-law for the Second Interested Party

JUDGMENT

Delivered by Bereaux J.A.

Introduction

(1) The issue in this appeal is whether sections 13 and 16 of the **Sexual Offences Act Chap. 11:28** ("the Act") are unconstitutional. The relevant constitutional provisions are sections 4, 5 and 6 of the **Constitution of Trinidad and Tobago** ("the Constitution"). The respondent alleges that sections 13 and 16 of the Act infringe his rights under sections 4 and 5 of the Constitution, to wit:

(i) his right to respect for his private and family life,

(ii) his right to liberty and security of the person,

(iii) his right to equality before the law and the protection of the law and

(iv) his right to freedoms of thought and expression and

(v) his right not to be subjected to cruel and unusual treatment or punishment.

He alleges as well are not reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual.

(2) The primary issue is whether the two sections are existing law as that term is defined by section 6(1) of the Constitution. If they are not existing law, the second question is whether they fall within the meaning of section 6(2) of the Constitution. The question whether these two sections of the Act are not reasonably justifiable in a society which has a proper respect for the rights and freedoms of the individual arises on the respondent's

pleaded case and also as a section 6(2) consideration.

(3) It is convenient to refer to sections 13 and 16 of the Act now. I shall also include sections 14 and 15 because they are relevant to whether the provisions of the **Offences Against the Person Act 1925** were *"re-enacted"* by the Act as opposed to *"replaced"* -

> ***13. (1) A person who commits the offence of buggery is liable on conviction to imprisonment for twenty-five years.***
>
> ***(2) In this section "buggery" means sexual intercourse per anum by a male person with a male person or by a male person with a female person.***
>
> ***14. (1) A person who commits bestiality is guilty of an offence and is liable on conviction to imprisonment for fifteen years.***
>
> ***(2) In this section "bestiality" means sexual intercourse per anum or per vaginam by a male or female person with an animal.***
>
> ***15. (1) A person who indecently assaults another is guilty of an offence and is liable on conviction to imprisonment for five years for a first offence and to imprisonment for ten years for a subsequent offence.***
>
> ***16. (1) A person who commits an act of serious indecency on or***

towards another is liable on conviction to imprisonment for five years.

(2) Subsection (1) does not apply to an act of serious indecency committed in private between—
(a) a husband and his wife;
(b) a male person and a female person each of whom is sixteen years of age or more, both of whom consent to the commission of the act; or
(c) persons to whom section 20(1) and (2) and (3) of the Children Act apply.

(3) An act of "serious indecency" is an act, other than sexual intercourse (whether natural or unnatural), by a person involving the use of the genital organ for the purpose of arousing or gratifying sexual desire.

(4) Section 13 prohibits buggery between consenting adults, whether male on male, or male on female. Put bluntly, it prohibits anal sex of any kind and anywhere; whether in the privacy of the home or in public. Consent does not absolve either party. It matters not that the couple is male/male or male/female.

(5) Section 16 prohibits sex acts - other than sexual intercourse - which use the genital organ to arouse or gratify sexual desire. It describes such an act as an act of serious indecency.

(6) By a process of deduction, section 16 is discriminatory. Section 16(1) creates the offences and section 16(2) then provides exceptions for sex acts performed in private between husband and wife and in private between a consenting male and a consenting female each over the age of 16 years. Consequently, Section 16 prohibits same sex acts of serious indecency; that is to say, serious indecency between men or between women. Public acts of serious indecency, whether same sex or heterosexual, are also offences.

The claim in summary

(7) The respondent Jason Jones is an openly homosexual man (I shall refer to him as "the respondent" or "Mr. Jones"). Mr. Jones sought a declaration that sections 13 and 16 of the Act are unconstitutional. He sought, in the alternative, a declaration that sections 13 and 16 infringe his rights under section 4(a), (b), (c) and (i), that is to say:

(i) his right to liberty and security of the person and the right not to be deprived thereof except by due process of law and,

(ii) his right to equality before the law and the protection of the law,

(iii) his right to respect for his private and family life, and

(iv) his right to freedom of thought and expression.

(8) He also alleges a breach of section 5(2)(b) of the Constitution. Section 5(2)(b) enjoins Parliament from imposing or authorising the imposition of cruel and unusual treatment or punishment. To the extent that the Act does impose or authorise such treatment, it is a breach of his right to security of the person of which section 5(2)(b) is a further and better particularization.

(9) There were two interested parties. The Equal Opportunity Commission appeared but made no submissions. The Trinidad and Tobago Council of Evangelical Churches intervened to oppose the claim. Mr. Jeremie SC, before us, adopted Mr. Hosein's submissions.

Grounds

(10) In summary the grounds of the claim are –

i. The mere existence of sections 13 and 16 of the Act infringe upon the respondent's rights because they have the effect of criminalizing same sex intimacy between consenting adults with severe penalties;

ii. Those sections constitute an unjustified interference with his private life. He has no freedom of choice in matters which amount to his expression and exercise of personal sexuality and he cannot freely and in the privacy of his own home engage in sexual intimacy with other consenting adults;

iii. Sections 13 and 16 affect the respondent's private life by forcing him to either respect the law and refrain from private consensual same sex activity or to commit the prohibited acts and risk criminal prosecution. The effect is that in the eyes of the legal system he is a criminal, subjecting him to widespread societal prejudice, persecution, marginalization and stigma;

iv. Although section 13 and 16 embraces acts of both males and females it disproportionally impacts homosexual men as primary targets of

stigmatization;

v. Sections 13 and 16 breach the respondent's rights to respect for his family life since they effectively deny the respondent the right to form a family unit because once an emotional attachment is formed it cannot be acted upon sexually without the fear of arrest, prosecution and conviction. Additionally, due to being viewed as a criminal by the State, society and his family he cannot perpetuate extended relationships with his family residing in Trinidad;

vi. Sections 13 and 16 breach the respondent's right to equality before the law because they unfairly discriminate against him solely and expressly on the basis of his gender and sexual orientation. Section 16 punishes homosexual but not heterosexual adults for sexual acts committed consensually. Section 13 is unequally applied and is primarily aimed at prosecutions against homosexuals;

In my judgment, this latter allegation is patently untrue. It is matter of public notoriety that no-one has been charged or punished in Trinidad and Tobago for engaging in consensual anal sex in the privacy of his or her's home. The truth is that Section 13 is not applied at all.

vii. Sections 13 and 16 breach the respondent's right to life, liberty and security of the person and the right to not be deprived thereof except by due process of law because Mr. Jones has no personal autonomy to make decisions which directly affect his choice of whether to enter into a relationship and whether to engage in sexual conduct. The

discriminatory elements which constitute the offences under both sections cannot be *"due process of law"*;

viii. The penalties imposed by sections 13 and 16 amount to cruel and unusual punishment because they impose severe penalties on the respondent for his form of sexual expression. There is a disproportionate link between the conduct and the sanctions which are not reasonably justifiable or proportionate;

ix. The Act repeals and replaces the old law and is not existing law within the scope of section 6 of the Constitution. It replaces the existing law rather than modifying it. The provisions of sections 13 and 16 derogate from the protected rights in a different manner and to a greater extent that the existing law by increasing the penalties, creating the offence of buggery involving a woman, creating a new offence of serious indecency and creating an offence between women.

The truth of the matter, however, is that in regard to the contentions at sub-paragraph (ix) only one of those allegations is correct. Section 16 included in the offence of serious indecency, serious indecency between women. The offence of buggery with a woman has been in existence since 1925. Moreover, the offence of serious indecency is no different from gross indecency except that the offence is now defined and the word *"serious"* is substituted for *"gross"*.

Evidence

(11) The issue for determination is primarily one of law, in particular the interpretation of section 4, 5, 6 and 13 of the Constitution, along with sections 13 and 16 of the Act. However, Mr. Jones has tried his best to show some element of persecution in his affidavit in support. The Attorney General has taken a non-adversarial role and has filed no affidavit in opposition. Matters of law are not dependant on the personal experiences of Mr. Jones, however empathetic a reader might be. Yet, I shall refer to Mr. Jones' evidence insofar as he purports to rely on it as proving a breach of his rights.

(12) In his affidavit in support, Mr. Jones deposes to a number of things, not all factual. He alleged that due to sections 13 and 16 of the Act, he and his partner would be unable to safely remain in Trinidad and Tobago to continue their relationship and build a family so he moved to England in 1996. He said he returned to Trinidad in 2010 and experienced the same homophobia, forcing him to return to England four years later in 2014. According to Mr. Jones he is perceived as a criminal and scorned by his own family who have barely spoken to him since 2014. I found his attempt to link the criminalization of buggery to the alienation of his family to be unpersuasive.

(13) He added that he cannot fully express himself and his sexuality because he has to choose between self-expression or the risk of severe criminal sanction. He is under the constant fear of unwanted intrusions from the police into his private life. Sections 13 and 16 allow the State to police the most intimate aspects of his life leaving him with narrow choices of either breaking the law and risking imprisonment, foregoing a consensual sexual relationship with another male or living alone or exile himself from Trinidad

and Tobago.

(14) In 1992 (thirty-three years ago) he was a singer at a bar frequented by a gay clientele. The performances received homophobic media coverage which led to him being attacked with bottles, rocks and pieces of wood and from which he had to flee. Similarly, in February 2001 (twenty-four years ago), he was in attendance at an Lesbian, Gay, Bisexual and Transgender ("LGBT") carnival party. He and his friends were attacked and robbed by young men who he believed were specifically attacking LGBT persons. When they reported the incident, the police was uncooperative and threatened to arrest the victims instead. I note here that none of those incidents was linked to the criminalization of buggery. The first was due to homophobic coverage and the second to homophobic young men. The complaint about the police, however, is regrettable.

(15) Mr. Jones contends that on a day to day basis he is harassed and verbally abused by homophobic taunts while in public and he is forced to avoid taking public transportation. Sections 13 and 16 has impacted on his ability to form relationships with other adult men in Trinidad and Tobago. He is unable to travel to Trinidad and Tobago with homosexual friends because they would all be put at risk of criminal sanction. He has never been able to experience and benefit from the kind of freedom that heterosexual persons enjoy.

(16) The judge at first instance upheld Mr. Jones'claim. He found sections 13 and 16 to be unconstitutional and made certain consequential orders. The judge also made a number of unfortunate statements to which I shall come. The Attorney General has appealed the decision. Here, as in the High Court, he

has prayed in aid the savings law clause in section 6 of the Constitution

Issues

(17) The issue turns on whether sections 13 and 16 of the Act fall within section 6(1) or (2) of the Constitution. If it falls within section 6(1) it is an existing law (as that term is defined in section 6(3)). Section 6(1) preserves an existing law from invalidation by sections 4 and 5 of the Constitution. Section 6(2) also preserves the provisions of an existing law by permitting their substitution in place of an enactment which purported to repeal and re-enact the provisions of the existing law but which derogated from the fundamental right in a manner or to an extent to which the existing law did not. There is of course a third issue, which is that the sections do not amend or alter an existing law at all but are instead a complete replacement of the two sections, in which case the issue will turn on whether the sections are reasonably justifiable per section 13 of the Constitution. This third issue is the respondent's case.

Submissions

(18) Mr. Hosein SC, for the Attorney General submitted that the Act is an existing law for the purposes of section 6(1) of the Constitution and once it is found to be an existing law, the question whether it infringes sections 4 and 5 becomes irrelevant. He submitted that sub-section (1) of section 6 saves any law found to be an existing law from invalidation by anything contained in sections 4 and 5 of the Constitution. He further contended that even if sections 13 and 16 of the Act were not existing laws, they were enacted in

accordance with section 13 of the Constitution. The respondent had to show that those sections fell within the proviso of section 13 of the Constitution as not being reasonably justifiable in society that has a proper respect for the rights and freedoms of the individual. It is a heavy burden which Mr. Jones has not discharged.

(19) In reply of Mr. Drabble KC, submitted that the Act did not repeal and re-enact the offence of buggery as it existed prior to the 1976 Constitution. Rather it repealed and replaced the existing law, as its long title states. It was a wholly new piece of legislation which in no way altered existing law. This put the legislation completely outside of the protection of section 6 and it is subject to scrutiny by the High Court for infringement of sections 4 and 5 of the Constitution. Therefore, even though it has been passed pursuant to section 13 of the Constitution, section 13 and 16 are subject to the section 13 proviso which when given due consideration is not reasonably justifiable in a society which has a proper respect for the rights and freedoms of the individual.

Law and Analysis

(20) The effect of sections 4 and 5 of the Constitution on the validity of an existing law as defined in section 6(1) of the Constitution was authoritatively stated by the Privy Council in **Matthew v State of Trinidad and Tobago [2005] 1 AC 433**. In **Matthew** a nine member panel had been specially constituted to review the Board's earlier decision in **Roodal v State of Trinidad and Tobago [2005] AC 328**. In **Roodal** the issue was whether the mandatory death penalty for murder prescribed by section 4 of the **Offences Against the**

Person Act had to be modified so as to provide for a discretionary death sentence in order to bring it into conformity with the Constitution of Trinidad and Tobago. The Board by a 3-2 majority, held that it had to be modified in that way. However, the panel in **Matthew** by a 5-4 majority, reversed that decision. The Board considered whether the mandatory death penalty was incompatible with the appellant's right to life under section 4(a) and his right under section 5(2)(b) not to be subjected to cruel and unusual treatment or punishment. The Board also had to consider section 2 of the Constitution. Section 2 proclaims the Constitution as the supreme law of Trinidad and Tobago and expressly provides that *"any other law that is inconsistent with this Constitution is void to the extent of the inconsistency"*.

(21) As the headnote of **Matthew** accurately summarizes, the Board held that section 4 of the **Offences Against the Person Act** was an existing law for the purposes of the savings law clause in section 6(1) of the Constitution which preserved it from constitutional challenge. This was so even though section 4 infringed the right to life under section 4 of the Constitution and was cruel and unusual treatment under section 5. The effect of section 6(1) was that section 4 of the **Offences Against the Person Act** could not be invalidated or rendered void pursuant to section 2 of the Constitution to the extent of any inconsistency with the Constitution. The mandatory death penalty imposed on the appellant in that case was therefore lawful and valid. Lord Hoffmann, giving the decision of the majority, stated at paragraph 1–

> ***1 …Section 4 declares the "right of the individual to life" and section 5(2)(b) says that Parliament may not "impose or authorise the imposition of cruel and unusual treatment or***

punishment". But section 6(1) provides that "Nothing in sections 4 and 5 shall invalidate … an existing law". The law decreeing the mandatory death penalty was an existing law at the time when the Constitution came into force and therefore, whether or not it is an infringement of the right to life or a cruel and unusual punishment, it cannot be invalidated for inconsistency with sections 4 and 5. It follows that despite section 2, it remains valid.

2 The language and purpose of section 6(1) are so clear that whatever may be their Lordships' views about the morality or efficacy of the death penalty, they are bound as a court of law to give effect to it. As Lord Bingham of Cornhill said in Reyes v The Queen [2002] 2 AC 235, 246, "The court has no licence to read its own predilections and moral values into the Constitution". And their Lordships do not understand the appellant to dispute that if one simply reads the Constitution, there is no basis for holding the mandatory death penalty invalid for lack of consistency with sections 4 and 5.

3 This is a very important point. It is not suggested that there is any ambiguity about the Constitution itself. It is accepted that it is simply not susceptible to a construction, however enlightened or forward-looking, which would enable one to say that section 6(1) was merely a transitional provision which somehow and at some point in time had become spent. It stands there protecting the validity of existing laws until such

time as Parliament decides to change them.

(22) He added at paragraph 18 –

> ***A reading of the Constitution, without reference to the 1976 Act, leaves no doubt that sections 4 and 5 are not intended to have any effect on existing laws. The only way in which the Constitution provides for those sections to affect any laws is by its express provisions for the invalidity of any laws inconsistent with them: by the provision for such laws being "void to the extent of the inconsistency" in section 2 and the provision in section 5(1) that "no law may" abrogate the declared rights and freedoms and the provision in section 5(2) that "Parliament may not" do the specified acts. This is the language of invalidity. When section 6(1) provides that nothing in sections 4 and 5 shall invalidate an existing law, it precisely mirrors the effect which sections 2, 4 and 5 would otherwise have.***

(23) The holding in **Matthew,** therefore, is that an existing law although it infringes section 4 and 5 rights remains valid and subsisting despite that infringement. **Matthew** was affirmed some seventeen years later by another nine-member panel of the Privy Council in **Chandler v The State [2022] UKPC 19**. The holding was unanimous. The Board affirmed that section 6(1) of the Constitution as a savings clause for existing law *"was"* not merely a transitional provision which had become spent (per Lord Hoffmann **supra** in **Matthew**). Lord Hodge gave the judgment of the Board. He reviewed the law on the issue and then summarised the relevant principles

as related to section 6(1). I shall refer only to those principles that are relevant to this appeal:

(i) …

(ii) The savings clause, which is contained in the 1976 Constitution and which is not a transitional provision, makes existing laws conform with the Constitution by disapplying sections 4 and 5 of the Constitution to such laws.

(iii) The Parliament of the independent Trinidad and Tobago decided in 1976 not to dispense with the savings clause which has this effect.

(iv) The power in section 5 of the 1976 Act to modify a law to make it conform to the 1976 Constitution is available only where the law in question is not in conformity with the Constitution. The 1976 Act does not give the courts power to modify a law the validity of which is preserved by the Constitution.

…

(v) The living instrument doctrine enables broadly worded statements of fundamental rights to be adapted to reflect changing attitudes and changes in society; but not all provisions in a Constitution are of that nature. The meaning and purpose of a savings clause which preserves existing law does not change over time.

(vi) Giving priority to a modification clause in the 1976 Act over the savings clause in the 1976 Constitution would in large measure destroy the effect of the savings clause which is part of the supreme law of the state and which reserves to the legislature the power to determine whether and if so how to change any existing law to conform with the fundamental rights articulated in the 1976 Constitution and changing social attitudes.

…

Background to the section 6 savings clause

(24) Section 6 of the Constitution was a radical change from the previous savings law clause in section 3 of the 1962 Independence Constitution. That change was precipitated by the decision of the Trinidad and Tobago Court of Appeal in **Trinidad Island-Wide Cane Farmers' Association Inc and Attorney General v Prakash Seereeram [1975] 27 WIR 362** which decided that an amendment which substantially changed the nature and character of an existing law excluded the amended law from the protection of the savings law provision. Section 3 of the Independence Constitution provided as follows:

> ***(i) Sections 1 and 2 of this Constitution shall not apply in relation to any law that is in force in Trinidad and Tobago at the commencement of this Constitution.***
>
> ***(ii) For the purposes of subsection (1) of this section a law in force at the commencement of this Constitution shall be deemed not to have ceased to be a law in force by reason only of –***
>
> ***(a) any adaptation or modification made thereto by or under section 4 of the Trinidad and Tobago (Constitution) Order in Council 1962, or***
>
> ***(b) Its reproduction in identical form in any consolidation or revision of laws with only such adaptations or modifications as are necessary or expedient by reason of its inclusion in such consolidation or revision.***

(25) The issue before the Court of Appeal in **Seereeram** revolved around section

3(ii)(b) of the Constitution. In that case, the Cane Farmers Incorporation and Cess Act, 1965 which repealed and replaced a 1961 Ordinance (an existing law at the time of the new passage of the 1962 Constitution) was itself amended by a 1973 Act. Those 1973 changes were substantial chnages. One important issue which arose according to Phillips JA at page 351g was whether the Act as amended could properly be held to be *"a consolidation or revision of laws which reproduces in identical form The Cane Farmers Incorporation and Cess Ordinance, 1961"* (which was the existing law). The unanimous decision of the Court of Appeal was that it could not be.

(26) Phillips JA found at page 354b that the amendment introduced by the 1973 Act had the effect of removing the Act from the protection of section 3(2)(b) of the 1962 Constitution altogether. He added that *"the terms of that provision … are such as evince the desire of the legislative to effect a substantial amendment of the Act and are not necessary or expedient merely by reasons of any consolidation or revision of laws"* (as provided in section 3(2)(b) - See page 354 letter C. At page 352 paragraph h Phillips JA noted –

> ***In approaching this question of construction it must be borne in mind that for the purpose of preserving the human rights and fundamental freedoms enshrined in s 1 of the Constitution, s 2 lays down certain prohibitions which operate as a curb on the future powers of the Legislature. In the pre-Independence era no such curb existed. It is at the same time manifest that it was necessary to preserve the whole body of the existing laws. In my opinion, this is the object which s 3 of the Constitution was intended to achieve, and it does not by implication confer on***

the Legislature any power to amend those laws.

This section has its counterpart in many of the newly independent Caribbean countries. Almost identical words are used in s 26 (9) of the Constitution of Jamaica. More detailed language is used in the Constitutions of both Barbados and Guyana. The relevant provision of the Barbados Constitution is to the following effect:

'26.(1) Nothing contained in or done under the authority of any written law shall be held to be inconsistent with or in contravention of any provision of sections 12 to 23 to the extent that the law in question –

> *(a) is a law (in this section referred to as "an existing law") that was enacted or made before 30th November 1966 and has continued to be a part of the law of Barbados at all times since that day;*
>
> *(b) repeals and re-enacts an existing law without alteration; or*
>
> *(c) alters an existing law and does not thereby render that law inconsistent with any provision of sections 12 to 23 in a manner in which, or to an extent to which, it was not previously so inconsistent.*
>
> *'(2) In subsection 1 (c) the reference to altering an existing law includes references to repealing it and re-enacting it with modifications or making*

different provisions in lieu thereof, and to modifying; and in subsection (1) "written law" includes any instrument having the force of law and in this subsection and subsection (1) references to the repeal and re-enactment of an existing law shall be construed accordingly.'

It will be observed that, unlike s 3 of the Constitution, s 26 of the Barbados Constitution specifically saves a law which is repealed and re-enacted with modifications, so long as such modifications do not have the effect of rendering that law inconsistent with the fundamental rights and freedoms (contained in ss 12 to 23) 'in a manner in which, or to an extent to which, it was not previously so inconsistent.'

The provisions of s 3 (2) (b) of the Constitution are rather more stringent in that in order to qualify for the immunity provided by s 3 (1) the following conditions must coexist: (a) the law must be reproduced 'in identical form', subject to (c) below; (b) it must form part of a consolidation or revision of 'laws'; (c) the only differences that are allowed are 'such adaptations or modifications as are necessary or expedient by reason of its inclusion in such consolidation or revision [of laws].'

(27) Later he said page 353–

The object of s 3 of the Constitution, in my opinion, is to save from any taint of unconstitutionality the laws of the country

that were in force on 31st August 1962. It seems clear that the section contemplates the existence of laws that infringe the rights and freedoms declared by s 1. While s 3 (1) preserves in their exact form individual laws existing on the prescribed date, s 3 (2) seeks to attain the same object in relation to any future consolidation or revision of those laws.

(28) **Seereeram** was a December 1975 decision of the Court of Appeal. The Republican Constitution came into force on 1st August 1976 with the section 6 savings clause for existing law being very much a hybrid of the savings law clause of The Bahamas (1973) and Barbados (1966) Constitutions and providing a far more formidable savings clause for existing law than section 3(1) of the 1962 Constitution did. The prevailing view among Caribbean academics at the time was that the section 6 provision was redrafted to plug the **Seereeram** loophole and that the widened savings law provision in section 6 evinced a clear intention in the newly drafted Republic Constitution that in the event of a failure of a succeeding enactment, the existing law must then prevail. This is strongly reflected in section 6(2) of the Constitution.

(29) **Matthew** and **Chandler thus** affirm the intention underlying section 6 and establish the *"supremacy",* so to speak, of the existing law as it relates to invalidation by sections 4 and 5. However, both decisions were concerned with legislation which were classically existing law within section 6(1)(a); that is to say legislation existing as governing law at the time of the coming into force of the 1976 Constitution. In regard to sections 13 and 16 of the Act, the existing law at the time of the 1976 Constitution was sections 60,

61 and 62 of the **Offences Against the Person Act, 1925**. Sections 13 and 16 purport to *"repeal and replace"* those provisions. The question is whether those sections amend the existing law in a manner prescribed for by sections 6(1)(b) or 6(1)(c) or 6(2). **Matthew** and **Chandler** do not consider section 6(1)(b) or 6(1)(c) or section 6(2). We are very much in uncharted territory.

The relevant constitutional provisions

(30) It is appropriate to refer to sections 4, 5 and 6 of the Constitution at this point:

> ***4. It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely:***
> ***(a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law;***
> ***(b) the right of the individual to equality before the law and the protection of the law;***
> ***(c) the right of the individual to respect for his private and family life;***
> ***…***
> ***(i) freedom of thought and expression; …"***
>
> ***"5. …***

(2) Without prejudice to subsection (1), but subject to this Chapter and to section 54, Parliament may not-

(a) …

(b) impose or authorise the imposition of cruel and unusual treatment or punishment; …"

"6 (1) Nothing in sections 4 and 5 shall invalidate –

(a) an existing law;

(b) an enactment that repeals and re-enacts an existing law without alteration; or

(c) an enactment that alters an existing law but does not derogate from any fundamental right guaranteed by this Chapter in a manner in which or to an extent to which the existing law did not previously derogate from that right.

(2) Where an enactment repeals and re-enacts with modifications an existing law and is held to derogate from any fundamental right guaranteed by this Chapter in a manner in which or to an extent to which the existing law did not previously derogate from that right then, subject to sections 13 and 54, the provisions of the existing law shall be substituted for such of the provisions of the enactment as are held to derogate from the fundamental right in a manner in which or to an extent to which the existing law did not previously derogate from that right.

(3) In this section –

"alters" in relation to an existing law, includes repealing that law and re-enacting it with modifications or making different provisions in place of it or modifying it;

"existing law" means a law that had effect as part of the law of

Trinidad and Tobago immediately before the commencement of this Constitution, and includes any enactment referred to in subsection (1);

"right" includes freedom.

Questions arising

(31) Sections 60, 61 and 62 of the **Offences Against the Person Act 1925** as set out in the revised laws of 1940 were existing law at 1st August 1976. They later appeared in the 1980 revised laws as sections 59,60 and 61. The 1980 revision was repealed and replaced by the Act in 1986. So the issue is whether sections 13 and 16 of the Act fall within section 6(1)(b), 6(1)(c) or 6(2) of the Constitution. For the purposes of sections 6(1)(b), 6(1)(c) and 6(2) the questions which arise in regard to the amendments made by sections 13 and 16 of the Act to the **Offences Against the Person Act 1925** are -

(i) Do sections 13 and 16 of the Act *"repeal and re-enact"* sections 59, 60 and 61 of the Offences Against the Person Act without alteration (section 6(1)(b); and

(ii) If the answer is that those sections did repeal, re-enact and alter those provisions of the **Offences Against the Person Act 1925**, did those alterations derogate from sections 4(a)(b)(c) and (i) and section 5(2)(b) in a manner greater than sections 59, 60 and 61 (section 6(1)(c)); or

(iii) If the alterations derogated further than sections 59, 60 and 61 did, then section 6(1) (c) of the Constitution does not apply and the next question will be whether it falls within section 6(2). If it does then

subject to sections 13 and 54 of the Constitution the provisions of the existing law will have to be substituted.

(32) The further derogation is of course subject to the proviso in section 13 of the Constitution as to whether it is reasonably justifiable. If shown not to be reasonably justifiable then the provisions of the **Offences Against the Person Act 1925** are still to be substituted.

Errors of the judge

(33) The trial judge made no effort to consider these questions. Rather, he proceeded on the basis that the Parliament having invoked section 13 of the Constitution had conceded that it was not an existing law question but one of reasonable justification under section 13 of the Constitution. As Lord Sales and Hamblen noted in their joint judgment in **Dominic Suraj & Ors. v The Attorney General of Trinidad and Tobago [2022] UKPC 26** at paragraph 95, Parliament does not have to reach a firm an final conclusion that the measure is inconsistent the fundamental rights provisions to adopt the section 13 override procedure. It may do so out of an abundance of caution in the event a court ultimately finds inconsistency. The judge still needed to do the section 6 analysis. Section 6 dictates what is necessary for the amending Act to have effect. That analysis is to be conducted by the judge and not by Parliament. The judge erred. Instead of doing that analysis he abdicated his role to Parliament. Consequently, I can derive no assistance from his judgment on this question and shall do the analysis without the benefit of his opinion.

Replaced or re-enacted?

(34) I turn then to whether sections 13 and 16 *"repeal and re-enact"* sections 59, 60 and 61 and if yes did sections 13 and 16 of the Act *"alter"* them as that term is defined in section 6(3) of the Constitution. Mr. Drabble KC submitted that the Act is a totally, new and comprehensive piece of legislation which repealed and replaced the provisions of the **Offences Against the Person Act 1925** as it related to the buggery offences. I do not agree. A proper examination of both statutes show that Act repealed and re-enacted sections 59, 60 and 61 with modifications which included making different provisions in respect of them, such as to fall within the provisions of section 6(2).

(35) The Act in its long title purports to *"repeal and replace the laws of Trinidad and Tobago relating to sexual crimes …"* The term *"replace"* would suggest a complete change in law. But that is not the case. The Act simply consolidated the laws in relation to sex crimes, to the procuration, abduction and prostitution of persons and to kindred offences, into one composite piece of legislation with modifications as to sentencing and creation of new offences or the outright repeal of some offences. The **Offences Against the Person Act 1925** was a comprehensive statute providing for a variety of offences against the person. But the buggery laws consisted of only three sections. Their repeal and *"replacement"* by the Act was more form than substance and for the convenience of having those sex crimes under one composite statute. Sections 59, 60 and 61 were re-enacted but with modifications, which included stiffer custodial sentences, the inclusion of women in the crime of serious indecency and the change of name from *"gross"* indecency to *"serious"* indecency.

(36) The crime of buggery remained intact and there is little difference between gross and serious indecency except serious indecency is now clearly defined and includes women. The Act re-enacted the same basic offences. In order to illustrate the point it is necessary to compare the 1925 legislation as it existed in 1976 with the 1986 legislation.

The offence of buggery over the years 1925 - 1976

(37) The **Offences Against the Person Act 1925** dealt with a miscellany of offences, most of them non-sexual. The offence of buggery was placed under the rubric *"unnatural offences"* and the *"abominable crime of buggery"*, as it was called was, created along with the crime of bestiality in section 60. It has been re-enacted in section 14 but with a stiffer penalty.

(38) Sections 60, 61 and 62 of the **Offences Against the Person Act 1925** provided as follows -

> ***60. Whosoever shall be convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable to be imprisoned for any term not exceeding five years, nor less than two years, with or without hard labour, and, if a male, with or without corporal punishment***
>
> ***61. Whosoever shall attempt to commit the said abominable crime, or shall be guilty of any assault with intent to commit the same, or of any indecent assault upon any male person, shall***

be guilty of a misdemeanor, and being convicted thereof shall be liable to be imprisoned for any term not exceeding five years, with or without hard labour.

62. Any male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be imprisoned for any term not exceeding two years, with or without hard labour.

(39) Section 60 spoke of the crime being committed *"with mankind…"* being punishable as a misdemeanor with a term of imprisonment of between two to five years with or without hard labour. It added the option of corporal punishment if the offender is a male. The phrase *"and if a male"* along with the option of corporal punishment, demonstrates that the section contemplated that either a man or a woman (or both) could have been charged for buggery under section 60. The term *"mankind"* is thus intended to include a *"woman"*. **The King v Wiseman [1748] EngR 270,** confirms this interpretation. It follows that any woman who was a participant in the *"abominable crime"* was liable to be charged but unlike the man would not face corporal punishment.

(40) The wording of section 60 was also wide enough to include a married heterosexual couple who engaged in the act of buggery. This is consistent with the act being categorized as unnatural. The mischief that the legislation

was directed at was the act of buggery, no doubt founded in the religious doctrine that anal sex even within marriage is unnatural and sinful. Homosexual men were not the target. Also of note is that the section did not distinguish between public and private acts. A married heterosexual couple, if caught, was subject to a charge of buggery even when performed in the privacy of their home. That still obtains under section 13 of the Act. Its inclusion in section 13(2) of the Act is significant. It reinforces the point that the prohibition is directed at the act of buggery rather than the targeting of homosexual men. Section 13(2) of the Act has simply put beyond doubt that the offence of buggery applies to anal sex committed with women.

(41) Section 62 created the crime of gross indecency by a male with another male. There was no definition of what gross indecency meant. Of note here is that there was no act of gross indecency between females. This was changed in the Act by section 16.

(42) There was an amendment to the 1925 provision by Ordinance No. 14 of 1939 by which the minimum sentence of two years set out in section 60 appears to have been repealed. The 1940 revision then deleted the option of adding corporal punishment to a male offender's sentence. Sections 60, 61 and 62 as amended then read:

> ***60. Whoever shall be convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable to be imprisoned for five years.***

61. Whosoever shall attempt to commit the said abominable crime, or shall be guilty of any assault with intent to commit the same, or of any indecent assault upon any male person, shall be guilty of a misdemeanor and liable to be imprisoned for five years.

62. Any male person who, in public or private, commits or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanor and liable to be imprisoned for two years.

(43) The punishment of hard labour was removed from both section 61 and section 62 but the custodial sentence for buggery was set at a fixed five year term. As at 1st August 1976, the date of the new Republican Constitution, the law as it related to buggery and related offences was as provided in the 1940 revision and as set out above.

(44) By the revised laws of Trinidad and Tobago 1980, the relevant sections became sections 59, 60 and 61. The terms of 10 years and later 25 years were substituted by the Act and a 2000 amendment.

(45) The Act was passed pursuant to section 13(1) of the Constitution, as having effect even though inconsistent with the provisions of sections 4 and 5 of the Constitution.

(46) The law as it now stands in the 2016 Revised Laws of Trinidad and Tobago is

as follows –

13. (1) A person who commits the offence of buggery is liable on conviction to imprisonment for twenty-five years.

(2) In this section "buggery" means sexual intercourse per anum by a male person with a male person or by a male person with a female person.

14. (1) A person who commits bestiality is guilty of an offence and is liable on conviction to imprisonment for fifteen years.

(2) In this section "bestiality" means sexual intercourse per anum or per vaginam by a male or female person with an animal.

15. (1) A person who indecently assaults another is guilty of an offence and is liable on conviction to imprisonment for five years for a first offence and to imprisonment for ten years for a subsequent offence.

(2) A person under the age of sixteen years cannot in law give any consent which would prevent an act being an assault for purposes of this section.

(3) In this section, "indecent assault" means an assault accompanied by words or circumstances indicating an indecent intention.

16. (1) A person who commits an act of serious indecency on or towards another is liable on conviction to imprisonment for five years.

(2) Subsection (1) does not apply to an act of serious indecency committed in private between—
(a) a husband and his wife;
(b) a male person and a female person each of whom is sixteen years of age or more, both of whom consent to the commission of the act; or
(c) persons to whom section 20(1) and (2) and (3) of the Children Act apply.

(3) An act of "serious indecency" is an act, other than sexual intercourse (whether natural or unnatural), by a person involving the use of the genital organ for the purpose of arousing or gratifying sexual desire.

(47) I note as well that although not relevant, bestiality which was criminalized in the same section as buggery was re-enacted in section 14 of the Act as a separate criminal offence with the term of imprisonment extended from five years to fifteen years.

The effect of the Sexual Offences Act amendments

(48) In my judgment section 13 of the Act repealed and re-enacted the offence of buggery (but deleted reference to it as an abominable crime). It increased the custodial sentence for the crime of buggery to ten years. Later increased to 25 years by the 2000 amendment.

(49) It put beyond doubt that the crime also applied to buggery of a woman. That was not a new offence. It was always an offence in the language of the 1925 Act.

(50) The crime of attempted buggery was repealed. At best, it was replaced by the offence of indecent assault in section 15 for which the punishment is five years imprisonment.

(51) By section 16 the name of the offence of 'gross indecency' was changed to 'serious indecency' and the custodial sentence was increased to a five year term. A clear definition of the meaning of serious indecency was provided. Section 16 widened the category of persons chargeable with such an offence to include women. However, it excepted from the crime of serious indecency a husband and wife who committed such an act in private and a heterosexual couple both of whom consent to the acts and both of whom are over sixteen years of age. The widening of the category in relation to acts of serious indecency corrected what appeared to be discrimination against men in relation to the crime of gross indecency. By doing so the consequence is that the Act now appears to target homosexual men and women. In my judgment, the crime of serious indecency is the same as the previous offence of gross indecency except that the sentence has been increased much like those of other offences and it has been extended to women. The change in wording is simply an update to a modern and more easily understood language.

(52) The Act abolished the crime of assault with intent to commit buggery and the crime of indecent assault on a male person. However, a wider category of the crime of indecent assault was created by section 15 of the Act which widened the category to include women and a person under the age of sixteen. It added the specific condition that a person under sixteen could not give consent to the assault. It retained the term of five years

imprisonment as with gross indecency but created a term of imprisonment of ten years for a repeat offence.

(53) Section 6(3) defines *"alters"* in relation to an existing law to include *"repealing that law and re-enacting it with modifications or making different provision in place of it or modifying it"*. The changes in the Act to which I have referred are modifications made to the existing law. To the extent that offences were abolished and new offences created by the Act, the amendments fall within the phrase *"making different provisions in place of it or modifying it"* in section 6(3) of the Constitution. To the extent that sentences were increased, these could only be modifications. The Act is not a replacement as submitted by Mr. Drabble. The next question is whether or not those modifications derogated any further than the existing laws did in relation to the fundamental rights.

Further derogation

(54) The term *"derogate"* I construe to mean infringe. The question is whether the infringements by the sections 13 and 16 of the Act are no greater than that of the **Offences Against the Person Act 1925** in which case they fall under section 6(1)(c). If they are greater the question is whether they fall within section 6(2).

(55) Section 6(2) has two features. First, there must be a finding that the succeeding enactment derogated from the fundamental right to a greater extent than the existing law did. Secondly, the enactment is subject to sections 13 and 54 of the Constitution. That, of course, is a genuflection to

the power of Parliament to override sections 4 and 5 by a three fifths majority pursuant to section 13 and to the power of Parliament to alter the provisions of sections 4 and 5 (among other sections) pursuant to section 54. If the enactment is found to derogate from the fundamental right but is passed in both Houses of Parliament pursuant to the provisions of section 13 of the Constitution it will of course be constitutional.

(56) Any override pursuant to section 13, renders it unnecessary to substitute the old law provision. But section 13 also has the proviso that the enactment must be reasonably justifiable. A finding that it is not reasonably justifiable will require the substitution of the existing law because it would have been found to derogate in terms of section 6(2) of the Constitution.

(57) The test of constitutionality is as set out by Baroness Hale in **Suratt v The Attorney General (2007) 71 WIR 391**. At paragraph 58, she said -

> ***"It cannot be the case that every Act of Parliament which impinges in any way upon the rights protected in ss 4 and 5 of the Constitution is for that reason alone unconstitutional. Legislation frequently affects rights such as freedom of thought and expression and the enjoyment of property. These are both qualified rights which may be limited, either by general legislation or in the particular case, provided that the limitation pursues a legitimate aim and is proportionate to it. It is for Parliament in the first instance to strike the balance between individual rights and the general interest. The courts may on occasion have to decide whether Parliament has achieved the***

right balance."

Legislative aim/Proportionate Limitation

(58) I thus pose the question: do sections 13 and 16 pursue a legitimate aim and are the limitations on the rights of the respondent proportionate to it?

(59) The Act does not set out what is the aim behind its promulgation. The relevant parts of its long title state that it is "*An Act to repeal and replace the laws of Trinidad and Tobago relating to sexual crimes, to the procuration, abduction and prostitution of persons and to kindred offences".* It makes no specific reference to the crime of buggery or serious indecency. This is unsurprising given its comprehensive nature dealing with a variety of offences.

(60) However, by providing stiffer penalties and clarifying that buggery applies to women while also giving greater clarity to the offence of serious indecency, I can safely conclude that one intention is to deter the commission of buggery and acts of serious indecency between people of the same sex.

(61) As to section 13, I am unable to discern how deterrence can be successful in relation to private acts performed in the home between man/woman or man/man. It is simply impossible to police or enforce without complaints being made. Detection and punishment must be the hallmark of any such policy. I cannot envision how detection will occur short of the police entering the home by force. In the case of a consenting husband and wife, it is unclear

what would give rise to reasonable suspicion that buggery has been occurring to cause the police to enter the home. As between consenting married heterosexual couples, there will be no complaint. Same can be said for consenting males. In the case of a married woman who is unhappy with such an act, she is also unlikely to complain to the police.

(62) I know of no case coming before the courts, whether now or in the distant past, in which a consenting couple whether man and woman or man and man have come before the courts charged with buggery committed in the privacy of their homes. If the aim is to punish and deter, it is a massive failure. Those cases of buggery which have come before the courts have been criminal cases of male on male sexual assault and even those are hardly reported to the police. The same criticism can be made of section 16 of the Act. If the aim is one of morality there is a moral divide and it depends on which side of the moral divide one falls. Many are of the view that buggery is unnatural. Some may add that it is sinful. But as repugnant as it may be to many, it is a question of choice. Should such morality be imposed upon those who choose the *"unnatural"* or the *"sinful"*? Are they to be judged by that moral standard?

(63) Free choice is a basic democratic right. While it is not absolute, it means that citizens are to be left to their own choices and are free to choose to go to hell if they so wish. Choice is not to be imposed upon them.

(64) It follows that in either case of determent or morality, the aim of the legislation cannot be described as legitimate. Even if legitimate, neither can justify the interference with one's freedom of thought and expression. Nor

can they justify choosing to target men and women who in the privacy of their home choose to indulge in acts of serious indecency, however morally repugnant it may to be to many. The threat of arrest is a breach of the right to security of the person, and the effort to suppress it breaches the right to freedom of thought and expression. The interferences with these rights are disproportionate.

(65) The stiffer penalties and the clear and deliberate targeting of homosexual men and women put the amendments made by the Act beyond the degree of derogation perpetrated by the **Offences Against the Person Act 1925.**

Is it reasonably justifiable?

(66) The next question is whether they are reasonably justifiable.

(67) Section 13 of the Constitution provides –

> ***13. (1) An Act to which this section applies may expressly declare that it shall have effect even though inconsistent with sections 4 and 5 and, if any such Act does so declare, it shall have effect accordingly unless the Act is shown not to be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual.***
>
> ***(2) An Act to which this section applies is one the Bill for which has been passed by both Houses of Parliament and at the final vote thereon in each House has been supported by the votes of***

not less than three-fifths of all the members of that House.

(3) …

(68) The test of reasonable justifiability is stated by the Privy Council in **Suraj & Ors. v The Attorney General of Trinidad and Tobago [2022] UKPC 26** at paragraphs 90 to 94. I shall quote it in its entirety -

> ***90. In the Board's view, (1) the correct interpretation of the Constitution is that the rights in section 4 are to be read as incorporating an implied proportionality test as set out in Suratt, para 58, for all the reasons set out above; (2) the proviso to section 13(1) also incorporates a proportionality test; but (3) the framing of the test in each case is different, so there is no inconsistency or incoherence involved. The proportionality test inherent in the rights in section 4 is the conventional and usual proportionality approach originally explained in de Freitas v Permanent Secretary and refined thereafter, which is more demanding from the point of view of the state than that under section 13(1). Another way of putting this is to say that the test of proportionality appropriate under section 13(1) involves a lesser intensity of review by the courts and a wider margin of appreciation or discretion for the state, acting by legislation passed by a super-majority in both Houses of Parliament.***
>
> ***91. The proportionality approach for bringing into account both individual rights on the one hand and the general interest of***

the community on the other is aimed at ensuring that a balance is struck between the two. The stronger the public interest in issue, the greater the interference with individual rights which may be permitted without there being any violation. Generally, in a democracy, it is the democratic institutions which have the primary responsibility to identify the public interest and what is required to promote it. As Baroness Hale put it in Suratt, para 58: "It is for Parliament in the first instance to strike the balance between individual rights and the general interest". Where Parliament gives expression to the public interest not merely by legislation passed in the usual way, but by an Act passed by a super-majority in each House pursuant to section 13 and which records expressly on its face that it is to have effect "even though inconsistent with sections 4 and 5", Parliament will have identified in a particularly clear and forceful way its opinion as to where the public interest lies. In a democratic state, the courts must be expected to be especially respectful of the choice made by Parliament to pass legislation in that form and slow to substitute their own view of the necessity for and proportionality of the measure taken.

92. That the proportionality framework may be affected by the extent of the engagement of the democratic institutions of the state is well attested by decisions in other jurisdictions: see Draon v France (2006) 42 EHRR 40, para 108; Animal Defenders International v United Kingdom (2013) 57 EHRR 21, paras 108-109 and 113-116; and R (SC) v Secretary of State for Work and

Pensions [2021] UKSC 26; [2022] AC 223, paras 208-209 ("SC"). In the context of the Constitution, where an Act has been passed using the super-majority procedure in section 13, "the democratic credentials of the measure" are especially strong (in the language used by Lord Reed in SC at para 209). Accordingly, although the court has to make the ultimate judgment whether the proviso in section 13(1) has been satisfied or not, it is obliged in doing so to give especially great weight to the judgment of Parliament regarding the importance of the public interest which is sought to be promoted by the measure in question. In the context of section 13 it is clear that the intention is that the weight to be given to the judgment of Parliament regarding the importance of the public interest and how individual rights should be accommodated in relation to that is even greater than in relation to an ordinary proportionality assessment, because the Constitution provides that Parliament may override the ordinary application of the rights in section 4 where it judges that the public interest requires this, provided that it faces up directly to the possibility that the measure may be inconsistent with sections 4 and 5 and uses the super-majority procedure. The proviso in section 13(1) is a long-stop check against abuse of that power and cannot be taken merely to replicate the ordinary proportionality standard inherent in the rights in section 4.

93. That this is the intended effect of the proviso is reinforced by the fact that under it the onus is cast upon the person who

contests the compatibility of the measure in question with the Constitution to show that it is not reasonably justifiable. This is to be contrasted with the position under the ordinary proportionality test inherent in the rights in section 4, where if the measure is shown to constitute an interference with a right the onus is on the state to justify it: see Paponette, paras 25 and 36-43; Webster v Attorney General of Trinidad and Tobago (above), para 21; and Robinson et al, Fundamentals of Caribbean Constitutional Law, pp 472-473. Where the court poses the question whether, according to the long-stop test in section 13(1), a measure is "reasonably justifiable" and the onus is on the complainant to show that it is not, according to unspecified bedrock principles which underpin a democratic society and one which "has a proper respect for the rights and freedoms of the individual", in the absence of being able to refer to a clear standard set out in positive law a court will be slow to conclude that this has been shown: compare SC (above), para 208. As Archie CJ rightly observed in Northern Construction, paras 5 and 21-22, section 13(1) places a "heavy burden" on the complainant.

94. Nonetheless, in the Board's view the test to be applied under the proviso in section 13(1) is still a version of the proportionality test, albeit one framed in a way which gives especially strong weight to the judgment of Parliament regarding the imperative nature of the public interest. Where legislation has been passed by a supermajority, that is capable

of affecting each of the four stages in the proportionality test (para 51 above). It shows that Parliament considers the public interest objective to be very important indeed (stage (i)), which in turn is likely to affect assessment of whether there is a sufficient degree of connection between the measure in issue and that objective (stage (ii)), whether the trade-offs in public policy terms in using that measure as opposed to others are acceptable (stage (iii)) and the question at stage (iv) (sometimes called proportionality in the strict sense). The essential question posed under the proviso, taking account of this framework, is whether the Act in question strikes an acceptable balance between the rights and freedoms of individuals and the general interest of the community. The proportionality test has been developed as the appropriate way to answer this question across a range of contexts and, since it is readily capable of being adapted in a suitable way to be applied here as well, there is good reason to conclude it should be used in the context of section 13(1). Therefore, with due allowance for the particular context in which it falls to be applied, the Board considers that Jamadar J and Archie CJ were correct in their respective judgments in Northern Construction in holding that the application of section 13(1) involved the application of a version of the proportionality test. But the framework in which the proportionality assessment has to be made under section 13(1) is qualitatively different from that in which an ordinary proportionality assessment is made, so that the Board does not think it right to characterise it as a "sliding

scale" as Archie CJ and Jamadar JA did in Francis at para 114(a).

(69) The ultimate question therefore is whether the Act strikes an acceptable balance between the rights and freedoms of the respondent and the general interest of the public. I take into account the Board's advice that great weight is to be given to the judgment of Parliament regarding the importance of the public interest. But I can see no benefit to the public interest in criminalizing of behaviours which are largely undetectable and are undetected. The offences and penalties imposed are largely an empty futility. They are not reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual.

(70) I find that the amendments effected by the Act to the **Offences Against the Person Act 1925** derogated from the fundamental rights in a manner far greater than sections 59, 60 and 61 of the **Offences Against the Person Act 1925** did. It follows that pursuant to section 6(2) of the Constitution the provisions of the the **Offences Against the Person Act 1925** must be substituted for sections 13 and 16 of the Act as appropriate.

The dissenting judgment of Kokaram JA

(71) Within all the commentary, the decision of Kokaram JA is simply that sections 13 and 16 of the Act are not saved law for the purposes of section 6 of the Constitution because the Act replaced all laws relating to sexual crimes in this jurisdiction. For him sections 13 and 16 were not alterations to existing law but were inserted into the Act by Parliament with its eyes wide open to their infringing character. Consequently, sections 13 and 16

were not preserved from invalidation for want of compliance with the bill of rights.

(72) While there is no controversy that but for section 6 of the Constitution sections 13 and 16 of the Act are not reasonably justifiable, it is Kokaram JA's approach to the application of section 6 of the Constitution with which I am respectfully unable to concur. It is not enough to merely look to the long title of the Act or focus on the penalties to determine whether the enactment is a completely new creature or existed before 1976. It is the substance of the offences created by the new sections 13 and 16 of the Act that the court must interrogate. This Kokaram JA has failed to do. In my judgment, his reference to Hansard at paragraph 213 of his dissenting judgment does not support his argument. Indeed the speech of the Attorney General in piloting the legislation confirms a reaffirmation of the substance of the offences. Section 6 of the Constitution itself envisages that Parliament can alter an enactment by ***"making different provisions in place of it or modifying it."*** The label placed on the enactment is immaterial, it is the substance or the effect of the enactment which is critical.

(73) Before making my order I wish to comment on aspects of the respondent's evidence and the comments of the judge.

Comments on the Evidence of Mr. Jones

(74) As I stated earlier, the issues are matters of law, however, Mr. Jones sought to support his claim by evidence. In my judgment, there was no nexus between his evidence as to his experiences and the presence of the offences in the statute. A feeling of unsafeness in Trinidad and Tobago has nothing to

do with the continued existence of buggery as a crime but more to do with societal intolerance. His purported inability to express himself sexually because of the risk of criminal sanction and the constant fear of police intrusions into his private life lacked credibility. I accept that the existence of the offence of buggery in the laws of Trinidad and Tobago is sufficient to negatively affect the state of mind of the respondent but he has produced not one example of any police intrusion into his or of any other person's private life which led to a charge under section 13 or section 16 of the Act. Indeed, I have had no case before me, nor do I know of any, either at first instance or on appeal in which the police have invaded the privacy of anyone's home and charged and prosecuted any couple male/female or male/male for buggery. There is not and has never been any ongoing police action against the commission of buggery in the privacy of the home. The Attorney General's non-adversarial role and overall approach to this case suggest at best an attitude of tolerance by the State to the situation of the respondent sufficient to allay any fear of arrest while in the sanctuary of the home.

(75) His complaints of having to flee a gay bar because he was attacked with rocks, pieces of wood in 1992 and of being robbed by young men who targeted his LGBT group in 2001 are two unfortunate incidents (which are of some vintage) but none of them was precipitated by the State or State forces. The complaints including allegations of daily taunts and harassment were the actions of private individuals. The allegation that the police were uncooperative is concerning. But that incident took place twenty-four years ago. The complaints point to a wider social attitude than to any concerted or organised action by the State against Mr. Jones or his community. The

respondent's complaint is about breach of his rights by the State. It is about state action not the actions of private individuals. The suggestion that the criminalizing of buggery is connected to that attitude, without evidence, is farfetched at best. Indeed there are many countries in which buggery has been de-criminalized which continue to experience homophobia.

(76) At ground (iv) at page 6 above Mr. Jones alleges that both sections 13 and 16 of the Act disproportionately impact homosexual men as primary targets of stigmatization. That is partly correct. Section 13 does no such thing but section 16 by exempting husband and wife and consenting men and women over sixteen from charges of serious indecency, effectively target homosexual men and lesbian women. Section 13, however, when it expressly included buggery of women as crime was simply making clear what had already been included in the **Offences Against the Person Act 1925**. The intendment of the then section 60 of the **Offences Against the Person Act 1925,** however, was never about targeting or impacting homosexual men. The creation of the offence reflected the prevailing philosophy that anal sex whether between men and women or men and men was unnatural and sinful, even in marriage. What was *"targeted"* was the act, not any one group.

Comments of the trial judge

(77) The judge purported to disapprove of the long established principle of presuming the constitutionality of an Act of Parliament, which he described as a *"legal fiction"*. He attached blame for that approach to the Board and what he considered to be the Board's inexperience in dealing with a written constitution because the United Kingdom had no written constitution of its

own. He added that that inexperience has led the Board to be predisposed to ruling in favour of the supremacy of Parliament rather than the supremacy of the Constitution. See paragraphs 39 to 45 of the judgment. The judge also referred to the decision of the Court of Appeal in **Francis and Hinds v The State of Trinidad and Tobago (2014) 86 WIR 418** and the Board's decision in **Suratt v Attorney General** and cast doubt on their correctness.

(78) The comments of the trial judge are badly misplaced. The presumption of constitutionality of Acts of Parliament is basic constitutional law. I did not expect that I would have to explain the rationale behind that concept in a judgment. As Mr. Jeremie submitted, it is one of the first principles taught to first time law students. The rationale behind it was explained by the authors **Robinson, Bulkan and Saunders** ***Fundamentals of Caribbean Constitutional Law*** at 3-031:

> ***The presumption of constitutionality is a form of judicial restraint or deference exercised by superior courts in reviewing legislation…Judicial review of legislation is a serious and responsible duty arising from guardianship of the fundamental law. Still it is an extraordinary remedy since it permits challenges to laws produced through the democratic process. the judiciary should be slow to interfere with laws properly enacted by parliaments. It demonstrates this by making "an initial presumption that Parliament did not intend to pass beyond constitutional bounds."***

(79) The authors cite Isaacs J in the Australian case of **British Imperial Oil Co. Ltd. v. Federal Commissioner of Taxation [1926] 38 C.L.R. 153**, at page 180:

> ***Nullification of enactments and confusion of public business are not lightly to be introduced. Unless, therefore, it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the constitution, it must be allowed to stand as the true expression of the national will … There is always an initial presumption that Parliament did not intend to pass beyond constitutional bounds.***

(80) Clearly, the predisposition of the courts is to give effect to the will and intention of Parliament unless the legislation transgresses the limits laid down by the Constitution. In the context of an independent Trinidad and Tobago that could only be the will of the people of Trinidad and Tobago. As to the Board's purported *"inexperience",* so to speak, with written constitutions, the many decisions of the Judicial Committee on the Trinidad and Tobago and other Caribbean Constitutions speak for themselves. The decisions in **Matthew**, **Chandler** and **Suraj** are examples in which the Board has upheld the Constitution as the supreme law. The Board in **Suraj** also authoritatively settled the issue of law arising under section 13 of the Constitution and affirmed the correctness of its decision in **Suratt** as well the correctness of the majority in **Francis** in applying **Suratt**. The judge's comments in relation to section 13 and **Suratt** predated the decisions in **Chandler** and **Suraj**. It is not now unnecessary to discuss them.

(81) Finally, I turn to the order. I say that in substituting the provisions of the **Offences Against the Person Act 1925** pursuant to section 6(2), I am acting in accordance with the Constitution as the supreme law. The decision of Parliament in enacting an expanded existing law clause in the 1976 Constitution (as opposed what prevailed in section 3 of the 1962 Constitution) evinced an intention that when the amending legislation is found to have gone too far then the existing law prevails. As unpalatable as that may be, that is the effect of section 6(2) of the Constitution. The dictum of Lord Hodge at paragraph 69 of **Chandler** is apposite:

> ***…the argument in Nervais that a general savings clause of colonial laws curtailed the freedom of the citizens of an independent state from giving effect to an expanding appreciation of fundamental rights and freedoms must carry much less weight in Trinidad and Tobago as the 1976 Constitution was adopted by the independent state when it transitioned into a republic. It was a conscious democratic decision to preserve existing laws and not to convert the savings clause into a transitional provision. As the Board has mentioned, Parliament had the option of dispensing with a savings clause at that time and deliberately chose not to do so. By making that choice the legislature reserved to itself the responsibility for updating the laws of Trinidad and Tobago to reflect developing appreciation of fundamental rights and freedoms and changes in social values.***

(82) It is, therefore, left to Parliament to repeal the criminalization of buggery and the related offence of gross indecency by legislation. It is an emotive

issue which engages vibrant discussion in the court of public opinion. Judges cannot change the law. We give effect to Parliament's intention. In my judgment the clear intention here is for the existing law to continue to prevail. Buggery remains a crime in Trinidad and Tobago pursuant to section 13 of the Act but punishable by a term of imprisonment of five years. Similarly, acts of "gross indecency" remain crimes pursuant to section 61 of the **Offences Against the Person Act 1925** punishable by a term of imprisonment of two years.

Order

(83) The Attorney General's appeal is allowed. The term of imprisonment of twenty-five years for buggery is struck from section 13(1) of the Act and a term of imprisonment of five years is substituted. In so far as they apply to consenting adults whether husband and wife, consenting men and women over sixteen years of age or any other adult, section 16(1) and section 16(2)(a) and (b) are disapplied. The provisions of section 61 of the **Offences Against the Person Act 1925** are reinstated in place of sections 16(1) and (2)(a) and (b). The provisions of section 16(1) and 2(c) of the Act shall continue to apply to persons to whom section 20(1) and (2) and (3) of the **Children Act Chap. 46:10** apply.

Nolan Bereaux
Justice of Appeal

Delivered by Pemberton JA

(84) I have read the judgments of my brothers Bereaux and Kokaram JJA. The facts and issues are detailed in both judgments and do not warrant repetition.

(85) I should like to address the purely structural issue: whether sections 13 and 16 of the Sexual Offences Act 1986 (as amended) qualify as "saved law" and, therefore, remain immune from judicial scrutiny? The section has been set out in the judgments and so I will not repeat it here. Suffice it to say that section 6(1) of the Constitution is clear and unambiguous.

(86) Before considering section 6 of the Constitution, we should remember the parliamentary debates on the 1976 Constitution. It recognized the need for a savings law clause which was envisioned as a transitory measure as a result of the difficulty associated with enacting new laws. The savings law clause as is in the 1976 Constitution allowed for laws passed at that time to be saved so as to establish some sort of certainty and legal continuity in the country. Parliament considered different formulations of the savings law clause, like the sunset clause approach in Belize and chose that as expressed in section 6. Were it not for our brand of savings law clause, I will happily follow the CCJ in their interpretation of the savings law clauses in the various jurisdictions in the Caribbean.

(87) According to the time-honoured rules of interpretation for constitutions, the fundamental rights provisions in sections 4 and 5 of the Constitution must be given a wide interpretation. Other provisions in our Constitution must be

construed literally. Section 6 of the Constitution acknowledges that some saved laws may be in violation of sections 4 and 5 of the Constitution and provided a blanket protection for them. However, there is some refinement of the protection. I will adopt Bereaux JA's formulation and add no more to it.

(88) In **Jay Chandler v The State (No 2) [2002] UKPC 19**, at paragraphs 96 to 98, the JCPC emphasized that it is the role of Parliament – not the Judiciary – to change saved laws. I am only too aware that this is well-known, but I feel the need to quote those paragraphs. The passage reads as follows:

"*96. In the Board's view, **the 1976 Constitution saves existing laws**, including the mandatory death penalty, from constitutional challenge. The consequence of that is that the state of Trinidad and Tobago has a statutory rule which mandates the imposition of a sentence, which will often be disproportionate and unjust. The sentence is recognised internationally as cruel and unusual punishment. The state does not dispute that characterisation. The 1976 Constitution leaves it to the President, having received ministerial advice, to substitute a less severe form of punishment in an appropriate case by exercise of the powers in section 87 of the Constitution.*

*97. **The allocation of powers in the 1976 Constitution places on Parliament the burden of deciding when the existing laws which are protected by the savings clause should be amended or repealed to reflect changes in thinking about fundamental rights and freedoms and to accommodate changes in social and political values.** The policy questions posed by the*

savings clause are not limited to the mandatory death penalty but apply also to other preserved laws which are inconsistent with the higher standards enshrined in section 4 of the 1976 Constitution.

98. ***Laws, which predate the creation of the 1976 Constitution and, but for the savings clause, would be exposed to constitutional challenge for breach of the fundamental rights and protections in section 4 or section 5 of the Constitution, will continue to exist only so long as Parliament chooses to retain them.*** *It is striking that there remains on the statute book a provision which, as the government accepts, is a cruel and unusual punishment because it mandates the death penalty without regard to the degree of culpability. Nonetheless, such a provision is not unconstitutional.* ***The 1976 Constitution has allocated to Parliament, as the democratic organ of government, the task of reforming and updating the law, including such laws****.*"
(Emphasis mine).

(89) Therefore, the JCPC reaffirmed the following regarding saved laws:

i. Section 6 of the Constitution is alive and well;
ii. On the face of it, any law enacted before 1976 is saved law;
iii. If one were to scrutinise the said law, one must determine the nature of the law by recourse to section 6 (1) (b) (c) and (2) of the Constitution;
iv. Saved laws which are in violation of sections 4 and 5 of the Constitution and can allegedly pass muster by the provisions of section 13 of the Constitution cannot be pronounced against by the

court;

v. Parliament is the only body authorised to change saved laws. Parliament must determine whether the saved law should be changed to bring it in conformity with sections 4 and 5 of the Constitution; and

vi. Section 13 of the Constitution provides a mechanism for treating with saved laws by way of a declaration that the law is reasonably justifiable in a society that has proper respect for the rights and freedoms of the individual, and which is passed by the requisite Parliamentary majority.

(90) Similarly, Lord Hodge and Lady Simler of the JCPC in in **General Legal Council v Michael Lorne [2024] UKPC 12** explained how the courts should operationalise their role in the context of the separation of powers which is provided for in our Constitution. The JCPC referred to para 76 of Lord Hoffmann's judgment in **R (Pro-Life Alliance) v British Broadcasting Corporation [2003] UKHL 23; [2004] 1 AC 185.** In that case, Lord Hoffmann spoke to the "*the separation of powers between the judicial branch and other branches of government* ". The Board opined that*. "… the separation of powers means that the courts themselves often have to decide the limits of their own decision making".*

(91) Parliament, as the law-making arm, must be guided by the provisions of the Constitution so that any laws enacted must conform to all of the provisions of the Constitution. The key question in this case is whether sections 13 and 16 of the Sexual Offences Act are in violation of sections 4 and 5 of the Constitution, and if so, whether they are saved under section 6 of the

Constitution.

(92) According to the trial judge and my brother Kokaram J.A., these sections are not captured by the strictures of section 6 of the Constitution. I disagree with both the trial judge and my brother Kokaram J.A. I associate myself with Bereaux J.A.'s reasoning and conclusions and concur with them.

(93) Under section 6(1) of the Constitution, existing laws remain valid. Therefore, the offence of buggery as spoken to by section 13 (1) of the Sexual Offences Act, Chap. 11:28 is saved law, and therefore protected under section 6(1). This means that the offence of buggery remains legally enforceable.

(94) However, in addition, section 13(1) was therefore modified to impose an increased term of imprisonment from five years to 25 years. The key difference between the two sections of the former and later provisions is the increased penalty. This requires an assessment under section 6(2) of the Constitution to determine whether the later provision derogates from sections 4 and 5 more than the original law. The increase from the maximum penalty of 5 years to 25 years is a greater derogation from the fundamental rights and freedoms that occurred under the original buggery law in section 60 of the 1940 and the 1925 Ordinances.

(95) It is clear that this tinkering did not abolish the offence of buggery but left it in tact with vestiges to be examined in the context of section 6 of the Constitution. It is only if the offence is abolished *in toto* will section 6 not be of any moment. I therefore agree with Bereaux J.A.'s analysis and conclusions with respect to this provision. The definition section, 13 (2)

remains.

(96) Section 62 of the 1940 Ordinance created the offence of gross indecency and imposed a maximum penalty of 2 years. Section 16 of the Sexual Offences Act, however, changed the name of the offence from gross indecency to serious indecency. Section 16(1) of the Sexual Offences Act, like section 13, increased the maximum penalty. The maximum penalty under section 16(1) is now 5 years.

(97) Furthermore, the exclusion in subsection (2) refers only to a man and woman relationship – either a husband and wife or a male and female each of whom is 16 years or more and both of whom consent to the act. This exclusion subsection does not address the act between same sex persons. Section 16(1) and 16(2) are discriminatory in that they exclude same-sex couples from the exceptions provided to heterosexual couples. This differential treatment violates the equality provisions of the Constitution. The offence of serious indecency, while similar to gross indecency under the 1925 Ordinance, now applies to women, correcting past gender-based disparities. However, the new provision inadvertently creates a new form of discrimination by maintaining exemptions only for heterosexual couples.

(98) The court can pronounce against the unconstitutionality of Section 16 (1) and (2) of the Sexual Offences Act and I, along with Bereaux and Kokaram JJA (although the latter for different reasons) do so now. I agree with Bereaux J. A.'s reasoning and conclusions that by the application of section 6(3) and subjecting the provision to the section 13 of the Constitution analysis, the court must take the course of reverting to the provisions of the

section 61 of the 1925 Act the saved law in place of the existing sections now pronounced against. It is now left for Parliament to perform its constitutional role.

(99) In keeping with our international obligations under the United Nations Convention on the Rights of the Child, brought into our law by way of the Children Act Chap. 46:01, the provisions of 16 (1), which create the offence and 2(c), which provide for exceptions continue to be applicable to those persons as provided for[1].

(100) In terms of the trial judge's judgment, I remind us all of that long-established principle of presuming the constitutionality of an Act of Parliament. I agree with my brothers both Bereaux J.A. and Kokaram J.A., the former in which the trial judge was reminded of fundamental principles of constitutional law and the latter to the extent where the the trial judge's conflation of the presumption of constitutionality and the interpretation of our savings law provision frowned upon. I remind that the Constitution is the supreme law of the land and in our space, Parliament is supreme only in so far as the Constitution provides.

(101) The roles of each of our institutions is clearly defined by our supreme law – the 1976 Constitution. We must not lose sight of that! Even the supremacy of the Constitution is provided for through the interpretation of the document where no one section must be read in ascendency over the other. The Constitution must be read as a whole and the savings law clause cannot be read as subordinate to sections 4 and 5 of the Constitution. What our

[1] Section 20 of the Children Act, decriminalises sexual activity between children.

Constitution does is to ascribe certain roles to the three arms of the Government. This finds expression as the '*separation of powers doctrine*'.

(102) The Constitution establishes 3 branches of government by which the nation is to be run and administered. They are the Executive, the Legislature and Judiciary. The interaction amongst these branches is observed by principles of comity between the branches of government. It does not behove any one branch of government to give itself ascendency over the other. The role of the court is to interpret and pronounce on the laws especially the constitutionality of laws. If the laws are found to be unconstitutional, the court must say so but it must do so within the limits prescribed by the Constitution.

(103) Parliament is ultimately responsible for ensuring that laws reflect the evolving standards of a democratic society. That is their role and function. Any provisions found to be unconstitutional must be taken from the statute books by Parliament through legislative reform and not by judicial overreach.

(104) In the premises I concur with the conclusions and Orders of Bereaux J.A.

Charmaine Pemberton
Justice of Appeal

DISSENTING JUDGMENT

Delivered by Kokaram JA

A. INTRODUCTION-

"How do I love thee? Let me count the ways…"[2]

(105) Love. That shapeless, formless energy is the essence of what makes us human and humane. There is no greater free-loving spirit than a Trinbagonian, a member of the open, hospitable, loving and caring peoples of this Caribbean space. It is what makes us whole; it is what makes us appealing; it is what makes us alive. Forged from a deep love of our liberty, freedoms, and values, our fundamental rights enshrined in our Constitution is a celebration of the dignity of each of us. We may not all like the costumes that pass on our savannah at Carnival but we can all agree everyone has an equal right to parade their colours on that stage. Once those notes of fundamental human rights is played, sounding the melody of who we are in the mas of our collective journey, our vision of self must be allowed the space to breathe, to flow, to move, to dance, to (re)create, to contribute to our collective good—it is the essence of living—it is the essence of free (not still) born rights. It underscores one of the tenets of our Preamble to our Constitution, that visionary statement that breathes life into that ideal of a society, culture and civilisation, that cherishes, reveres and respects the dignity of each individual. A dignity that comes with the respect for individual autonomy to make personal choices which cause no harm to others. In the context of the deep yearning for such a free society, this

[2] How Do I Love Thee (Sonnet 43) by Elizabeth Barrett Browning.

appeal addresses a fundamental question: should a law that criminalises acts of consensual sexual expression and intimacy between male adults of the same sex continue to be a feature of our landscape or is it a breach of fundamental constitutional human rights?

(106) Jason Jones is a homosexual and a member of our community of Trinidad and Tobago. His physical expression of love by sex per anum (anal sex) is not universally shared by all in this community, yet it is an intrinsic feature of his personhood as integral as his genetic code of identity. But his engagement and membership in this community guarantees to him and all of us a fundamental respect and accommodation of varied moral values in the yearning for the good life synergised and assimilated within the wide ambit of our declared values embedded in our Constitution—our fundamental law. His constitutional claim in the court below successfully challenged the constitutional validity of the criminal offences of buggery and serious indecency enacted in sections 13 and 16 of the Sexual Offences Act 1986 Chap. 11:28 (as amended) ("the SOA") which repealed and replaced the old offences of sodomy/buggery and gross indecency in section 60 and 61 of the Offences Against the Person Ordinance 1925. The trial judge held that sections 13 and 16 SOA were a breach of Mr. Jones' right to liberty and security of the person, respect for family and private life, equality before the law and protection of the law and freedom of thought and expression.

(107) The State now appeals against the trial judge's declarations of unconstitutionality of those sections and its modification to target non-consensual acts between gender neutral persons.

(108) The State does not concede that sections 13 and 16 of the SOA contravene

fundamental human rights guaranteed by sections 4 and 5 of the Constitution. It argued that sections 13 and 16 of the SOA make constitutionally permissible incursions or limitations on fundamental human rights by either being (a) a saved law pursuant to section 6(1)(c) and 6(2) of the Constitution and therefore immune from constitutional challenge as they do not derogate from fundamental human rights to an extent which the existing law did not previously so derogate from that right or (b) a law passed with the requisite three-fifths majority or "supermajority" and which modifications of the existing law passes the inquiry of being reasonably justified "in a democratic society" for the purposes of section 13 of the Constitution or further (c) if it is in breach of the Constitution the sections can be modified to comport with the saved law prior to 1976.

(109) The main issues[3] that fall for consideration on this appeal in answering the

[3] The parties' agreed issues were filed as follows:

(i) Whether sections 13 and 16 of the Sexual Offences Act Chap 11.28 ("the Act") violate the Claimant/Respondent's fundamental rights, especially his right to respect for private and family life;
(ii) Whether sections 13 and 16 of the Act are saved by section 6 of the Constitution of the Republic of Trinidad and Tobago ("The Constitution");
(iii) Whether any claim that sections 13 and 16 of the Act are to be treated as "Existing Law" for the purposes of section 6 of the Constitution is compatible with the fact that they were enacted utilising the procedure provided for by section 13 of the Constitution;
(iv) Whether the terms of the long title and preamble to the Act are relevant to this issue;
(v) Whether sections 6 and 13 of the Constitution ought to be construed on a purposive basis;
(vi) Whether sections 13 and 16 of the Act fall to be determined on an application of section 13 of the Constitution;
(vii) Whether sections 13 and 16 of the Act were in breach of sections 4 and 5 of the Constitution or were disproportionate;
(viii) Whether sections 13 and 16 of the Act have been proven to not be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual;

question whether sections 13 and 16 of the SOA contravene fundamental human rights guaranteed by sections 4 and 5 of the Constitution of the Republic of Trinidad and Tobago therefore are:

a. Whether sections 13 and 16 of the SOA are "existing laws" as defined by section 6 of the Constitution.

b. If it is an existing law, by repealing and re-enacting with modifications an existing law (section 60 and 62 Offences Against the Person Ordinance), does it derogate from a fundamental right to an extent that it did not previously derogate in its original form to warrant a substitution to its original derogation?

c. If it is not an existing law, then notwithstanding that it was passed by a 'supermajority' i.e. a not less than a three-fifths majority in each House of Parliament[4], is it reasonably justifiable in a society that has a proper respect for the rights and freedoms of individuals?

(ix) Subject to sections 13 and 54 of the Constitution, whether the provisions of sections 60 and 62 of the Offences Against the Person Ordinance ("the Existing Law") or any part thereof, ought to be substituted for sections 13 and 16 of the Act;
(x) Whether sections 13 and 16 of the Act altered or alternatively repealed and re-enacted with modifications sections 60 and 62 the Existing Law;
(xi) Whether the recitals contained in the preamble of the Act require or do not require a judicial finding of inconsistency with sections 4 and 5 of the Constitution;
(xii) Whether sections 13 and 16 of the Act ought to have been modified;
(xiii) Whether the prescribed penalty of 25 years imprisonment provided for in section 13 of the Act ought to have been severed and "imprisonment for a term not more than 5 years but not less than 2 years imprisonment" in section 60 of the Existing Law substituted in its place;
(xiv) Whether the prescribed penalty of 5 years imprisonment provided for in section 16 of the Act ought to have been severed and "imprisonment for a term not exceeding 2 years with or without hard labour" be substituted in its place.

[4] Section 13(2) of the 1976 Constitution: "An Act to which this section applies is one the Bill for which has been passed by both Houses of Parliament and at the final vote thereon in each House has been supported by the votes of not less than three-fifths of all the members of that House."

d. To the extent that it is inconsistent with the Constitution, to what extent can the Court modify those sections to make them compliant with sections 4 and 5 of the Constitution.

(110) In this judgment, while I do not share the observations made by the trial judge on some constitutional principles, I am of the view that the trial judge was not plainly wrong to declare sections 13 and 16 SOA unconstitutional and to have modified those laws within the remit of an appropriate constitutional remedy to target the area of criminal sexual activity which is non-consensual sexual conduct.

(111) The proper application and interpretation of the savings law of our Constitution continued to be a matter of controversy in this appeal. A supreme law that confers such deeply revered rights to a newly born nation on the one hand but takes it away on the other with saved laws clinging to old notions of self, fashioned in a colonial past will always trouble us, seeming incongruous or repugnant, a formula for the foundation of a schizophrenic society. However, the structure of our section 6 saved law provision is unique and assumed to be deliberately so to ensure an uncontroversial transition into a new legal order building a vision for a future and recognising the sensibilities of the past.

(112) The Privy Council in **Chandler v The State (No. 2)** [2022] UKPC 19, delivered the most recent authoritative and binding statement on our savings law provisions. Their Lordships make the point that it is for Parliament and not the Judiciary to alter or reform any saved law to the extent that it is inconsistent with our Constitution. However, this task of ensuring that our

laws are human rights compliant is an urgent and pressing one. To that extent, their Lordships importantly observed:

> "Laws, which predate the creation of the 1976 Constitution and, but for the savings clause, would be exposed to constitutional challenge for breach of the fundamental rights and protections in section 4 or section 5 of the Constitution, will continue to exist only so long as Parliament chooses to retain them. **It is striking that there remains on the statute book a provision which, as the government accepts, is a cruel and unusual punishment because it mandates the death penalty without regard to the degree of culpability**. Nonetheless, such a provision is not unconstitutional. The 1976 Constitution has allocated to Parliament, as the democratic organ of government, the task of reforming and updating the law, including such laws." **Chandler v The State (No. 2)** [2022] UKPC 19 at paragraph 98.

(113) Our constitutional savings law provisions remind many of us of our childhood days when we were told myth stories that we dared not to question in our youth. But while the wisdom of our growing years put many of them to the lie, as an emerging nation, our maturing vision of our collective personhood in the Republic is mummified by a saving law that still averts our gaze from the untruths told to us in our societal infancy. However, in my view it is equally a task for the Legislature and the court as guardians of democracy and the rule of law, even in the face of the current interpretation of the savings law clause, to release us from this time warp and to ensure our society can evolve organically to reflect the developing needs and norms of society.

(114) The savings law clause of our Constitution uniquely places the mirror to our constitutional sensibilities. It creates the opportunity to continue the dialogue between our arms of State and between our judicial bodies as to whether our Republican vessel still moors in the harbour of our colonial past. If so, it falls equally upon the Legislature to unfasten it and moreso the Judiciary, the guardians of democracy when the occasion requires it such as this one on Mr. Jones' constitutional challenge which investigates a fundamental human value and celebrates a natural expression of love incidental to a person's personal autonomy and dignity.

(115) Even if such laws, which strike at the heart of our vision of who we are as a people, may be construed as "saved law" under the Constitution, what should our courts do? Options may include to continue to wring our hands and trust that the Legislature will act to fulfil our shared vision under the Constitution. Hope by persuasive language used in our judgments the Legislature may be resolved into action to fully reform our law to keep in step with modern values.

(116) Precedent that binds our hands to outlived versions of ourselves and our ability to love will always be viewed as controversial but the role of the constitutional court is to continue to engage in a dialogue recognising the comity of powers to help and inspire the Legislature to keep our laws, our boundaries of conduct, in step with evolving standards of our shared vision of the good life. Our sensibilities of the past seldom bear any relevance to who we are now or in the future. These questions all simmer under the purely legal question on this appeal.

(117) Why live in fear of who I am? Can we deny a person or shape that person's expression of love? Why should the State police the most intimate part of a person's life, who that person loves and who that person falls in love with? These are the questions Jason Jones is asking in this appeal. In my view sections 13 and 16 SOA serve only to criminalise physical acts of love between consenting adults distorting the meaning of family life and identity for persons whose only crime is that they are in love. The "supermajority's" view of this aspect of personhood expressed by a three-fifths majority of the Houses of Parliament in the passage of the SOA is not reasonably justifiable in a democratic society. There is no common good served when what is being alienated are deeply rooted aspects of one's personality, carving away at the DNA of a people. The closer we are to personal attributes, the more dangerous the majoritarian excuse becomes.

(118) To say that this case is not about the morality of homosexuality is to cover our eyes to the obvious. The legislation has the effect of marginalizing homosexuals from our normative order. To de moralise them. Those laws criminalised, stigmatised and delegitimised Mr. Jones' personhood and served to shape the moral conduct of our community to deny him any validity to occupy our legal space. The fundamental human rights to security of the person, respect for privacy, freedom of expression, equality before the law and the protection of the law have all been engaged.

(119) I have in this judgment answered these main issues in the following manner:

a. Sections 13 and 16 of the SOA are neither an existing law nor saved under section 6 of the Constitution. It represents part of a suite of

new laws deliberately intended to replace laws relating to sexual crimes in this jurisdiction (previously codified in sections 60 and 62 of the Offences Against the Persons Ordinance 1925) where Parliament was conscious that its laws may infringe sections 4 and 5 of the Constitution. It is not immune from constitutional interrogation or challenge.

b. Sections 13 and 16 SOA are in plain contravention of the rights to respect for private and family life, the right to freedom of expression, the protection of the law, and the right to equality before the law enshrined in sections 4(b), (c) and (i) of the Constitution.

c. Sections 13 and 16 SOA have been shown not to be reasonably justifiable in a society that has a proper respect for the rights and freedoms of individuals.

d. While an alternative was available to the trial judge to suspend any declaration of unconstitutionality to allow Parliament a period of time to amend the legislation to meet its constitutional obligations, it was open to the trial judge to have made his order to modify sections 13 and 16 in line with fundamental constitutional principles and target non-consensual sexual activity.

(120) I acknowledge that the questions whether sections 13 and 16 SOA are saved laws is an important and critical issue. On this appeal however, I propose to adopt an unorthodox approach in my analysis. Before addressing the question of whether sections 13 and 16 SOA can be construed as saved law, I propose to first determine whether these laws on its face do in fact engage and contravene our fundamental human rights protected by our supreme law. In doing so, as this law was passed by a 'supermajority', I will determine

whether it can withstand a section 13 analysis. That is, I shall deal with Issue 5(c) above before I consider the question of whether it is saved law. The substantive issue of the constitutionality of these laws in the context of our maturing society's respect for the rights and freedoms of others can then be dealt with head-on. If the section 13 analysis is answered against the Respondent, there ought to be a therapeutic acceptance of the result that the constitutional challenge must fail rather than a resort to saved laws.

(121) I accept it may be a shorter route in analysis to address the question first of whether this is saved law, and if so, then no issue of a breach arises. However, such an approach may downplay a fundamental dichotomy of our saved law provisions and the vision for the future of our Republic. I prefer this analysis so that the point is made that if indeed it was an impermissible incursion by a Parliament into the rights of citizens, it brings home to our Legislature the question that if indeed it is an existing law why is the savings law still in the manner and effect as determined by **Chandler** still on our books or why is this unconstitutional law still being retained by a modern republic. In interrogating the legislation for its constitutional incompatibility before subjecting it to the saved laws analysis, in the event of a negative answer to the first question I hope to focus on the human rights deficiency of our laws where they may exist and do not hide the fact of human rights illegitimacy of old laws in a time warped immunity.

(122) After examining the judgment and the submissions of the parties below the structure of my analysis will be to examine:

a. key interlocking constitutional principles which will guide the approach to the constitutionality of sections 13 and 16;

b. the sexual offences legislation;

c. the traumatic effect of the legislation on the lived experience of Mr. Jones;

d. the constitutional impact-the rights contravened;

e. the section 13 'reasonably justifiable' analysis;

f. the saved law analysis to answer the question whether it is a 'new law' or saved law; and

g. the appropriate remedy.

The Judgment[5]

(123) The constitutional motion brought by Mr Jones by Amended Fixed Date Claim sought declarations that sections 13 and 16 of the SOA contravened his rights guaranteed under section 4 of the Constitution of the right to liberty and security of the person and not to be deprived except by due process of law (section 4(a)), the right to equality before the law and protection of the law (section 4(b)), the right to respect for his private and family life (section 4(c));, and the right to freedom of thought and expression (section 4(i)). He sought an order striking down those sections.

[5] The judgment of Rampersad J has been considered a land mark judgment and has featured in other judgments in the Commonwealth to date. See *Navtej Johar and others v Union of India and others* [2018] 7 SCR 379; *BG v AG* (Dominica) Claim No. DOMHCV2019/0149.

(124) In his supporting affidavit he described himself as an openly homosexual man since the age of 16. While he is a native of Trinidad, he was forced to move to England to escape the harassment and discrimination he experiences in Trinidad and Tobago as an openly homosexual man. He was taunted, harassed, verbally abused and physically attacked. His reports of attacks to the police was met with indifference and inactivity. He faced strained relationships with members of his family who frowned on his homosexual life. He declared his perception that he is a criminal and someone to be scorned by his family and society. He viewed sections 13 and 16 of the SOA as responsible to a large extent for this homophobia and "primarily exist to punish me and other LBGT citizens".

(125) The Attorney General filed no evidence in the court below. There is therefore no record of any policy decision nor justification for the passage of this legislation. Senior Counsel for the Attorney General submits that such evidence is unnecessary as the object of the legislation can be gleaned from the Act itself.

(126) The trial judge observed that numerous parties had expressed an interest in being heard in the proceedings below. Some of them were religious bodies who were invited to make written submissions. They were The Trinidad and Tobago Council of Evangelical Churches and The Sanatan Dharma Maha Sabha of Trinidad and Tobago and The Equal Opportunity Commission also filed written submissions, recognising no doubt that the question of an alleged discrimination on the basis of one's sexual orientation may feature in the Commission's deliberations or concern.

(127) In a comprehensive and impassioned judgment, the trial judge agreed with the parties that it was not a case about religious or moral beliefs but "about the inalienable rights of a citizen under the Republic and Constitution of Trinidad and Tobago; any citizen, all citizens…this is a case about the dignity of the person and not about the will of the majority or any religious debate." After examining the history of the legislation, the judge examined the section 6 savings law clause and concluded that the challenged sections did not repeal and re-enact the existing law of 1925. It was a new criminal provision, that replaced the 1925 law of buggery. Having found that it was not an existing law, the trial judge conducted the 'section 13 analysis' and determined that sections 13 and 16 had not passed constitutional muster.

(128) During his analysis, the trial judge controversially expressed his strong views on three aspects of our constitutional law: (a) the presumption of constitutionality, (b) the interpretation of our saved law provisions, and (c) the proportionality tests that are applicable. In the trial judge's analysis of the savings law clause under "commentary," the trial judge viewed the presumption of constitutionality as one of the flaws in savings law clauses. Presumably he was critical of the concept that a saved law is justifiable because it is presumed to be constitutional. The approach to the construction of our saved laws and the concept of the presumption of constitutionality are, however, two distinct concepts. To that extent, the trial judge's approach to mixing these aspects of our constitutionalism was erroneous.

(129) With respect to the presumption of constitutionality, the trial judge was

critical of the heavy burden placed on the applicant to demonstrate the unconstitutionality of a parliamentary enactment. But this too is settled law. He was of the view that such an approach is more attuned to the concept of parliamentary sovereignty, unsuited to our local regime where the Constitution is our supreme law. At paragraph 47 of his judgment, he expressed the view that the starting point in analysing whether legislation is unconstitutional, should be deference to the Constitution and not Parliament, "that constitutionally protected rights and freedoms should stand affirmed before the application of any fiction. To my mind, the word presumption should be deleted and totally eradicated from the constitutional legal vocabulary. There is no need to start from any presumption. Each case can be looked at individually in all of the circumstances with due consideration being given to the applicable constitutional provisions." The trial judge saw the presumption of constitutionality as a concept to be "jettisoned".

(130) However, this presumption of constitutionality is a long-standing principle of our constitutional law. The strong statements by the judge were, in my view, obiter and did not affect the interpretation or application of the section 13 analysis. In any event, as discussed below in cases where legislation passed by a three-fifths majority interferes with core aspects of personhood protected by our Constitution, while a burden of proof is always on the claimant as a feature of our adversarial system, a court should always scrutinise the legislation in the context of the complaint to determine whether a breach with the supreme law would have been committed. In this way the court can properly discharge a fundamental principle of our co-existing duties under the doctrine of separation of powers by determining

whether the laws made by Parliament are constitutionally compliant. Whether the burden has been discharged will always be a matter of context.

(131) The learned judge declared that sections 13 and 16 of the SOA are unconstitutional, to the extent that these laws criminalised any acts constituting consensual sexual conduct between adults. It was further modified in his subsequent order in the following manner:

"Section 13 of the Sexual Offences Act be modified in the following manner with the words shown in red read into Section 13 (2):

"13. (1) A person who commits the offense of buggery is liable on conviction to imprisonment for twenty-five years.

(2) In this section, "buggery" means sexual intercourse without consent per anum by a male person with a male person or by a male person with a female person."

Section 16 of the Sexual Offences Act be modified in the following manner: deleting the words "*a male person and a female*" and reading in the letter "s" after the word person from section 16 (2) (b) so that the section reads as follows:

"16. (1) A person who commits an act of serious indecency on or towards another is liable on conviction to imprisonment for five years.

(2) Subsection (1) does not apply to an act of serious indecency committed in private between—

(a) a husband and his wife;

(b) ~~a male person and a female~~ persons, each of whom is sixteen years of age or more, both of whom consent to the commission of the act; or

(c) persons to whom sections 20(1), (2), and (3) of the Children Act apply.

(3) An act of "serious indecency" is an act, other than sexual intercourse (whether natural or unnatural), by a person involving the use of the genital organ for the purpose of arousing or gratifying sexual desire."

The Parties' Submissions:

(132) The only interested party actively participating in this appeal was The Trinidad and Tobago Council of Evangelical Churches. With respect to the main submissions of the parties I will briefly summarise their core submissions.

(133) Senior Counsel for the Attorney General submitted that the issue of the criminalisation of the conduct and the provision of penalties is a matter solely within the remit of the Legislature. Sections 13 and 16 meet the threshold requirements of section 13 of the Constitution, and Mr. Jones has not demonstrated that they are not reasonably justifiable in a society that has the proper respect for the rights and freedoms of the individual. These sections, if not saved, are reasonably justifiable under section 13. The modifications of the section or added features in sections 13 and 16 are the matters that attract the reasonably justifiable test and not the original offence or the offence that was reformulated to comport with modern

legislative jargon. In any event, if sections 13 and 16 are not saved law either in their entirety or the modification made to them, then the Court should consider that the offence formulated under the Ordinance be reinstated as saved law.

(134) The thrust of the Attorney General's submissions on our section 6 constitutional scheme of saved laws logically puts up an impenetrable shield after 1962 to the extent that no constitutional court can call into question any pre-independence law regardless of its unconstitutionality. It is for that reason that only such modifications that occur subsequent to 1962 can fall under scrutiny with the impairment of section 13 of the Constitution. Reliance was placed on authorities of **Dominic Suraj and others v Attorney General** [2022] UKPC 26, **Vijay Maharaj and another v Attorney General** [2023] UKPC 36, **AG v Akili Charles** [2022] UKPC 31, and **Pinder v R** (2002) 61 WIR 13 and **Chandler v The State (No. 2)** [2022] UKPC 19.

(135) King's Counsel for the Respondent contends that the object of the SOA cannot be treated as an existing law because it was passed after fresh examination by Parliament on the law relating to sexual offences. The Respondent also contended that the SOA did not repeal and re-enact with modifications the earlier legislation but rather it replaced the law entirely and therefore is not a saved law. In addition, the Respondent also stated that the impugned sections were not just an attack on his freedom in terms of him going to jail but also his whole lifestyle and freedom of expression. In relation to the section 13 test, the Respondent contended that the impugned section criminalised a particular activity in a way which hinged on the autonomy of the individual.

(136) On behalf of The Trinidad and Tobago Council of Evangelical Churches, Mr Jeremie SC's core argument was that the trial judge's approach in relation to the presumption of constitutionality was wrong as well as the trial judge's disregard to settled jurisprudence emanating from the Privy Council in relation to the savings law clause.

B.THROUGH THE LOOKING GLASS-

Perspectives on the constitutionality of sections 13 and 16 SOA

> "There is something solemn and sacred about the Constitution. It represents the hope and aspirations of the nation. There are strong spiritual and moral underpinnings on which it is founded. In it the nation affirms its belief in the Supremacy of God, acknowledges the dignity of the human being, and the State faithfully pledges to secure and protect the fundamental rights and freedoms of its citizens. These are some of the noble ideals, which illustrate the great divide between private law on the one hand and the Constitution on the other." **Ramanoop v AG** CvA No. 52 of 2001 at page 18 per Sharma CJ (as he then was)

(137) Caribbean constitutionalism is imagination.[6] Not hallucination.[7] The sacred

[6] "The social philosophy of the Constitution shapes creative judicial vision and orientation. Our nation has, as its dynamic doctrine, economic democracy sans which political democracy is chimerical. We say so because our Constitution, in Parts III and IV and elsewhere, ensouls such a value system, and the debate in this case puts precisely this soul in peril….Our thesis is that the dialectics of social justice should not be missed if the synthesis of Parts III and Part IV is to influence State action and court pronouncements. Constitutional problems cannot be studied in a socio-economic vacuum, since socio-cultural changes are the source of the new values, and sloughing off old legal thought is part of the process the new equity-loaded legality." – *Puttaswamy v Union of India* [2018] 8 SCR 1 at 204 B.

[7] *Dobbs, State Health Officer of the Mississippi Department of Health and another v Jackson Women's Health Organization and another* 53 BHRC 1 at 18: "… In interpreting what is meant by the Fourteenth Amendment's reference to 'liberty,' we must guard against the natural human

task entrusted to the Judiciary is to transcend itself and to interrogate the vision of our society's needs balanced with a deep respect for who we all would like to be in this shared space. It is a continuous dialogue with Parliament as it is within the various levels of our courts on the shape of the road map to the good life. It is a constant (re)awareness of the impact constitutional declarations will make on the lived realities of diverse groups of peoples and seeks to infuse a rational morality into our law that transcends a legal text with the ultimate aim of instilling respect for the rule of law.

(138) Cardozo himself would remark that the judicial role is much like that of the poet, or philosopher emanating a psychology of intuitive understanding.[8]

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tendency to confuse what that Amendment protects with our own ardent views about the liberty that Americans should enjoy. That is why the Court has long been 'reluctant' to recognize rights that are not mentioned in the Constitution. Collins v Harker Heights (1992) 503 US 115 at 125. 'Substantive due process has at times been a treacherous field for this Court,' Moore v East Cleveland (1977) 431 US 494 at 503 (plurality opinion), and it has sometimes led the Court to usurp authority that the Constitution entrusts to the people's elected representatives. See Regents of University of Michigan v Ewing (1985) 474 US 214 at 225–226. As the Court cautioned in Glucksberg, '[w]e must … exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this court.'

[8] "The truth, of course, is that in the development of law, as in other fields of thought, we can never rid ourselves of our dependence upon intuitions or flashes of insight transcending and transforming the contributions of mere experience. "The great historians," says Windleband, "had no need to wait for the experiments and research of our psychophysicists. The psychology they used was that of daily life. It was the knowledge of men, the experience of life, of the common man, coupled with the insight of the genius and the poet. No one has ever yet succeeded in making a science of this psychology of intuitive understanding." What is here said of the historian is true also of the lawyer. A perception, more or less dim, of this truth underlies the remark of Graham Wallas, that in some of the judges of our highest court there should be a touch of the qualities which make the poet. The scrutiny and dissection of social facts may supply us with the data upon which the creative spirit broods, but in the process of creation something is given out in excess of what is taken in. Gény, in his Science and Technique of Law, reminds us how this notion of the development of law fits into the general scheme of recent philosophical thought, and in particular with the philosophy of Bergson and Bergson's school. "It is necessary, they tell us, to complete and correct the rigidity of the intellect by the suppleness of instinct, in a way to auscultate the mystery

There is no greater area of the law that calls for such imagination as interpreting and giving life to fundamental rights and freedoms.

(139) In analysing the constitutional issues raised in this appeal there are a number of interlocking values and principles which should inform the Caribbean constitutional court's outlook and perspective on the interpretation of sections 13 and 16 of the SOA.

The inherent dignity of man and social justice- the imagination of the Constitution

(140) The Preamble to the Constitution is the window through which we view, perceive and conceive of the fundamental rights. The concept of human dignity is a core foundational value of our constitutional vision for our Republic.

(141) The Preamble to the Constitution states:

"Whereas the People of Trinidad and Tobago—

(a) have affirmed that the Nation of Trinidad and Tobago is founded upon principles that acknowledge the supremacy of God, faith in fundamental human rights and freedoms, the position of the family in a society of free men and free institutions, the dignity of the human person and the equal and inalienable rights with which all members of the human family are endowed by their Creator;

(b) respect the principles of social justice and therefore believe that the operation of the economic system should result in the material resources of

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of the universe by means of a sort of intellectual sympathy."- *The Growth of the Law* by Benjamin Cardozo at pages 89 to 91.

the community being so distributed as to subserve the common good, that there should be adequate means of livelihood for all, that labour should not be exploited or forced by economic necessity to operate in inhumane conditions but that there should be opportunity for advancement on the basis of recognition of merit, ability and integrity;

(c) have asserted their belief in a democratic society in which all persons may, to the extent of their capacity, play some part in the institutions of the national life and thus develop and maintain due respect for lawfully constituted authority;

(d) recognise that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law;

(e) desire that their Constitution should enshrine the above-mentioned principles and beliefs and make provision for ensuring the protection in Trinidad and Tobago of fundamental human rights and freedoms.

Now, therefore the following provisions shall have effect as the Constitution of the Republic of Trinidad and Tobago:"

(142) The language of the Preamble to our Constitution is visionary. It is a declaration of the foundational vision of the people of Trinidad and Tobago. That vision affirms foundational principles; respects principles of social justice; asserts beliefs in a democratic society; recognises fundamental freedoms and desires that the supreme law enshrines these principles and beliefs and "make provision for ensuring the protection in Trinidad and Tobago of fundamental rights and freedoms". It comports with another important preamble in the United Nations Declaration of Human Rights (UDHR). The Preamble to the UDHR states, "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of

the human family is the foundation of freedom, justice and peace in the world."

(143) The dignity of the human person and the equal and inalienable rights with which all members of the human family are endowed by their creator is an affirmatory foundational principle of our social order.

(144) The Preamble of our Constitution creates the vision of the good life, family values, spiritual and moral values and the dignity of all persons. These lie at the core of our personhood and nation. I agree with Senior Counsel for the Attorney General that the Constitution seeks to meld the disparate strands of beliefs and value systems into a coherent common denominator of what we all desire for ourselves individually and collectively.

(145) This Preamble is a key filter through which our rights are perceived. It animates fundamental rights when appreciated as aspects of human dignity respect, self-worth and pride. In **Navtej Singh Johar and others v Union of India and others** [2018] 7 SCR 379, Justice Misra defined human dignity as an individual feeling of self-respect and self-worth, and at page 491, paragraph 133 stated:

> " In this context, we may travel a little abroad. In Law v. Canada (Minister of Employment and Immigration) capturing the essence of dignity, the Supreme Court of Canada has made the following observations:-
> "Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological

integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is 1999 1 S.C.R. 497 enhanced when laws recognise the full place of all individuals and groups within Canadian society."

(146) In **Orozco v Attorney General (Commonwealth Lawyers Association and others, interested parties)** (2016) 90 WIR 161 Benjamin CJ stated:

"63. The Preamble of the Constitution affirms that Belize as a nation is founded upon principles which acknowledge 'the dignity of the human person'. Section 3(c) states that every person in Belize is entitled to recognition of his human dignity. These references to human dignity render the concept central to the fundamental rights and freedoms set out in Pt II which is plainly understandable given the fundamental nature of the concept. The concept is not easy to define. I am attracted to the following attempt made by the Canadian Supreme Court in *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 at para 53:

'Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to the individual needs, capacities or merits. It is enhanced by laws which are sensitive to the

needs, capacities and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society.'"

(147) President Saunders (as he then was) in **Mc Ewan and others v AG of Guyana [2018] CCJ 30 (AJ)** stated at paragraph 68:

"68. At its core, the principle of equality and non-discrimination is premised on the inherent dignity of all human beings and their entitlement to personal autonomy. There is a marked link between gender equality, self-determination and the limits placed on self determination by gender stereotypes. The CEDAW Committee has noted that:

"Inherent to the principle of equality between men and women, or gender equality, is the concept that all human beings, regardless of sex, are free to develop their personal abilities, pursue their professional careers and make choices without the limitations set by stereotypes, rigid gender roles and prejudices…"

(148) Recognising that the task of interpreting fundamental human rights involves a delicate composition of human dignity also calls for sensitivity to the treatment of the constitutional question to respect the dignity of all persons empathising with the underlying differences which may occur and guiding sensitively, educating various publics on the evolving shape and form of our common humanity. Human dignity calls on us to understand the importance of our collective future marked by a truism that people matter. For Mr Jones it is a case of 'I am here among you, respect me for who I am'. This sensitivity

to the realisation of human dignity informs a constitutional court's study of fundamental human rights and to animate those rights in the varied circumstances of disputants' lived experiences.

Constitutional (not Parliamentary) supremacy

(149) Section 2 of the Constitution provides as follows: "This Constitution is the supreme law of Trinidad and Tobago, and any other law that is inconsistent with this Constitution is void to the extent of the inconsistency."

(150) In our constitutional democracy the Constitution is the supreme law. The Executive created by it is subject to its edict. Our Parliament is not supreme and must defer to it. The Judiciary as the sole interpretive authority of the Constitution is to interpret it and give it life and meaning. To interpret the broad and general fundamental rights declared in our supreme law calls for a much different analysis than that required for an ordinary Act of Parliament. It calls for an appreciation of context and vision, a synergising of past, present and future.

(151) To the extent that Parliament can make laws that may impact upon fundamental human rights, the Courts have the final say on the interplay between the need for such laws for the regulation of society and the fundamental rights of the individual. The Court's task is to mediate that tension between wide and general human rights and the needs of the society "between the high generalities of the constitutional text and the messy detail of their application to concrete problems"

A principle of coherency

(152) In doing so, the task of the constitutional court equally is to provide coherency within our supreme law. One such example of coherency at work is the recognition that the rights of sections 4 and 5, although cast in absolute terms, are subject to implied limitations. To consider that it does not will be counterintuitive to a working democracy. This is the main theme of **Suraj v AG**. An inherent implicit rationality of action threading a coherent legitimacy for the constitutional construct. In **Suraj** at paragraph 73 the Board stated, "the only way in which the rights can operate coherently at the level of ordinary executive action by public officials is if they are interpreted as limited rights which naturally implies they are subject to a proportionality qualification".

(153) Similarly, in paragraph 41 of **Mc Ewan**, recognizing the dynamism of the law, the fundamental law itself must be able to accommodate growth and dynamism, and it is the court's responsibility to ensure the internal and external coherency of the declared vision and objects of the Constitution and its underlying ethos and principles. At paragraph 41 President Saunders (as he then was) stated:

"41. We reiterate those statements here. Law and society are dynamic, not static. A Constitution must be read as a whole. Courts should be astute to avoid hindrances that would deter them from interpreting the Constitution in a manner faithful to its essence and its underlying spirit. If one part of the Constitution appears to run up against an individual fundamental right, then, in interpreting the Constitution as a whole, courts should place a premium on affording the citizen his/her enjoyment of the fundamental right, unless there is some overriding public interest. That was this Court's

approach in Joseph & Boyce14 when we held that, in order to assure a condemned man the right to the protection of the law, a constitutional ouster clause did not prevent the courts from inquiring into the decisions of the local Mercy Committee".

(154) A connecting thread of coherency is the conception that the State cannot impose the views of one on all which would result in a breach of a fundamental right. The US Supreme Court in **Planned Parenthood v Casey** (1991) 505 US 833 at Page 851 paragraph 1 stated:

"… It is conventional constitutional doctrine that where reasonable people disagree the government can adopt one position or the other. See, e. g., Ferguson v. Skrupa, 372 U. S. 726 (1963); Williamson v. Lee Optical of Okla., Inc., 348 U. S. 483 (1955). That theorem, however, assumes a state of affairs in which the choice does not intrude upon a protected liberty. Thus, while some people might disagree about whether or not the flag should be saluted, or disagree about the proposition that it may not be defiled, we have ruled that a State may not compel or enforce one view or the other. See West Virginia Bd. of Ed. v. Barnette, 319 U. S. 624 (1943); Texas v. Johnson, 491 U. S. 397 (1989)."

(155) The principle of coherency is also integral to constitutional interpretation. In **Commissioner of Police v Alleyne** [2022] 2 LRC 590 at paragraph 23 Jamadar JCCJ stated:

"23. However, this is not the end of the matter in the context of statutory interpretation in constitutional democracies. In constitutional democracies

all statutory interpretation must include a consideration of whether the law as stated can be interpreted in a manner that is consistent with the Constitution, as to the extent that there is an inconsistency, the law is void.19 Statutory interpretation in a state where there is constitutional supremacy, such as in Barbados, necessarily requires that all legislation be filtered through constitutional lenses".

A principle of judicial supervision vs judicial legislation

(156) It is for the courts then to decide, in a principled, coherent and rational way, how the fundamental rights and freedoms listed in the Constitution are to be applied in the multitude of different sets of circumstances which arise in practice. It is for the courts to decide what is the extent of the protection afforded by these constitutional guarantees. **Panday v Gordon [2005] UKPC 36, per Lord Nicholls of Birkenhead.**

(157) It is no business for the Court to write legislation. Parliament possesses the expertise in doing so and in legislation like the SOA, call to its aid public consultation, the work of law reform commissions and a series of debates. However, the criticism that 'judicial legislating' impermissibly encroaches on the duty of the Legislature misunderstands the point of a core judicial function under the Constitution conferred by section 14 of the Constitution to interrogate the constitutionality of law. **Mc Ewan** at paragraph 143 Barrow JCCJ as follows:

"[143] In both his written and oral submissions, counsel for the State urged that the judiciary should be cautious not to succumb to deciding on social policy and effecting legislative reform, as these are the remit of the

Executive and the Legislature. There can be no gainsaying the value of this caution or wish for it to be otherwise, and judges are often uneasy when the performance of the judicial function becomes exposed to concerns about intrusion into the purview of the other branches of government. However, what Mr Ramkarran's caution against 'judicial legislating' fails to comprehend is that challenges to existing legislation, which seek to achieve reform that is properly the business of the legislature, are not challenges created or initiated by the judiciary; they are challenges that the Constitution gives aggrieved persons the right to make and they are challenges that the courts must (not may) hear and determine, once satisfied that they are justiciable."

(158) It is axiomatic to maintaining the status of our Constitution as the supreme law to recognise the important role of the Judiciary in supervising the conduct of all state actors including the Judiciary itself to ensure that it upholds the Constitution and the rule of law. In recognizing in **Suratt and others v AG** [2007] UKPC 55 the legislative power to make laws, the Law Lords implicitly recognized the Judiciary's function of conducting, where appropriate, the proportionality test to ensure that laws that have been passed are proportionate to the legitimate needs and objects. It is the courts and not Parliament who are ultimately tasked with the responsibility of determining whether any laws passed by Parliament are constitutionally compliant.

(159) Equally it the Court's duty to give life to the high ideals of these fundamental rights. Parliament has accepted its subordinate role to the rule of law and constitutional fundamentals. It is equally important to note the advice of the

then Barrow JCCJ in answer to the criticism of 'judicial legislating' and that it is for the Legislature to take it upon itself exclusively to effect reform. At paragraph 144 of **Mc Ewan** Barrow JCCJ stated:

"144. The certain way for the legislature to keep the courts from becoming engaged with legislative reform, as counsel apprehended may be involved in the adjudication of the challenge to section 153 is for the legislature itself to undertake that reform. In this regard, it is appropriate to mention also that it is not every law that the executive must feel obliged to defend against challenge. It is proper for a government to acknowledge that a law is long past its "sell-by date" and serves no social or legal purpose. With respect, the soundness of that approach in this case is not reduced by the effort of the Court of Appeal to ascribe value to the section by giving the example of using it against a man who dresses in female clothing to commit robbery. It is difficult to resist the response that the society is not benefitted from retaining a law under which to charge a robber for cross-dressing, which carries a minimum fine of G$7,500.00 (or US$35.00) when the offence to charge is robbery, which carries a sentence of imprisonment for 14 years."

(160) Barrow JCCJ's comment deserves noting. The Executive and Legislature are encouraged not to take an adversarial position with respect to the constitutionality of its laws. It is proper as in this case for the State to acknowledge that certain laws simply have no value in a modern secular state.

A principle of separation (co-operation) of powers-

(161) As it was noted in **Chandler** at paragraph 81 and reinforced in **Akili Charles** -:

"The separation of powers is not a free-standing, legally enforceable principle that exists independently of and above a Constitution. It is a principle that has informed the drafting of a Constitution and operates through the terms of a Constitution. In other words, it is a principle which is relevant to the interpretation of the 1976 Constitution but provides no basis independent of the Constitution for invalidating legislation".

(162) While the separation of powers doctrine soundly establishes the separate functions of the arms of State and a system of inbuilt checks and balances to prevent the abuse of power, the concept of "separation" misses a more nuanced relationship in the effective working of these State actors which in fact represents a comity or even a limited co-operation of powers. To this extent, whether it is in the working out of a proportionality analysis or a determination of whether laws are reasonably justifiable, the Judiciary is indeed working in tandem with the Legislature. The constitutional court must bat within its crease. But equally, there is no competition between the Judiciary and the Legislature. It is a partnership, each understanding the roles that they play in "building an innings" on keeping our laws constitutionally compliant.

(163) Lord Sales and Lord Hamblen in **Suraj** at paragraph 68 stated:

"The natural solution to accommodate the inevitable friction that always exists between individual fundamental rights and democratic decision-making in a constitutional liberal democracy like Trinidad and Tobago is that

conventionally adopted, often in such states, namely to require that interreference with such rights should be permitted in the public interest but only if the interference is proportionate to a legitimate aim."

(164) Deference to Parliament's opinion as to whether a law is a public good does not make the Judiciary subservient to it. The natural solution and coherent approach requires a continuing dialogue on rights and freedoms. To say that Parliament has the power to make laws and its views on what social policy requires should carry significant weight is to overstate the obvious. But what it cannot do is usurp the function of the Judiciary in determining whether those laws are constitutional. That is a question only for the court to decide. At best under section 13, Parliament is only concerned that they have engaged sections 4 and 5 rights without fully answering that question. Similarly, their determination that it is constitutional is subject to whether it is reasonably justifiable is a matter only the constitutional court can decide.

(165) Paragraph 13 in **Newton Spence v The Queen** Criminal Appeal No. 20 of 1998: speaking to the question of parliament's responsibility to determine whether the death penalty should be automatic makes the point, "whereas it is for Parliament to set sentencing policy, it is the duty of the courts to evaluate whether the laws passed by Parliament contravene the constitution without fear or favour. It is trite that the constitution is the supreme law and the legislation must conform to it."

(166) In **Maharaj v AG** at paragraph 81 the Board stated:

"81. At p 110, Lord Hoffmann continued: "There is no reason why a democratic constitution should not express a compromise which imitates

neither the unlimited sovereignty of the United Kingdom Parliament nor the broad powers of judicial review of the Supreme Court of the United States. Instead of leaving it to the court to categorise forms of discrimination on a case by case basis and to concede varying degrees of autonomy to Parliament only as a matter of comity to the legislative branch of Government, the constitution itself may identify those forms of discrimination which need to be protected by judicial review against being overridden by majority decision."

(167) To properly lend coherency to the arrangements under the Constitution it is in my view, without diluting the significance of keeping one's functions in watertight compartments, to equally understand the role of "co-operation". This can have positive effects that will allow one body to positively influence, not erode, the activities of another. It may inspire the activities of another. Certainly, modern legislation to tackle deep rooted social problems enlightens and enforces the judicial role in its determination of those social issues. Enlightened judgments in fact spawn new legislation. The co-operation of these traditional separate powers produces several advantages in managing our future under the Constitution: It engenders mutual respect. It prevents competition between the powers and ensures the proper operation of powers. In adopting such a perspective, court orders are implemented by state actors, the debate in our courts on public issues becomes more collaborative and less adversarial, an empathetic approach is adopted to glean the intention of Parliament. Section 13 is a classic example of this co-operation at work where Parliament passes laws with a supermajority knowing that there may be a breach of fundamental human rights but understanding that the final guidance will be required by judicial

pronouncement. The political and judicial arms should be mindful of the same purpose to be articulated under our constitutional arrangements for Parliament to make laws for good order for peace and for the Judiciary to guide and inspire such laws with the introspection on deep constitutional issues such that arise in this case.

Majoritarian rule and individual rights

(168) An important aspect of the law under review in this case is that it was one which was passed by a three-fifths majority of both Houses in Parliament. However, constitutional theory places the concept of majoritarian rule in its proper context in a constitutional democracy.

(169) In the **State v Makwanyane v Mchunu** (Case CCT/3/94) (South African Constitution) by Caskalson P (para. 13, Newton Spence) put to one side any thought that majoritarian or public opinion can take precedence over fundamental rights: public opinion…

"… is no substitute for the duty vested in the courts to interpret the constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication. The protection of rights could then be left to parliament, which has a mandate from the public and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty and a retreat from the new legal order established by the 1993 constitution.".

(170) The constitutional court is not in a popularity contest. That may be a matter

more suited to the Legislature or Executive. As the bulwark of upholding the rule of law, our role is to ensure that the popularist measures are in line with the fundamental principle of constitutionality. We help shape and refine the laws considering underlying mores of social order, not popularism but secularism and equality.

(171) Lady Hale in the decision **Regina (Chester) v Secretary of State for Justice and another; McGeoch v Lord President of the Council and another** [2014] AC 271 at paragraphs 88-90 further underscored the fact that democracy is about more than respecting the views of the majority. It is also about safeguarding the rights of minorities. In this light in my view any notion of deference by the court to a parliamentarian majority is not a synonym for subservience to the wishes of the majority. The Court still has an important function to play to rectify obvious and unjust imbalances. At paragraphs 88 to 90 Lady Hale stated:

"88. Of course, in any modern democracy, the views of the public and Parliamentarians cannot be the end of the story. Democracy is about more than respecting the views of the majority. It is also about safeguarding the rights of minorities, including unpopular minorities. "Democracy values everyone equally even if the majority does not": Ghaidan v Godin-Mendoza [2004] 2 AC 557, para 132. It follows that one of the essential roles of the courts in a democracy is to protect those rights. It was for that reason that Lord Bingham of Cornhill took issue with the argument of a previous Attorney General, Lord Goldsmith, in A v Secretary of State for the Home Department [2005] 2 AC 68, para 42:

"I do not … accept the distinction which he drew between democratic

institutions and the courts. It is of course true that the judges in this country are not elected and are not answerable to Parliament … But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic."

89. The present Attorney General has wisely not suggested any such thing. He recognises that it is the court's task to protect the rights of citizens and others within the jurisdiction of the United Kingdom in the ways which Parliament has laid down for us in the Human Rights Act 1998. But in so far as he implied that elected Parliamentarians are uniquely qualified to determine what the franchise should be, he cannot be right. If the current franchise unjustifiably excludes certain people from voting, it is the court's duty to say so and to give them whatever remedy is appropriate. More fundamentally, Parliamentarians derive their authority and legitimacy from those who elected them, in other words from the current franchise, and it is to those electors that they are accountable. They have no such relationship with the disenfranchised. Indeed, in some situations, they may have a vested interest in keeping the franchise as it is.

90. To take an obvious example, we would not regard a Parliament elected by an electorate consisting only of white, heterosexual men as uniquely qualified to decide whether women or African-Caribbeans or homosexuals should be allowed to vote. If there is a Constitution, or a Bill of Rights, or even a Human Rights Act 1998, which guarantees equal treatment in the

enjoyment of its fundamental rights, including the right to vote, it would be the task of the courts, as guardians of those rights, to declare the unjustified exclusion unconstitutional. Given that, by definition, Parliamentarians do not represent the disenfranchised, the usual respect which the courts accord to a recent and carefully considered balancing of individual rights and community interests (as, for example, in R (Countryside Alliance) v Attorney General [2008] AC 719 and R (Animal Defenders International) v Secretary of State for Culture, Media and Sport [2008] AC 1312, both upheld in Strasbourg for that very reason) may not be appropriate."

(172) A three-fifths majority in the passage of legislation under section 13 says no more than just that it is a popular law. It does not necessarily signal it is constitutional. To the extent that it comports with the majoritarian rule it must be subject to the constitutional filter whether it is a proportionate measure. Parliamentarian deference is therefore a loaded word. It is not translated to judicial subservience. Simply put the court is to discharge its functions mindful of the direction which society has signalled through majoritarian representatives not to simply abdicate its functions to deference to majoritarian rule.

(173) There are but three, of many examples, of the court robustly adopting this approach.

(174) In **Dudgeon v the United Kingdom** Application No 7525/76 October 1981 the court considered Mr Dungeon's complaint that the buggery laws of the OAP Act of Northern Ireland and the common law had the effect of making certain acts between homosexual adult males criminal. The court carefully

considered the weight of public opinion which weighed in favour of such legislation. The Court held at paragraphs 58-59 :

“58. … In the present circumstances of direct rule, the need for caution and for sensitivity to public opinion in Northern Ireland is evident. However, the Court does not consider it conclusive in assessing the "necessity", for the purposes of the Convention, of maintaining the impugned legislation that the decision was taken, not by the former Northern Ireland Government and Parliament, but by the United Kingdom authorities during what they hope to be an interim period of direct rule.

59. Without any doubt, faced with these various considerations, the United Kingdom Government acted carefully and in good faith; what is more, they made every effort to arrive at a balanced judgment between the differing viewpoints before reaching the conclusion that such a substantial body of opinion in Northern Ireland was opposed to a change in the law that no further action should be taken (see, for example, paragraphs 24 and 26 above). Nevertheless, this cannot of itself be decisive as to the necessity for the interference with the applicant’s private life resulting from the measures being challenged (see the above-mentioned Sunday Times judgment, p. 36, par. 59). Notwithstanding the margin of appreciation left to the national authorities, it is for the Court to make the final evaluation as to whether the reasons it has found to be relevant were sufficient in the circumstances, in particular whether the interference complained of was proportionate to the social need claimed for it…”

(175) It is of supreme importance in a constitutional democracy that the

constitutional court protects vulnerable classes and minorities from the imposition of unjust majoritarian views. In **Lawrence v Texas** 539 US 558 the concern was whether the majority may use the power of the state to enforce the views on the whole society through the perpetration of the criminal law. At page 585 O'Connor J stated:

"In the words of Justice Jackson: "The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected." Railway Express Agency, Inc. v. New York, 336 U. S. 106, 112–113 (1949) (concurring opinion)."

(176) In the Opinion of the Court, it was stated at page 571:

"The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code.""

(177) Again, referring to **State v. Makwanyane** (Paragraph 13 in **Newton Spence v The Queen)**, "the issue of the constitutionality of capital punishment cannot be referred to as freedom in which a majority view would prevail over the wishes of the minority. The very reasons for establishing the new legal order and for vesting the power of judicial review of all legislation in the courts was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us that all of us can be secure that our own rights will be protected."

(178) It is in this context that Lord Bingham's remarks at paragraph 26 of **Reyes v R** [2002] UKPC 11 must be understood: that the Court will not read into legislation our own moral predications and values. This is where the adjudicative constitutional function transcends self to ensure contemporary protection of the rights in light of evolving standards of decency that mark the progress of a maturing society much like a living tree.

The living tree principle

(179) Our Constitution is not an ordinary statute and is not to be read as an immutable historical document but as a living instrument, a living tree. The analogy of the Constitution as a living tree is well known and apt to underscore the necessity of the constitutional court to tend to and breathe life into it by a purposive approach that takes into account the dynamism of

life and evolving standards of our society capable of growth and expansion within its natural limits. As discussed in **Charles Matthew v The State** [2004] UKPC 33, the task of constitutional interpretation involves a much broader vision recognizing that the over literal approach to interpretation may be inappropriate when seeking to give effect to "the rights, values and standards expressed in a constitution as these evolve over time".

(180) By its very nature, human rights are to be given a broad interpretation. Section 4 of the Constitution as far as possible in words captures the essence of a free humanity in a democratic society and a generous interpretation is needed bearing the character, form and origin of these rights. It calls for a generous interpretation.

(181) The dynamism of the judicial function in giving life to the living tree principle is no better explained than by Dipak Misra CJ in **Johan v Union of India** at pages 474 to 475 which state:

"82. A democratic Constitution like ours is an organic and breathing document with senses which are very much alive to its surroundings, for it has been created in such a manner that it can adapt to the needs and developments taking place in the society. It was highlighted by this Court in the case of C*hief Justice of Andhra Pradesh v LVA Dixitulu* that the Constitution is a living, integrated organism having a soul and consciousness of its own and its pulse beats, emanating from the spinal cord of its basic framework, can be felt all over its body, even in the extremities of its limbs.
83. In the case of *Saurabh Chaudri v Union of India*[35], it was observed:
'Our Constitution is organic in nature. Being a living organ, it is ongoing and

with the passage of time, law must change. Horizons of constitutional law are expanding.'

84. Thus, we are required to keep in view the dynamic concepts inherent in the Constitution that have the potential to enable and urge the constitutional courts to beam with expansionism that really grows to adapt to the ever-changing circumstances without losing the identity of the Constitution. The idea of identity of the individual and the constitutional legitimacy behind the same is of immense significance. Therefore, in this context, the duty of the constitutional courts gets accentuated. We emphasize on the role of the constitutional courts in realizing the evolving nature of this living instrument. Through its dynamic and purposive interpretative approach, the judiciary must strive to breathe life into the Constitution and not render the document a collection of mere dead letters. The following observations made in the case of *Ashok Kumar Gupta and another v State of Uttar Pradesh* further throws light on this role of the courts:

> 'Therefore, it is but the duty of the Court to supply vitality, blood and flesh, to balance the competing rights by interpreting the principles, to the language or the words contained in the living and organic Constitution, broadly and liberally.'

(182) Justice of Appeal Kangaloo in **Ishwar Galbaransingh v AG** C.A. Civ. 185/2010 would describe the Constitution as not cast in stone as “the Ten Commandments handed down to Moses on Mount Sinai”. In its interpretation and application that reflects its dynamism Justice of Appeal Kangaloo continued at paragraph 21:

"It must be interpreted in a way that keeps apace with our modern democratic society and our current notions on human rights and fundamental freedoms. A universal feature of modern-day existence is the increasing levels of legislative intervention as Parliament attempts to fulfil its role to make laws for the peace, order and good governance of the multi-racial, multi-ethic and multi-cultural melting pot that is Trinidad and Tobago. In fulfilling this mandate, a balancing of rights and freedoms is wholly appropriate. When courts are called upon to pronounce on the constitutionality of legislation they are of necessity engaging in a balancing exercise. Call it proportionality, inconsistency, or reasonable justifiability, a rose by any other name would be as aromatically attractive."

…

while fairness, justice and human rights are expressed in any constitution as universal codes their boundaries, content and requirement should be given local contextual flavour".

(183) At paragraphs 256[9] and 257[10] of **BS v Her Worship Magistrate Marcia Ayers-Caesar and another** CV2015-02799, CV2015-03725, I noted Dr. Justice AS Anand, a former Chief Justice's, comment.

(184) The Judiciary therefore also serves as a barometer of societal standards and changing values[11]. Lady Hale in paragraph 130 in **Ghaidan v Godin Mendoza** [2004] 2 AC 557 at page 604 expressed her sensibility of changing values in these times:

"130. My Lords, it is not so very long ago in this country that people might be refused access to a so-called "public" bar because of their sex or the colour of their skin; that a woman might automatically be paid three

[9] **BS v Her Worship Magistrate Marcia Ayers-Caesar and another** CV2015-02799, CV2015-03725 at paragraph 256: "256. It is important to bear in mind that the Constitution, though by itself an important document, is after all cold print on a piece of paper. What is important to remember is the system the Constitution seeks to introduce and the way that system works. The Constitution no matter how well-crafted it is, will not be able to deliver the goods unless the system which it introduces functions effectively to realize the dreams of the founding Fathers of the Constitution. When we talk of the Constitution as living law it is usually understood to refer to the doctrines and understandings that the courts have invented, developed, spread and applied to make the Constitution work in every situation. Unless life can be pumped into the cold print of the Constitution to keep it vibrant at all times it shall cease to be living law. Generally speaking, this role of pumping life is assigned to the higher courts, more particularly under a Constitution which has separation of powers as its core. The Constitution of a State essentially reflects the aims and aspirations of the people who gave to themselves the Constitution.
In human affairs there is a constant recurring cycle of change and experiment. A society changes as the norms acceptable to the society undergo a change. Old ideologies and old systems give place to new set of ideologies and new systems which in their turn are replaced by different ideologies and different systems. Judicial creativity (often being principles termed as judicial activism), as a means of evolving new juristic principles for the development and growth of law, is an accepted and well recognized role of the judiciary not only in this country but in almost all the common law countries. The law must move with the times and judiciary has forever to remain alive to this reality. This role of the judiciary is not new either in India or elsewhere."

[10] Paragraph 257: The Courts will give life to human rights and "while fairness, justice and human rights are expressed in any constitution as universal codes their boundaries, content and requirement should be given local contextual flavour." Per Kangaloo JA.

[11] See the reversal of **Roe v Wade** in **Dobbs v Jackson Women's Health Organisation** 597 US 215 (2022).

quarters of what a man was paid for doing exactly the same job; that a landlady offering rooms to let might lawfully put a "no blacks" notice in her window. We now realise that this was wrong. It was wrong because the sex or colour of the person was simply irrelevant to the choice which was being made: to whether he or she would be a fit and proper person to have a drink with others in a bar, to how well she might do the job, to how good a tenant or lodger he might be. It was wrong because it depended on stereotypical assumptions about what a woman or a black person might be like, assumptions which had nothing to do with the qualities of the individual involved: even if there were any reason to believe that more women than men made bad customers this was no justification for discriminating against all women. It was wrong because it was based on an irrelevant characteristic which the woman or the black did not choose and could do nothing about."

(185) Even in the absence of a written constitution, Lady Hale was able to engage in judicial imagination to recognize the rights of a homosexual couple as "husband and wife" in exhibiting "marriage-like qualities." To arrive at such an interpretation, Lady Hale acknowledged that morality has changed what may have been the norm due to our evolving sense of self and respect for the individual; we learn it is wrong. At paragraph 131 of **Ghaidan v Godin-Mendoza** the House of Lords stated, "It would be a poor human rights instrument indeed if it obliged the state to protect the homes or private lives of one group but not the homes or private lives of another."

(186) This appreciation of the Judiciary's roles in sensing, being alive to and realising the changing social mores and values in discharging its constitutional function or giving life and breath to the Constitution is an

invaluable insight in constitutionalism.

(187) **Suraj** acknowledges the long-standing principle that the constitutional fundamental rights are not frozen in time. The proportionality test was viewed as a coherent rational and dynamic test which will "cater for the inevitability of changing standards moral values and perspectives or breadth of fundamental rights which are susceptible to be enlarged over time subject only to the interest of the community "the fact that the rights are liable to change in ways which have new and wider effects on government activity which itself adapts as society develops means that the scope for friction between the fundamental rights of individual and the general interest of the community referred to in para 68 above is likely to increase which gives greater force to the point made there". The evolving standards and depth of rights over time gave credence to a proportionality test to strike a fair balance between evolving rights and the wider society.

(188) Further, this living tree principle provides an insight into a therapeutic application of the law and understanding of the inherent morality of the law. It feeds into a recognition that the Constitution is an organic charter of progressive rights, it is transformative and distils a coherent constitutional morality.

(189) **Johar** underscored those three pillars of a therapeutic understanding of constitutionalism in the judgment of Dipak Misra CJ. At page 476-F, 479 C-E and 485-E the court stated:

"89. The Court, as the final arbiter of the Constitution, has to keep in view

the necessities of the needy and the weaker sections. The role of the Court assumes further importance when the class or community whose rights are in question are those who have been the object of humiliation, discrimination, separation and violence by not only the State and the society at large but also at the hands of their very own family members. The development of law cannot be a mute spectator to the struggle for the realisation and attainment of the rights of such members of the society.

…

96. The concept of transformative constitutionalism has at its kernel a pledge, promise and thirst to transform the Indian society so as to embrace therein, in letter and spirit, the ideals of justice, liberty, equality and fraternity as set out in the Preamble to our Constitution. The expression 'transformative constitutionalism' can be best understood by embracing a pragmatic lens which will help in recognizing the realities of the current day. Transformation as a singular term is diametrically opposed to something which is static and stagnant, rather it signifies change, alteration and the ability to metamorphose. Thus, the concept of transformative constitutionalism, which is an actuality with regard to all Constitutions and particularly so with regard to the Indian Constitution, is, as a matter of fact, the ability of the Constitution to adapt and transform with the changing needs of the times.

…

113. Our Constitution was visualized with the aim of securing to the citizens of our country inalienable rights which were essential for fostering a spirit of growth and development and at the same time ensuring that the three organs of the State working under the aegis of the Constitution and deriving their authority from the supreme document, that is, the Constitution,

practise constitutional morality. The Executive, the Legislature and the Judiciary all have to stay alive to the concept of constitutional morality."

(190) That constitutional morality reflects on emerging sensitivity to the therapeutic effect of laws on society.

Therapeutic (Peace) Jurisprudence

(191) To be truly accountable a Court should produce results which earn the trust of the various publics which we serve. In my view, true accountability can also be achieved when our results can serve a therapeutic purpose of promoting healing rather than acrimony, promote reconciliation rather than simply ending a legal dispute and infuse a humanistic philosophy in our approach to dispute resolution. There can yet be a synergy between the ethos of mediation's pillars of collaboration, consensus and compassion into our mainstream judging. Such an approach can be accommodated under the umbrella of peace jurisprudence which is an approach of synergising principles of therapeutic jurisprudence, restorative justice, mediation and consensus building into our traditional adversarial system. It is an attempt to look for humane solutions which can further enhance trust and confidence in the system of justice beyond the settlement of limited legal issues: CV2019-03989 **Law Association of Trinidad and Tobago v Dr Keith Rowley and others** at paragraph 309.

(192) In a case such as this one with deeply divided moral opinion, a constitutional court must be sensitive to the role it plays to quell the controversy. See

Dobbs v Jackson at pages 12-F to 13-B.[12]

(193) A constitutional court must be sensitive to the human values being espoused and the impact of the law on the human condition. In this discipline, therapeutic justice outcomes should inform a court's approach to complex human problems. **In Calvin Ramcharan v The Director of Public Prosecutions [2022] CCJ 4 (AJ) GY** it was noted at paragraph 95, 96 and 98**:** "95…. Essentially, therapeutic justice approaches are intended to interrogate the law, legal procedures and processes and assess how they actually impact people's lives, and then to determine whether they can be reshaped to enhance their therapeutic potential consistent with other values served by the law, including due process, protection of the law, and

[12] *Dobbs v Jackson Women's Health Organisation*: "… But the three Justices who authored the controlling opinion 'call[ed] the contending sides of a national controversy to end their national division' by treating the Court's decision as the final settlement of the question of the constitutional right to abortion.12 As has become increasingly apparent in the intervening years, Casey did not achieve that goal. Americans continue to hold passionate and widely divergent views on abortion, and state legislatures have acted accordingly. Some have recently enacted laws allowing abortion, with few restrictions, at all stages of pregnancy. Others have tightly restricted abortion beginning well before viability. And in this case, 26 States have expressly asked this Court to overrule Roe and Casey and allow the States to regulate or prohibit pre-viability abortions. Before us now is one such state law. The State of Mississippi asks us to uphold the constitutionality of a law that generally prohibits an abortion after the 15th week of pregnancy—several weeks before the point at which a fetus is now regarded as 'viable' outside the womb. In defending this law, the State's primary argument is that we should reconsider and overrule Roe and Casey and once again allow each State to regulate abortion as its citizens wish. On the other side, respondents and the Solicitor General ask us to reaffirm Roe and Casey, and they contend that the Mississippi law cannot stand if we do so. Allowing Mississippi to prohibit abortions after 15 weeks of pregnancy, they argue, 'would be no different than overruling Casey and Roe entirely.' Brief for Respondents 43. They contend that 'no half-measures' are available and that we must either reaffirm or overrule Roe and Casey. Brief for Respondents 50. We hold that Roe and Casey must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of Roe and Casey now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.' Washington v Glucksberg (1997) 50 BMLR 65 at 76, (1997) 521 US 702 at 721 (internal quotation marks omitted)."

other core constitutional values and principles.

[96] In this context therapeutic justice and the therapeutic potential of a law are informed by and aimed at enhancing an ethic of care and regard for all persons and the greater good of the society. Its jurisprudential basis lies in the core international and constitutional value of the inherent dignity of all persons. As such, all persons are to be treated equally and with appropriate regard and respect for their inherent personhood and rights throughout the entire court proceedings and in relation to all aspects of a matter. Hence regard, respect, and dignity, and as well as procedural fairness, are integral.

[98] In sum, therapeutic approaches try to maximize the personal and societal wellbeing of individuals and communities, and so focuses on more than just strict legal rights, responsibilities, duties, obligations, and entitlements. It is what is referred to in the academic literature as a 'Rights Plus approach to adjudication, that also consciously focuses on the law's potential to have a positive impact on people's lives and on society…"

(194) In this balance of rights and dignity one must not lose sight of other voices equally valid in their eyes which have been articulated by various religious groups in this litigation.

(195) The Trinidad and Tobago Council of Evangelical Churches asserted in their affidavit their opposition to the practice of buggery and homosexual activities generally on biblical, medical and social grounds, "while at the same time recognising the need for compassion and tolerance of those struggling with same sex attraction". Their fear is that if Mr Jones succeeds

in his claim, homosexual activities will be encouraged and it will not be long before same sex marriages will be encouraged and adopted and homosexual lifestyle promoted and permitted. This, according to them, will affect their own rights of expression, freedom of conscious and belief, equality of law, a healthy environment respect for family life and freedom of religion. "The survival of the human race is strongly dependent on the perpetuation of sexual relations between a male and female."

(196) The challenge in this judgment is to arrive at a constitutional solution on this appeal that is sound in principle but equally results in positive peace, acceptance and a willingness to build for the future with a respect for the dignity of us all.

International norms

(197) Finally, it is useful to pay regard to the climate of international human rights having regard to the fact that the Constitution was birthed from the existing climate at that period of time, in particular, adopting the Canadian Charter 1965 as a constitutional model of universal human rights. It is what the constitutional court attributes as the meaning of legislation not the motives of the parliamentarians which are inconclusive.

(198) The State's international obligations play an important part in the articulation of human rights. It is relevant to have regard to international human rights norms laid down in treaties to which the State is a party whether or not they were independently enforceable in domestic law.

(199) In **Alleyne** the court at paragraph 24 and 25 stated:

"24. In addition, and consistent with the principle of sovereignty, the task of statutory interpretation in Barbados includes attending to the state's declared international undertakings through signed and subscribed international treaties and legal instruments. Sovereignty in a constitutional democracy means that a state that enters into treaty arrangements does so with full autonomy, intending to mean what it represents to the world and its citizens as having been done. The agency of the executive to act for the state in this regard is constitutionally warranted, and the imprimatur of the Parliament is not a necessary requirement. In this regard the pure notion of dualism that has its origins in Parliamentary supremacy is arguably and conceptually tenuous. The result is a constitutional impetus to interpret all domestic laws in alignment with state undertaken international obligations and commitments, an approach recognised and endorsed by this Court.

25. Thus, two principles of statutory interpretation emerge for states which exist in the context of constitutional supremacy. Methodologically, (a) respect for fundamental rights and basic deep structure principles,24 and (b) formal international treaty commitments are both lenses through which all statutes must be viewed, interpreted, and applied so as to adhere to and be consistent with, so far as is appropriate, those core values, principles, and commitments."

(200) To that extent it is undisputed that Trinidad and Tobago is a signatory to the International Covenant on Civil and Political Rights. Article 17 of the Covenant protects privacy rights and was interpreted as preventing the criminalisation of consensual intimacy between adults of the same sex by

the United Nation Human Rights Committee in **Toonen v Australia** Communication No.488/1992, CCPR/C/50/d/488/1992 (1994).[13]

(201) With these interlocking principles which inform the constitutional analysis, I now turn to examine the laws under constitutional scrutiny.

C. SODOMY, BUGGERY AND SECTIONS 13 AND 16 SEXUAL OFFENCES-

"The criminalization of sodomy in private between consenting males is a severe limitation of a gay man's right to equality in relation to sexual orientation, because it hits at one of the ways in which gays give expression to their sexual orientation. It is at the same time a severe limitation of the gay man's rights to privacy, dignity, and freedom. The harm caused by the provision can and often does affect his ability to achieve self-identification and self-fulfilment. The harm also radiates out into society generally and gives rise to a wide variety of other discrimination, which collectively unfairly prevent a fair distribution of social goods and services and the award of social opportunities for gays." Ackerman, J., National Coalition for Gay and Lesbian Equality v. Minister of Justice, 1998.

(202) To the extent that sections 13 and 16 SOA have impacted on Mr. Jones as a homosexual's expression of love, the main indignity in the law is the criminalisation of anal sex -sex per anum. The history of the common law offence of buggery and gross or serious indecency was traced by both parties in their submissions and by the trial judge in his judgment at

[13] The Office of the High Commissioner for Human Rights comments : In September 2012 the Office of the High Commissioner for Human Rights "the criminalisation of private consensual sex between adults of the same sex breaches a state's obligation under intentional law including the obligation to protect individual privacy and to guarantee non disclination

paragraphs 16 to 33. It is significant to do so, as the law's aversion of sex between males represented societal values reaching back to the 13th century (1290), predating the "discovery" of the Caribbean islands. The common law offence of sodomy targeted the person performing the act of sodomy in the ecclesiastical courts. The punishment was severe. It was considered a vice, an unnatural act. An abomination on this earth, to that end, one who committed such an act did not deserve to be treated as a human or be alive. They were either burnt alive or hanged to death. (Naz. Foundation Delhi-Buggery Act 1533). Evolving norms saw those punishments decrease to terms of imprisonment from 1861 with the eradication of the death penalty for buggery.

(203) There is a significant Christian context to the common law offence of 'sodomy.' Sodomy was perceived to be an offence against God's will which thereby attracted society's sternest punishment. "Sodomy was a form of pollution". Similar strong religious sentiments have been expressed by other members of faith in this case on the offence of buggery.[14] Sodomy and buggery are conceptually seen by them as unnatural as Justice Kirby in quoting Edward Coke noted, "Buggery is a detestable, and abominable sin, … committed by carnal knowledge against the ordinance of the Creator and order of nature, by mankind with mankind, or with brute beast, or by womankind with brute beast".

(204) The abominable crimes of sodomy and the misdemeanour of gross indecency therefore have a long history in the common law. It found

[14] The Sanatan Dharma Maha Sabha of Trinidad And Tobago noted that many Hindu scriptures including the Mahabharat, Srimad Bhagavad Gita and the Manusmriti expressly suggest the condemnation of such types of activity.

legislative expression in the 1533 Buggery Act and the Offences Against the Person Act 1861 (UK). Section 61 of that Act and the 1885 Labouchere Amendment of section 11 was transplanted into our 1925 OAPO.[15]

(205) **Sections 60 and 62 of the Offences Against the Person Ordinance** set out the criminal offence of sodomy and gross indecency as follows:

"sodomy 60. Whosoever shall be convicted of the abominable crime of buggery, committed either with mankind or any animal, shall be liable to be imprisoned for any term not exceeding five years, nor less than two years, with or without hard labour, and, if a male, corporal punishment.

61. **.** Whosoever shall attempt to commit the said abominable crime, or shall be guilty of any assault with intent to commit the same, or of any indecent assault upon any male person, shall be guilty of a misdemeanor,

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[15] Paragraphs 23 to 25 of the trial judge's judgment:

"23. The original 1828 version of the Offences Against the Person Act in England:

> "….changed the requirements of evidence in sodomy trials from penetration and emission in the body to penetration only. The 1861 Offences Against the Person Act formally abolished the death penalty for sodomy and introduced instead life sentences of penal servitude. It also formalized the maximum and minimum sentences for indecent assault by introducing a prison term of between two and ten years as the standard sentence. In 1885, Labouchere's amendment ostensibly introduced the new offence of gross indecency, but did not enlarge the scope of the law any further. Neither did it affect sentencing practice in a noticeable fashion. The law regarding soliciting was changed in 1889, making it possible to prosecute someone for importuning a homosexual offence."

24. The 1861 Act "removed the capital indictment for sodomy, but retained the archaic Buggery Act of 1533 as the basis for legislation." The provision under that Act was as follows:

> "Unnatural Offences.
>
> 61. Whosoever shall be convicted of the abominable28 Crime of Buggery, committed either with Mankind or with any Animal, shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for Life or for any Term not less than Ten Years."

25. The 1885 Labouchere amendment in relation to gross indecency provided:

> "11. Outrages on decency. Any male person who, in public or private, commits, or is a party to the commission of or procures (a) or attempts (b) to procure the commission by any male person of, any act of gross indecency (c) with another male person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour."

and being convicted thereof shall be liable to be imprisoned for any term not exceeding five years, with or without hard labour.

Gross indecency 62. Any male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanour, and being convicted thereof shall be liable to be imprisoned for any term not exceeding two years, with or without hard labour."

(206) These offences were replaced with the offences of 'buggery' and 'serious indecency' under sections 13 and 16 respectively of the Sexual Offences Act 1986.

D. MODERNISING OUR SEXUAL OFFENCES- SECTIONS 13 AND 16 SOA

(207) The question whether sections 13 and 16 constituted new law rather than "modified" or altered existing law is an important aspect of the question whether it can be construed as existing or saved law. Senior Counsel for the Attorney General contended stridently that these sections merely modified or altered sections 60 and 62 of the OAP Ordinance. By virtue of the effect of section 6 (1) (c) and (2) of the Constitution any alteration to an existing law is saved to the extent that the new provision does not derogate from constitutionally protected human rights further than the existing law. I will return to this argument in some detail later in this judgment but from my analysis set out in my judgment below, sections 13 and 16 of the SOA were clearly a replacement and not a re-enactment or modification of existing law

as: (a) Parliament clearly used the words "replace" deliberately to modernise the law on sexual offences. It repealed altogether the old vestiges and the baggage of its colonial past; (b) a comparison of the offences demonstrate a modernisation introducing nuanced sentencing structures, importing the modern constitutional principles of proportionality; (c) Parliament clearly paid mind to the Republican Constitution and was acutely aware of its mandate under section 13; (d) This was new legislation that the Parliament was proud to have enacted as seen in the Hansard reports. It represented a Parliamentarian choice of deliberately breaking from the past and modernising our sexual offences within the mores of the existing values prevailing at that time.

(208) It was with great acclaim by Parliament that the SOA was introduced and enacted in 1986. It represented a modernised approach to sexual offences in our jurisdiction. It later was further refined dramatically in 2000 with the introduction of marital rape and increasing the penalties for sexual offences. There is no doubt that a prevailing and dominant concern by Parliament was the climate of deviant sexual behaviour.

(209) The SOA explicitly repealed and replaced the laws with respect to sexual crime and in our case the laws of buggery and gross indecency. The Act is entitled: "An Act to repeal and replace the laws of Trinidad and Tobago relating to sexual crimes, to the procuration, abduction and prostitution of persons and to kindred offences." It was an Act that was passed in both Houses by a three fifths majority. It was assented in 11th November 1986 and pursuant to section 13 of the Constitution it expressly declared in its

preamble[16] that the Act shall have effect notwithstanding sections 4 and 5 of the Constitution.

(210) Sections 60, 61 and 62 of the OAP Ordinance were expressly repealed. This was also reiterated in the First Schedule of the Act.

(211) The offences of sodomy/buggery and gross indecency in Sections 60 and 62 of the OAP Ordinance were now **replaced** by sections 13 and 16 of the Act:

> "13. (1) A person who commits buggery is guilty of an offence and is liable on conviction to imprisonment—
>
> (a) if committed by an adult on a minor, for life;
>
> (b) if committed by an adult on another adult, **for twenty-five years**;
>
> (c) if committed by a minor, for five years.
>
> (2) In this section "buggery" means sexual intercourse per anum by a male person with a male person or by a male person with a female person.
>
> 16. (1) A person who commits an act of serious indecency on or towards another is guilty of an offence and is liable on conviction to

[16] Preamble to SOA- "WHEREAS it is enacted inter alia by subsection (1) of section 13 of the Constitution that an Act of Parliament to which that section applies may expressly declare that it shall have effect even though inconsistent with sections 4 and 5 of the Constitution and, if any such Act does so declare, it shall have effect accordingly: And whereas it is provided by subsection (2) of the said section 13 of the Constitution that an Act of Parliament to which that section applies is one the Bill for which has been passed by both Houses of Parliament and at the final vote thereon in each House has been supported by the votes of not less than three-fifths of all the members of that House: And whereas it is necessary and expedient that the provisions of this Act shall have effect even though inconsistent with sections 4 and 5 of the Constitution:".

imprisonment—

(a) if committed on or towards a minor under sixteen years of age for ten years **for a first offence and to imprisonment for fifteen years for a subsequent offence**;

(b) if committed on or towards a person sixteen years of age or more for five years.

(2) Subsection (1) does not apply to an act of serious indecency committed in private between—

(a) a husband and his wife; or

(b) a male person and a female person each of whom is sixteen years of age or more, both of whom consent to the commission of the act.

(3) An act of "serious indecency" is an act, other than sexual intercourse (whether natural or unnatural), by a person involving the use of the genital organ for the purpose of arousing or gratifying sexual desire."

(212) The highlighted sections above represent the present iterations of these offences after the amendment in 2000. Those amendments introduced an increased penalty of twenty five years for the offence of buggery by an adult on another adult. For the offence of serious indecency it introduced a two tier system of punishment for offences against a minor of 16 years for the first offence and fifteen years for the subsequent offence.

(213) Further these laws deliberately targeted anal sex by consenting adults as a criminal act. It linked a "buggery" law to delegitimising homosexual "behaviour". In very crude terms the then Attorney General disparaged this minority group of society:

"We then dealt with clause 12, one which has generated a lot of comment, for what reason I do not know. I think there was a lot of misconception in the society probably given by certain publications, that in fact we were legalizing homosexuality. I am not aware of that. When you look at the bill—the bill which was out for public comment you will see that it was clear that buggery remained an offence. Indeed, any feeling that one might have had to be—I would not say "liberal" because I do not think liberal is the word—any feeling that one might have had or any inclination to remove this as an offence of the criminal law from the statute books will indeed today have disappeared and been dissipated by the fear of that serious disease. What do you call it? **That disease that figures now greatly among members of the homosexual community. My friend, the Member for Port-of-Spain says something about deficiency syndrome; that particular disease which is feared by so many. We could not be seen to be doing anything to encourage that kind of activity, which of course, is an unnatural exercise.** And while we sympathize with those unfortunate persons who have found themselves in the situation where they feel compelled and they act out of compulsion in that line, we cannot at this point think of excising it from our statute books. **It is far too dangerous a practice for us to do anything which may seem as an encouragement thereof. Only a few weeks ago I had reason to make a request of certain members of the police to try to do something about some of these people who parade on our streets. They parade on some of our main streets in Port-of-Spain at all hours of the night making it very difficult even for you. If you slow down to turn a corner they run you down and so on. One has to be very, very careful. As I said some time ago they have come out**

from the cold. No longer are they hiding and carrying on their affairs in secret and in private; they are in fact are now making a public spectacle of themselves and this is not something which we can encourage. We had never intended to and therefore the offence of buggery remains on the statute books."

(214) The entire legislative exercise was one to address the question what should be done about deviant sexual behaviour in Trinidad and Tobago in 1986. The Hansard reports demonstrated a reluctance by members of Parliament to deal with the social issue of homosexuality of which it would have been well aware as having been legitimised in comparable UK legislation. But those comments above reflect a sensibility which is in my view no longer relevant and I doubt very much if those statements can be repeated in the Parliament of today.

E.IMPACT OF THE <u>NEW LAW</u> ON JASON JONES- I AM A HOMOSEXUAL DO YOU RESPECT ME?

"Keep love in your heart. A life without it is like a sunless garden when the flowers are dead. The consciousness of loving and being loved brings a warmth and a richness to life that nothing else can bring." Oscar Wilde

(215) In tracing the history of the legislation there is no doubt that the intent of the legislation was to target a vice expressed by sexual conduct and included those whose sexual desires and expression of love are seen as perverts. Intentionally it would shape moral behaviour and eliminate the thought of

sex per anum. The complaint by Mr Jones, as a homosexual[17], is that in doing so he is denied his right to love and the right to be human.

(216) Senior Counsel for the Attorney General has conceded that it is not in a position to contradict the subjective statements of Mr Jones relative to the impact on him of being a homosexual. It is an accepted fact that Mr Jones is a homosexual man and citizen of Trinidad and Tobago residing here from time to time. It is not contested that as a homosexual man he expresses his love by anal sex with another man and that if he does so he would be labelled a criminal in the eyes of the law and exposed to criminal sanction.

(217) While Senior Counsel of the Attorney General submits that any impact on Mr Jones is irrelevant to the legal question, I disagree. It is important to

[17] *Johar v Union of India* [2018] 7 SCR 379 at 492-G to 493-G: "After stating about the value of dignity, we would have proceeded to deal with the cherished idea of privacy which has recently received concrete clarity in Puttaswamy's case. Prior to that, we are advised to devote some space to sexual orientation and the instructive definition of LGBT by Michael Kirby, former Judge of the High Court of Australia:- "Homosexual: People of either gender who are attracted, sexually, emotionally and in relationships, to persons of the same sex. Bisexual: Women who are attracted to both sexes; men who are attracted to both sexes. Lesbian: Women who are attracted to women. Gay: Men who are attracted to men, although this term is sometimes also used generically for all same-sex attracted persons. Gender identity: A phenomenon distinct from sexual orientation which refers to whether a person identifies as male or female. This identity' may exist whether there is "conformity or non-conformity" between their physical or biological or birth sex and their psychological sex and the way they express it through physical characteristics, appearance and conduct. It applies whether, in the Indian sub-continent, they identify as hijra or kothi or by another name. Intersex: Persons who are born with a chromosomal pattern or physical characteristics that do not clearly fall on one side or the other of a binary male female line. LGBT or LGBTIQ: Lesbian, Gay, Bisexual, Transsexual, Intersex and Queer minorities. The word 'Queer' is sometimes used generically, usually by younger people, to include the members of all of the sexual minorities. I usually avoid this expression because of its pejorative overtones within an audience unfamiliar with the expression. However, it is spreading and, amongst the young, is often seen as an instance of taking possession of a pejorative word in order to remove its sting. MSM: Men who have sex with men. This expression is common in United Nations circles. It refers solely to physical, sexual activity by men with men. The expression is used on the basis that in some countries - including India - some men may engage in sexual acts with their own sex although not identifying as homosexual or even accepting a romantic or relationship emotion.

contextualise the impact of a law perceived to be unjust by its dehumanising impact on the integrity of the person. If not why are we here? To this extent it is relevant to note the following.

(218) Mr Jones lives in constant fear that his privacy and personal life can be subject to unwanted intrusion by the police because of his sexual orientation. He has faced homophobia and harassment in this country. He has been forced to make a difficult personal choice of either expressing himself sexually and build a family and be the subject of criminal sanction or to deny himself his expression of love and live a life that is not his own. He is in effect being forced to undergo a 'conversion'. He cannot feel free to express himself in the privacy of his own home of all places in his most intimate space of his bedroom. What place is the law there overlooking the conduct of consenting adults? He has mixed feelings of fear, anxiety, shame and guilt.

(219) The homophobia emboldened by the criminal law has driven a wedge between himself and his family. He is seen as a disgrace and perceives himself a criminal by virtue of engaging in acts prohibited by the criminal law. He laments that 54 years since this land forged from the love of liberty was born he still cannot find his equal place.

(220) His lived experience is born out by the recorded experiences of this group in the evidence supplied by Mr Jones in his affidavit. He has also provided a perspective of the global legal landscape that had to deal with the constitutionality of buggery laws. Such a lived experience is similar to lived experiences of the LGBTQ community as reflected in the comments of

Chandrachud CJ in **Chakraborty and another v Union of India** [2024] 1 LRC 331 at paragraphs 97 and 98 :

"97. The criminalization of the LGBTQ community and their resultant prosecution and conviction under these laws coupled with the violence enabled by these laws drove large sections of the community underground and into the proverbial closet. Society stigmatized any sexual orientation which was not heterosexual and any gender identity which was not cisgender. Persons with an atypical gender identity and/or sexual orientation were therefore compelled to conceal their true selves from the world. Their presence in the public sphere gradually shrunk even as homophobia and transphobia flourished. Despite their alienation from mainstream society, many queer persons continued to live their lives in ways that were visible to the public eye. Indeed, many of them (such as hijras) often did not have a choice but to do so. Others expressed their sexual orientation only in the comfort of their homes, in the presence of their families and friends. Yet others led double lives – they pretended to be heterosexual in public and while with their families and made their sexual orientation known to a select few persons, who were often themselves of an atypical sexual orientation. Some people entered into 'lavender marriages' or 'front marriages' which are marriages of convenience meant to conceal the sexual orientation of one or both partners.

98. It is evident that it is not queerness which is of foreign origin but that many shades of prejudice in India are remnants of a colonial past. Colonial laws and convictions engendered discriminatory attitudes which continue

into the present. Those who suggest that queerness is borrowed from foreign soil point to the relatively recent increase in the expression of queer identities as evidence of the fact that queerness is 'new,' 'modern,' or 'borrowed.' Persons who champion this view overlook two vital details. The first is that this recent visibility of queerness is not an assertion of an entirely novel identity but the reassertion of an age-old one. The second factor is that establishment of a democratic nation-state and the concomitant nurturing of democratic systems and values over six decades has enabled more queer persons to exercise their inherent rights. An environment has been fostered which is conducive to queer persons expressing themselves without the fear of opprobrium. This Court also recognizes that queer persons have themselves been crucial in the project of fostering such an environment. The constitutional guarantees of liberty and equality have gradually been made available to an increasing number of people. This seems to be true across the world – the global turn towards democracy has created the conditions for the empowerment of queer people everywhere. Progress has perhaps been inconsistent, non-linear, and at a less than ideal pace but progress there has been. We must recognize the vital role of Indian society in contributing to the evolving social mores. The evolution may at times seem imperceptible, but surely it is."

(221) Equally the fears and experience of other groups are not irrelevant. As noted earlier in this judgment religious groups have gone on affidavit to express their own view of the significance and meaning of this criminal sanction which preserves their own way of life and their philosophy of what is a good life. These perceptions cannot be washed away. However, it cannot be

sensibly argued that this is not a law which discriminates against one group of persons in our society making them a vulnerable class subject to caprice by the majority. It was a deliberate singling out of a group.

(222) The question of constitutionality cannot be divorced from morality in the sense that the fundamental rights, the values of our personhood are engaged and the Court is entrusted with the adjudicative injunction to interpret, apply and rationalise the meaning shape and effect of that "constitutional being". Inevitably, the court is engaged in an evaluative and moral judgment first to determine the extent and shape of any particular right its breach and harmonising its values in law with pre-existing views of our society through saved laws.

F. THE SECTION 13 ANALYSIS-THE FUNDAMENTAL RIGHTS ENGAGED-

"The Court, as the final arbiter of the constitution, has to keep in view the necessities of the needy and the weaker sections. The role of the Court assumes further importance when the class of community whose rights are in question are those who have been the object of humiliation, discrimination, separation and violence by not only the state and the society at large but also at the hand of their very own family members. The development of law cannot be a mute spectator to the struggle for the realization and attainment of the rights of such members of the society." **Navtej Singh Johar and others v Union of India and others** [2018] 7 SCR 379 at 476-F.

(223) In conducting any section 13 analysis the starting point is to determine whether there has been in fact a contravention of sections 4 and 5 of the

Constitution before the issue of reasonable justification of sections 13 and 16 SOA can arise. Indeed, the Act's inconsistency with our fundamental human rights provisions and the extent to which they so derogate becomes a key consideration in determining whether the law is in fact reasonably justifiable. In my view, the fundamental rights engaged by sections 13 and 16 of the SOA are the rights to privacy; the right to freedom of expression; equality before the law and the protection of the law.

(224) The relevant text of sections 4 and 5 of the Constitution provide as follows:

> " 4. It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely:
>
> (b) the right of the individual to equality before the law and the protection of the law;
>
> (c)the right of the individual to respect for his private and family life;
>
> (d)the right of the individual to equality of treatment from any public authority in the exercise of any functions; (e) the right to join political parties and to express political views;
>
> (i) freedom of thought and expression.
>
> 5. (1) Except as is otherwise expressly provided in this Chapter and in section 54, no law may abrogate, abridge or infringe or authorise the abrogation, abridgment or infringement of any of the rights and freedoms hereinbefore recognised and declared.

(225) It is difficult to discern from the submissions made to this Court whether the State (without prejudice to its position that the legislation is saved law or satisfies the reasonably justifiable test) has actually challenged the trial judge's finding that the legislation does impinge directly on these rights. In fact, while the only challenge in the notice of appeal is to the finding that there was a breach of his privacy rights there are no submissions made on this point. Very little analysis was required by the trial judge on this issue presumably as there was no real contest by the State that the legislation was, in fact, inconsistent with section 4 rights. While the trial judge declared these laws to be unconstitutional the Court's order did not directly refer to the rights that have been breached. However, in paragraph 87, 92 and 93 of the judgment it is clear that the trial judge was of the view that the legislation breaches or is inconsistent with Mr Jones' right to privacy, freedom of expression and right to equality of treatment. In my view, for the reasons I shall now explain, the trial judge was not plainly wrong to so hold. At paragraphs 87, 92 and 93 the trial judge stated:

"87. Counsel for the TTCEC also suggested that as relates section 13 of the Act, there was no discrimination based on sexual orientation as sexual intercourse per anum is prohibited in relation to both males and females and further, the fact that a person takes part in the act of buggery is not proof that such person is sexually oriented towards homosexuality as many male persons who are heterosexual or pansexual indulge in homosexual activities not because of any incurable tendency but for sexual excitement. As relates section 16 of the Act, it was suggested that the claimant has not, either by his affidavit evidence or in his submissions,

brought himself within the ambit of that section as it criminalizes acts of serious indecency, which it defines as acts "other than sexual intercourse (whether natural or unnatural)". According to the TTCEC the claimant has not, by his affidavit evidence, identified himself as partaking in any such acts.

…

92. To this court, human dignity is a basic and inalienable right recognized worldwide in all democratic societies. Attached to that right is the concept of autonomy and the right of an individual to make decisions for herself/himself without any unreasonable intervention by the State. In a case such as this, she/he must be able to make decisions as to who she/he loves, incorporates in his/her life, who she/he wishes to live with and with whom to make a family. A citizen should not have to live under the constant threat, the proverbial "Sword of Damocles", that at any moment she/he may be persecuted or prosecuted. That is the threat that exists at present. It is a threat that is sanctioned by the State and that sanction is an important sanction because it justifies in the mind of others in society who are differently minded that the very lifestyle, life and existence of a person who chooses to live in the way that the claimant does is criminal and is deemed of a lesser value than anyone else. It has been so expressed in the recent past by leaders in society. In this way, Parliament has taken the deliberate decision to criminalize the lifestyle of persons like the claimant whose ultimate expression of love and affection is crystallized in an act which is statutorily unlawful, whether or not enforced. This deliberate step has meant, in this circumstance, that the claimant's rights are being infringed.

93. The claimant, and others who express their sexual orientation in a similar way, cannot lawfully live their life, their private life, nor can they choose their life partners or create the families that they wish. To do so would be to incur the possibility of being branded a criminal. The Act therefore impinges on the right to respect for a private and family life."

G. THE STARTING POINT-THE INTERPRETATIVE LENS-THE INHERENT DIGNITY OF MR JONES A HOMOSEXUAL MAN

"…the constitutional courts must strive to protect the dignity of every individual, for without the right to dignity, every other right would be rendered meaningless. Dignity is an inseparable facet of every individual that invites reciprocative respect from others to every aspect of an individual which he/she perceives as an essential attribute of his/her individuality, be it an orientation or an optional expression of choice." Johar v Union v India at paragraph 253 (vi), page 534-C.

(226) As discussed above, in analysing the impact of these sections, it is important to note the constitutional framework of our rights which preserve and protect the inherent dignity of one personhood. These are normative moral principles of individual personhood or worthiness or dignity and self-respect of personal value. This obvious preservation of individual self-determination can only breathe life, inspire or sustain the collective society. We are richer because of our diverse colours and at the same time it sets up discrete zones of private autonomy within which "we may pursue our life plans" without fear of incrimination or encroachment of others save to the extent it intermeddles with the rights of others. Hence the famous words from

Collymore v AG (1967) 12 WIR 5 from Wooding CJ (as he then was) at page 15, "In like manner, their constitutionally-guaranteed existence notwithstanding, freedom of movement is no licence for trespass, freedom of conscience no licence for sedition, freedom of expression no licence for obscenity, freedom of assembly no licence for riot and freedom of the press no licence for libel." As discussed above, our Preamble firmly places our human dignity as the axis within which we are to view our fundamental human rights.

(227) The trial judge correctly recognised that "this is a case about the dignity of the persons" and that, "human dignity is a basic and inalienable right recognized worldwide in all democratic societies". Sexual orientation is innate to a human being an important attribute of personality and identity: see **Johar and others v Union of India and others**.

The right to respect for private and family life section 4(c)

(228) Privacy is a key constitutional element of human dignity. It has been viewed as having both a normative and descriptive function. At a normative level privacy subserves those eternal values upon which the guarantees of life, liberty and freedom are founded. At a descriptive level, privacy postulates a bundle of entitlements and interests which lie at the foundation of ordered liberty.[18]

[18] "There is a sacred realm of privacy…into which the law generally speaking must not intrude. This is a principle of the utmost importance for the preservation of human freedom self-respect and responsibility." Dr Geffrey Fisher Private

(229) The contours of privacy include a number of facets:

a. Privacy has always been a natural right. It is concomitant of the right of the individual to exercise control over his or her personality.
b. Privacy is the necessary condition precedent to the enjoyment of any of the guarantees in a human and intrinsic to freedom, liberty and dignity.
c. The fundamental right to privacy would cover at least three aspects – (i) intrusion with an individual's physical body, (ii) informational privacy, and (iii) privacy of choice.
d. It is the reservation of a private space for the individual to be let alone consistent with personal autonomy and self determination. The free will in their private space to pursue the ideals of the good life and to develop one's personality and being.
e. Inherent with this expectation of the enjoyment of this right is the fundamental respect for one's privacy.
f. Respect for one's family life is an attribute of autonomy to develop one's family values for one's ideal of a family life.

(230) **Justice K.S. Puttaswamy and others v Union of India and others** [2018] 8 SCR 1, Chandrachud J noted at page 258-G:

"297. What, then, does privacy postulate? Privacy postulates the reservation of a private space for the individual, described as the right to be let alone. The concept is founded on the autonomy of the individual. The ability of an individual to make choices lies at the core of the human

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consensual Homosexual Behaviour the Crime and its Enforcement Yale Law Journal Vol. 70 No. 4 (1961).

personality. The notion of privacy enables the individual to assert and control the human element which is inseparable from the personality of the individual. The inviolable nature of the human personality is manifested in the ability to make decisions on matters intimate to human life. The autonomy of the individual is associated over matters which can be kept private. These are concerns over which there is a legitimate expectation of privacy. The body and the mind are inseparable elements of the human personality. The integrity of the body and the sanctity of the mind can exist on the foundation that each individual possesses an inalienable ability and right to preserve a private space in which the human personality can develop. Without the ability to make choices, the inviolability of the personality would be in doubt. Recognising a zone of privacy is but an acknowledgment that each individual must be entitled to chart and pursue the course of development of personality. Hence privacy is a postulate of human dignity itself. Thoughts and behavioural patterns which are intimate to an individual are entitled to a zone of privacy where one is free of social expectations. In that zone of privacy, an individual is not judged by others. Privacy enables each individual to take crucial decisions which find expression in the human personality. It enables individuals to preserve their beliefs, thoughts, expressions, ideas, ideologies, preferences and choices against societal demands of homogeneity. Privacy is an intrinsic recognition of heterogeneity, of the right of the individual to be different and to stand against the tide of conformity in creating a zone of solitude. Privacy protects the individual from the searching glare of publicity in matters which are personal to his or her life. Privacy attaches to the person and not to the place where it is associated. Privacy constitutes the foundation of all liberty because it is in

privacy that the individual can decide how liberty is best exercised. Individual dignity and privacy are inextricably linked in a pattern woven out of a thread of diversity into the fabric of a plural culture. "[19]

(231) In the **National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others** (CCT11/98) [1998] ZACC 15 the Court stated, "While recognising the unique worth of each person, the Constitution does not presuppose that a holder of rights is as an isolated, lonely and abstract figure possessing a disembodied and socially disconnected self. It acknowledges that people live in their bodies, their communities, their cultures, their places and their times. The expression of sexuality requires a partner, real or imagined. It is not for the state to choose or to arrange the choice of partner, but for the partners to choose themselves".

(232) In **Johar** Chandrachud J further stated at paragraph 63 and 64, page 648 to 650:

"63. In the absence of a protected zone of privacy, individuals are forced to conform to societal stereotypes. Puttaswamy has characterised the

[19] [19] At page 281 Chandrachud J further reflected on the element of human dignity - "This element of human dignity as community value relates to the social dimension of dignity. The contours of human dignity are shaped by the relationship of the individual with others, as well as with the world around him. English poet John Donne expresses the same sentiments when he says 'no man is an island, entire of itself'. The individual, thus, lives within himself, within a community, and within a state. His personal autonomy is constrained by the values, rights, and morals of people who are just as free and equal as him, as well as by coercive regulation. Robert Post identified three distinct forms of social order: community (a "shared world of common faith and fate"), management (the instrumental organization of social life through law to achieve specific objectives), and democracy (an arrangement that embodies the purpose of individual and collective self-determination. These three forms of social order presuppose and depend on each other, but are also in constant tension.

right to privacy as a shield against forced homogeneity and as an essential attribute to achieve personhood:

> "…Recognizing a zone of privacy is but an acknowledgment that each individual must be entitled to chart and pursue the course of development of personality. Hence privacy is a postulate of human dignity itself. Thoughts and behavioural patterns which are intimate to an individual are entitled to a zone of privacy where one is free of social expectations. In that zone of privacy, an individual is not judged by others. Privacy enables each individual to take crucial decisions which find expression in the human personality. It enables individuals to preserve their beliefs, thoughts, expressions, ideas, ideologies, preferences and choices against societal demands of homogeneity. Privacy is an intrinsic recognition of heterogeneity, of the right of the individual to be different and to stand against the tide of conformity in creating a zone of solitude. Privacy protects the individual from the searching glare of publicity in matters which are personal to his or her life. Privacy attaches to the person and not to the place where it is associated."[20]

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[20] The Supreme Court in ***Johar*** continued at paragraph 64, "…The right to privacy enables an individual to exercise his or her autonomy, away from the glare of societal expectations. The realisation of the human personality is dependent on the autonomy of an individual. In a liberal democracy, recognition of the individual as an autonomous person is an acknowledgment of the State's respect for the capacity of the individual to make independent choices. The right to privacy may be construed to signify that not only are certain acts no longer immoral, but that there also exists an affirmative moral right to do them. As noted by Richards, this moral right emerges from the autonomy to which the individual is entitled:

> "Autonomy, in the sense fundamental to the theory of human rights, is an empirical assumption that persons as suchhave a range of capacities that enables them to develop, and act upon plans of action that take as their object one's life and the way it is lived. The consequence of these capacities of autonomy is that humans can make independent decisions regarding what their life shall be, self-critically reflecting, as a separate being, which of one's first-order desires will be developed and which disowned, which capacities cultivated and which left barren, with whom one will or will not identify, or what one will

(233) There has been no challenge to Mr Jones' declaration that he is a homosexual man. It is not a fad. It is not a fashion. It is his identity. He is entitled to the privacy of his sexual relation and he is entitled to build a family. Far more important to these important pre-requisites of his identity is an entitlement to respect for his privacy and family life. The unchallenged evidence is that Mr Jones has been forced to lead a solitary life unable to develop intimate bonds with a partner of his choice to create a same sex family and to enjoy all the intimacies that accompanies such a family life.

(234) The right to privacy covers one's sexual life. Critically section 4(c) protects a right to respect one's private life. There is utter disrespect and disdain shown to Mr Jones by sections 13 and 16 of the SOA of his personal life. It prevents him from expressing his love in the privacy of his own life. It encroaches in his personal life's plans for developing his version of the good life built on his intimate values of love. His expression of love impacts no one. It is a private and personal expression and bond he cherishes and develops with whom he has fallen in love.

(235) The trial judge was correct when he said at paragraph 93:

> "93. The claimant, and others who express their sexual orientation in a similar way, cannot lawfully live their life, their private life, nor can they choose their life partners or create the families that they wish. To do so would be to incur the possibility of being branded a criminal. The Act therefore impinges on the right to respect for a private and family life."

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define and pursue as needs and aspirations. In brief, autonomy gives to persons the capacity to call their life their own. The development of these capacities for separation and individuation is, from birth, the central developmental task of becoming a person."

Equality before the law and protection of the law- section 4(b)

(236) It can hardly be sensibly argued that this law is not discriminatory. It treats persons like Mr Jones differently from heterosexual couples. They can express love through penile-vaginal sex but he cannot express love through anal sex. The obviously discriminating feature is the law's treatment of an individual's private expression of love. It is here that the law of discrimination features predominantly to ensure that all are treated alike and that where there is a difference in treatment that there is a rational explanation for that treatment. There is no such attempt at rational justification here.

(237) It is Baroness Hale who so creatively explained how homosexuals by legislation such as these are in fact being targeted for discriminatory treatment. In **Nadine Rodriguez v Minister of Housing and another** [2009] UKPC 52 Baroness Hale stated at paragraph 19:

> "19. In this case we have a clear difference in treatment but not such an obvious difference between the appellant and others with whom she seeks to compare herself. The appellant and her partner have been denied a joint tenancy in circumstances where others would have been granted one. They are all family members living together who wish to preserve the security of their homes should one of them die. The difference in treatment is not directly on account of their sexual orientation, because there are other unmarried couples who would also be denied a joint tenancy. But

> even if, as Dudley J found, these are the proper comparator, the effect of the policy upon this couple is more severe than on them. It is also more severe than in most cases of indirect discrimination, where the criterion imposed has a disparate impact upon different groups. In this case, the criterion is one which this couple, unlike other unmarried couples, will never be able to meet. They will never be able to get married or to have children in common. And that is because of their sexual orientation. Thus it is a form of indirect discrimination which comes as close as it can to direct discrimination. Indeed, Mr Singh puts this as a Thlimmenos case: they are being treated in the same way as other unmarried couples despite the fact that they cannot marry or have children in common. As Ackermann J put it in the South African Constitutional Court decision in National Coalition for Gay and Lesbian Equality v Minister of Home Affairs [2000] 4 LRC 292, at para 54, the impact of this denial "constitutes a crass, blunt, cruel and serious invasion of their dignity".

(238) There is of course no justification provided by the State for the difference in treatment.

(239) There is no doubt that Mr Jones has been denied the protection of the law. He is victimised by the law. He is subject to an unnatural and inhumane law. The Privy Council has recently endorsed the CCJ's widened perspective on the meaning of the protection of the law in **Seepersad v Commissioner of Prisons and another** [2021] UKPC 13.

(240) In **Mc Ewan**, Maureen Rajnauth Lee JCCJ reiterated that the right to the

protection of the law is a broad and expansive right. In **Seepersad and another v Commissioner of Prisons and another** Sir Bernard McCloskey noted at paragraph 53:

"53. The judgment of the court, which was unanimous, contains the following passage of particular note, at para 47:

> "The law is evidently in a state of evolution but we make the following observations. The right to protection of the law is a multi-dimensional, broad and pervasive constitutional precept grounded in fundamental notions of justice and the rule of law. The right to protection of the law prohibits acts by the Government which arbitrarily or unfairly deprive individuals of their basic constitutional rights to life, liberty or property. It encompasses the right of every citizen of access to the courts and other judicial bodies established by law to prosecute and demand effective relief to remedy any breaches of their constitutional rights. However the concept goes beyond such questions of access and includes the right of the citizen to be afforded 'adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power' [Attorney General v Joseph and Boyce at para 20]. The right to protection of the law may, in appropriate cases, require the relevant organs of the state to take positive action in order to secure and ensure the enjoyment of basic constitutional rights. In appropriate cases, the action or failure of the state may result in a breach of the right to protection of the law. Where the citizen has been denied rights of access and the procedural fairness demanded by natural justice, or where the

citizen's rights have otherwise been frustrated because of government action or omission, there may be ample grounds for finding a breach of the protection of the law for which damages may be an appropriate remedy."

(241) Mr Jones is at the mercy of a discriminating law. He is oppressed, forced to reculturalise and forced to deny himself. Laws which criminalise offensive conduct has targeted his beautiful expression of genuine love. He is at the mercy of police officers. The heavy hand of the law does not protect but oppresses.

Freedom of thought and expression section 4(i)

(242) Mr Jones' freedom of expression has been infringed. How he wishes to express his love and express his family values have been vilified. He has been the subject of taunts, bullying and violence. He is shunned and he feels isolated. This is not the values that are the bulwark of our Constitution. He is forced to conform to a life that is not his own nor his reality. Being forced into a heterosexual relationship is not an expression of who he is. Importantly, the knock-on effect of creating such an individual dichotomy is the creation of friction in relationships and family life.

(243) In **Johar** the Indian Supreme Court stated at paragraph 247, page 530:

"247. In view of the test laid down in the aforesaid authorities, Section 377 IPC does not meet the criteria of proportionality and is violative of the fundamental right of freedom of expression

including the right to choose a sexual partner. Section 377 IPC also assumes the characteristic of unreasonableness, for it becomes a weapon in the hands of the majority to seclude, exploit and harass the LGBT community. It shrouds the lives of the LGBT community in criminality and constant fear mars their joy of life. They constantly face social prejudice, disdain and are subjected to the shame of being their very natural selves. Thus, an archaic law which is incompatible with constitutional values cannot be allowed to be preserved."

(244) The CCJ in **Mc Ewan** stated at paragraph 76:

> "76. It is essential to human progress that contrary ideas and opinions peacefully contend. Tolerance, an appreciation of difference, must be cultivated, not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed. A person's choice of attire is inextricably bound up with the expression of his or her gender identity, autonomy and individual liberty. How individuals choose to dress and present themselves is integral to their right to freedom of expression. This choice, in our view, is an expressive statement protected under the right to freedom of expression."

(245) Sections 13 and 16 therefore directly impact upon Mr Jones' fundamental rights. It is prima facie unconstitutional and has been shown to be unconstitutional.

H. THE SECTION 13 ANALYSIS- IS IT REASONABLY JUSTIFIABLE?

> "… the requirement of a three fifths majority to pass legislation which overrides the fundamental rights and freedoms, was no doubt taken to ensure that the decision to pass such legislation was not lightly made. It was done to protect the primacy and sanctity of the rights set out in sections 4 and 5 of the Constitution. But it was also drafted so as to permit Parliament to enact legislation which, for reasons of policy and social or economic necessity, needed to be enacted even though inconsistent with sections 4 and 5. The Constitution, by the proviso in section 13(1), entrusts the courts, as guardians of the Constitution, with the final decision on the efficacy of the legislation."[21]

(246) Can the buggery law withstand a section 13 analysis? The question is critical. If it can, that should be the end of the matter, and justifiably so, as it has been demonstrated that notwithstanding its inconsistency with the derogation of fundamental rights, it has passed constitutional muster of being reasonably justifiable in a democratic society. This is our great democratic trade off. Majority v Minority, Judiciary v Legislature and the Constitution above us all. This analysis has a greater therapeutic value.

(247) What is further critical is the argument that a burden lies on the Claimant to demonstrate that the laws are not reasonably justifiable. This was intermingled with the presumption of constitutionality which was unnecessarily criticised by the trial judge.

[21] Bereaux JA noted in the majority judgment of **Barry Francis and another v The State Criminal Appeal Nos. 5 and 6 of 2010** at paragraph 44.

(248) Section 13 of the Constitution provides:

> "(1) An Act to which this section applies may expressly declare that it shall have effect even though inconsistent with sections 4 and 5 and, if any such Act does so declare, it shall have effect accordingly unless the Act is shown not to be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual.
>
> (2) An Act to which this section applies is one the Bill for which has been passed by both Houses of Parliament and at the final vote thereon in each House has been supported by the votes of not less than three-fifths of all the members of that House.
>
> (3) For the purposes of subsection (2) the number of members of the Senate shall, notwithstanding the appointment of temporary members in accordance with section 44, be deemed to be the number of members specified in section 40(1)."

(249) In **Akili Charles** the Board at paragraph 56 settled the section 13 analysis in the following terms:

> "56. …(1) The onus is on the complainant to show that the measure is not "reasonably justifiable". This places a "heavy burden" on the complainant and a court will be slow to conclude that this has been shown (para 93).

(2) The test of proportionality appropriate under section 13(1) involves a lesser intensity of review by the courts and a wider margin of appreciation or discretion for the State, acting by legislation passed by a super-majority in both Houses of Parliament (para 90).

(3) In relation to such legislation, Parliament will have identified in a particularly clear and forceful way its opinion as to where the public interest lies. In a democratic state, the courts must be expected to be especially respectful of the choice made by Parliament to pass legislation in that form and slow to substitute their own view of the necessity for and proportionality of the measure taken (para 91).

(4) Although the court has to make the ultimate judgment whether the proviso in section 13(1) has been satisfied or not, it is obliged in doing so to give especially great weight to the judgment of Parliament regarding the importance of the public interest which is sought to be promoted by the measure in question (para 92).

(5) Where legislation has been passed by a super-majority, that is capable of affecting each of the four stages in the proportionality test (para 94).

(6) Whether the legislation is inconsistent with sections 4 and 5 of the Constitution and the extent of any inconsistency is likely to be a relevant consideration (para 95)".

(250) **Suraj v AG** developed this proportionality test appropriate for the section 13 reasonable justifiability analysis as a measure of giving coherency to the idea that fundamental rights as formulated by the Constitution could not have been absolute rights. That would have been an unworkable arrangement with respect to the idea of the power of Parliament to exercise its legislative function and that Executive and government action impinges on fundamental rights. In my view the aspiration of the ideal of a society of free people living collectively could not be based on a singular ideal of the supremacy of an individual right over that of others. There must be a balance between competing rights in a society of social beings. **Collymore v AG** (1967) 12 WIR 5 understood that balance as **Suratt** underscored and which The Oakes test in **R v Oakes** [1986] 1 SCR 103 in my view was a method by which to achieve that balance.[22]

(251) The significance of **Suraj** however is to demonstrate the stark difference between the ordinary proportionality test inherent in assessing the constitutional validity of regular laws as against laws passed by a Parliament

[22] Dickson CJ **in R v Oakes** [1986] 1 SCR 103 stated at paragraph 70:

> "Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": R. v. Big M Drug Mart Ltd., supra, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: R. v. Big M Drug Mart Ltd., supra, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance"."

conscious that its act may impact on fundamental human rights and securing a three-fifths majority to so express the will of the majority.

(252) Lord Sales and Lord Hamblen expressed the proper approach in paragraphs 90, 91 and 94 of **Suraj**:

> "90. With respect, the Board finds neither the position of the majority nor that of the minority to be entirely satisfactory. In the Board's view, (1) the correct interpretation of the Constitution is that the rights in section 4 are to be read as incorporating an implied proportionality test as set out in Suratt, para 58, for all the reasons set out above; (2) the proviso to section 13(1) also incorporates a proportionality test; but (3) the framing of the test in each case is different, so there is no inconsistency or incoherence involved. The proportionality test inherent in the rights in section 4 is the conventional and usual proportionality approach originally explained in de Freitas v Permanent Secretary and refined thereafter, which is more demanding from the point of view of the state than that under section 13(1). Another way of putting this is to say that the test of proportionality appropriate under section 13(1) involves a lesser intensity of review by the courts and a wider margin of appreciation or discretion for the state, acting by legislation passed by a super-majority in both Houses of Parliament.
>
> 91. The proportionality approach for bringing into account both individual rights on the one hand and the general interest of the community on the other is aimed at ensuring that a balance is struck between the two. The stronger the public interest in issue, the greater the interference with individual rights which may be permitted without there being any

violation. Generally, in a democracy, it is the democratic institutions which have the primary responsibility to identify the public interest and what is required to promote it. As Baroness Hale put it in Suratt, para 58: “It is for Parliament in the first instance to strike the balance between individual rights and the general interest”. Where Parliament gives expression to the public interest not merely by legislation passed in the usual way, but by an Act passed by a super-majority in each House pursuant to section 13 and which records expressly on its face that it is to have effect “even though inconsistent with sections 4 and 5”, Parliament will have identified in a particularly clear and forceful way its opinion as to where the public interest lies. In a democratic state, the courts must be expected to be especially respectful of the choice made by Parliament to pass legislation in that form and slow to substitute their own view of the necessity for and proportionality of the measure taken.

94. Nonetheless, in the Board’s view the test to be applied under the proviso in section 13(1) is still a version of the proportionality test, albeit one framed in a way which gives especially strong weight to the judgment of Parliament regarding the imperative nature of the public interest. Where legislation has been passed by a supermajority, that is capable of affecting each of the four stages in the proportionality test (para 51 above). It shows that Parliament considers the public interest objective to be very important indeed (stage (i)), which in turn is likely to affect assessment of whether there is a sufficient degree of connection between the measure in issue and that objective (stage (ii)), whether the trade-offs in public policy terms in using that measure as opposed to others are acceptable (stage (iii)) and the question at stage (iv) (sometimes called proportionality

in the strict sense). The essential question posed under the proviso, taking account of this framework, is whether the Act in question strikes an acceptable balance between the rights and freedoms of individuals and the general interest of the community. The proportionality test has been developed as the appropriate way to answer this question across a range of contexts and, since it is readily capable of being adapted in a suitable way to be applied here as well, there is good reason to conclude it should be used in the context of section 13(1). Therefore, with due allowance for the particular context in which it falls to be applied, the Board considers that Jamadar J and Archie CJ were correct in their respective judgments in Northern Construction in holding that the application of section 13(1) involved the application of a version of the proportionality test. But the framework in which the proportionality assessment has to be made under section 13(1) is qualitatively different from that in which an ordinary proportionality assessment is made, so that the Board does not think it right to characterise it as a "sliding scale" as Archie CJ and Jamadar JA did in Francis at para 114(a)."

The burden of proof and presumption of constitutionality

(253) The presumption of constitutionality is an important principle of constitutional law. In the circumstances of section 13, legislation passed by a supermajority bears the stamp of a consideration by Parliament of fundamental rights and the rational decision-making backing competing values. There is a presumption of constitutionality but only until it can be demonstrated that the legislation is not to be reasonably justifiable in a society that has proper respect for the rights and freedoms of the individual.

(254) It is obvious to me that "unless the Act is shown to be" refers to a preliminary assessment that it must be shown in an adversarial landscape a lack of reasonable justification and an onus lies on the claimant that he must demonstrate. The Respondent accepts this burden. But even here we must not allow the legal fiction of a burden of proof to detract from the actual inquiry itself: has it been shown to be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual? The Court must also be careful in giving implied limitations to constitutional rights a greater primacy over the written text and the citizens' access to the constitutional court.

(255) Equally, Bereaux JA in **Barry Francis** observed that the question whether the burden is discharged is contextual. At paragraph 90 Bereaux JA states:

> "90. The onus lies on the person alleging that it is not reasonably justifiable. Evidence may be required to discharge that burden, unless, as in this case, legal principles and societal norms are sufficient. Usually a challenge under section 13(1) of the Constitution is made by way of constitutional motion which is supported by affidavit evidence. The burden is a heavy one. The decision of a majority of the country's elected representatives is not to be lightly disregarded. Heavy though the burden is, the decision is still to be made on the civil standard, that, is a balance of probability. The evidence may be rebutted by the State with evidence of its own. In this case, no evidence has been produced. It is a criminal appeal but arguments have proceeded on legal principles. That too is permissible but may not always suffice. The necessity for evidence will turn on the facts and circumstances of a given case."

(256) I do not agree that section 13, with the inbuilt provisions, should give Parliament a margin of appreciation in the sense of a free pass or "get out of jail" card. This is where the cooperation of power analysis is useful. In the utilisation of section 13, the legislator is telegraphing to the constitutional court that it had in mind that these provisions may offend the fundamental human rights provisions and there is an overwhelming view that it should do so. Similarly, the section 13 proviso also simply telegraphs to legislators that even in the case of a supermajority or such an overwhelming justification for the measure, in recognition of the separation of powers, its legislative act is still open to review if such legislation is not reasonably justifiable. And so, it must. The separation of power principle simply means that Parliament must respect, be enlightened and be complicit with the Constitution and naturally to such interpretations given to it by the Judiciary.

(257) Bereaux JA usefully commented in **Barry Francis** that there is an inherent danger in uncritically adopting the majoritarian view and that it is the duty of the courts to ensure that such laws passed with any supermajority is constitutionally compliant. Due deference to a Parliamentarian supermajority as I explained above merely in my view does no more than underscore the respect that is afforded to equal actors in the exercise of constitutionalism one to make laws the other to ensure its constitutional compliance.

(258) Bereaux JA in **Barry Francis** at paragraphs 46 to 48 stated:

"46. Section 13(1) of the Constitution, in many respects, recognises

all that democracy encompasses in a society in which rights compete and collide. While there is the necessity for the minority to accept the majority view and there is the necessity for all rights to submit to the public interest, there is also an acceptance that the view of the majority is not necessarily right. It was Thomas Jefferson, on 4th March, 1801, in his first inaugural address as President of the United States who noted that "though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable."

47. History is littered with examples in which the majority view initially prevailed but was ultimately not just unreasonable but wrong; slavery, segregation and the holocaust come immediately to mind. The inclusion of the proviso in section 13(1) of the Constitution is in recognition of the fact that the majority view may not necessarily be the right view. It reposes in the judiciary the heavy responsibility of declaring legislation undemocratic, despite the views of a majority of those elected to represent the people.

48. In coming to any decision under section 13 of the Constitution, therefore, due deference must be paid to the intention of Parliament. But ultimately, the responsibility is one from which the courts cannot shirk. Legislation which is undemocratic for the purposes of section 13(1) does not become any less so by the imprimatur of a parliamentary majority."

(259) Lord Sales in **Suraj** would advocate for a heightened awareness of

parliament consciously being aware of its inconsistency, hence some deference being afforded to it as to what is in the public interest. This does not eliminate the inquiry: is it reasonably justifiable, and is it for the court to so decide. The preamble of the SOA therefore simply signals that Parliament has flagged the constitutionality of the measure and simply 'tags' the Judiciary respecting its task to ensure Parliament is kept in check by conducting the reasonably justifiable analysis.

(260) In this way both Parliament and the Judiciary work hand in hand to ensure the supremacy of the Constitution and that its fundamental rights and fundamental respect, upon which our society was founded, for those rights are not unduly subverted.

(261) Importantly in **Suraj** the Board considered the questioned ordinary legislation, that is health regulations passed during the pandemic. The Ordinance itself was saved law but the regulations passed under that legislation was not. The Board's analysis in concluding that the regulations were not saved law is instructive and dealt with later in this judgment.[23] It

[23] Paragraph 100 of **Suraj**: Despite this, the Board is satisfied that the interference with the appellants' rights was proportionate and hence consistent with those rights and involved no violation of them. The Rules were promulgated on the basis of expert scientific advice against a background of considerable uncertainty about how the disease was transmitted and how best to counter its spread. The public interest in issue, the protection of the right to life and the health of the whole population, was an especially important one. In the Board's view, the Rules struck a fair balance between the rights of the appellants and the general interest of the community and were plainly a proportionate means of protecting the public interest in the circumstances. The Board takes the same view of this as the Court of Appeal of England and Wales in R (Dolan) v Secretary of State for Health and Social Care [2020] EWCA Civ 1605; [2021] 1 WLR 2326 in relation to similar restrictions on gatherings.

Paragraph 101 of **Suraj**- On this aspect of the case the Board endorses the reasoning of Boodoosingh J at first instance. If his judgment had depended on this point, he would have found that the Rules were a proportionate response to the management of the pandemic in the

meant however that as ordinary legislation, the ordinary proportionality test was applicable. The Board held :

a) the rules were passed to pursue a legitimate aim to protect the public from a virulent and dangerous disease;

b) there was a substantial interference with fundamental human rights;

c) the interference was proportionate and consistent with those rights and involved no violation of them;

d) the protection of the right to life and health of the whole population represented a powerful counterpoint;

e) the rules struck a fair balance between the right of the applicant and that of the community.

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circumstances which applied when they were promulgated and during the period they were maintained in place. As he explained in his judgment, the spread of Covid-19 had been "rapid and pervasive" with the result that healthcare systems were placed under great strain and many people lost their lives. Based on scientific advice, governments around the world, including in Trinidad and Tobago, felt the need to act quickly by implementing restrictions on rights and freedoms that would previously have been unthinkable. There was a need to respond urgently in the face of the pandemic, which called for consideration of a range of economic, social and political factors in relation to which a significant measure of respect was to be accorded to the judgment of the executive and the legislature. The uncontradicted evidence of the Minister of Health, Mr Terrance Deyalsingh, and the Chief Medical Officer, Dr Roshan Parasram, was to the effect that the Rules were introduced on the basis of expert scientific advice which indicated that severe impacts would be likely to result if no action was taken. The evidence was that controlling gathering and enforcing social distancing were critical elements in a strategy to check the spread of the disease. The measures taken were similar to those taken in a range of other democratic states. The regulations were amended on several occasions and it was clear that there had been constant monitoring of the status of the virus in Trinidad and Tobago with adjustments being made in the light of that. At the same time, persons in the position of the appellants had procedural protections available to them, in terms of access to the courts to contest the lawfulness and constitutionality of the measures being taken.

(262) Could the same be said for sections 13 and 16? Does it pursue a legitimate aim, is there a proportionate interference of rights and is there an appropriate balance between competing rights? Notably, in contrast there is silence from the State in this case to justify the need for criminalising anal sex between consenting males. The fact that the laws were passed by a supermajority as **Suraj** explains simply means that weight should be afforded to Parliament that it did strike the right balance. But like a brilliant student writing an examination it is expected that the student would have addressed all the relevant considerations but that does not mean that it would have passed the test which is now to be marked by the Judiciary.

Applying the proportionality test

(263) **Lord Sales and Lord Hamblen** in **Suraj** explain that the proportional analysis is a single test, which is less intensive, as Parliament has itself given thought to it. This is an understandable distinction from the ordinary proportionality test to be applied for ordinary legislation as explained in **Suratt** and **Panday**. The question of the exercise being less intensive is, however, not to remove the rigor of a constitutional court's analysis of the alleged breach of the fundamental right, and in my view, the closer the right comes to an incursion into the vital aspects of personhood, the more vigilant the constitutional court must be.

(264) Adopting this approach, it is clear, in my view that the law is not reasonably justifiable for the following reasons.

(265) First, the law interferes with the core rights of dignity and the fundamental

rights as explained above.

(266) Second, no objective can be gleaned to justify the limitation of these fundamental rights. If there were sound policy reasons, save to target the sexual activity of people of the same sex, the State is obliged to inform the Court as to what those objectives are for this. It is not enough to thumb its nose at the applicant and shield itself behind a presumption of constitutionality.

(267) While the Hansard reports may demonstrate a desire to update and reform the laws of sexual offences, but no objective was demonstrated to single out anal sex between consenting adults as an offensive act save for the homophobia reported by the then Attorney General. It seems to have been an oversight or blind spot or fell within a societal black hole of "don't speak or don't tell" or worse, the default of homophobia displayed in the light but derogatory exchanges in Parliament.

(268) The trial judge was alert to the need to look for objectivity. I agree. There is no evidence of this, but taken at its highest, the object of maintaining traditional values by this law is an inconsequential statement by the State, which predicated its defence on the fact that it took no moral or religious ground. What are traditional values? What is the shape of the family? What is traditional? Criminalising anal sex can only serve to continue homophobia to dehumanize and delegitimise homosexuals who have not been shown to have an impact on other grounds of sexual orientation. Homosexuality is not an infectious disease.

(269) There is an obvious lack of rationality. In the absence of a proper objective for criminalising consenting adults engaged in anal sex.

(270) There is no need to single out and invade the privacy of citizens. The Respondent submitted that incentives for childbearing or married couples are a less intrusive method of achieving that objective, even if it was a legitimate one. Parliament simply could have targeted non-consensual penetration, which ideally targets the crime without criminalising a genuine act of love.

(271) There is therefore no fair balance struck having regard to these matters and the severity of the consequences to Mr Jones. The deleterious effects of sections 13 and 16 are evident.

H. A GLOBAL TREND OF THERAPEUTIC JURISPRUDENCE AND BUGGERY LAWS

> "Civilised society has a duty to accommodate suitably differences among human beings." President Saunders (as he then was) Mc Ewan v AG of Guyana [2018] CCJ 30 (AJ) at paragraph 1.

(272) While the task of the constitutional court is to define the scope of our fundamental human rights based on our lived experiences, it is not entirely irrelevant to examine the tide of social values being espoused on similar legislation. It is clear to me that a survey of the cases over the years produced by the parties have shown that through judicial edict a minority group of persons were liberated from scorn and ridicule legitimised by buggery laws. In my view, these cases espoused an empathetic therapeutic

approach to the problem of the buggery laws that placed the dignity of the person as the focus of its treatment of the law's constitutionality.

(273) See **Dudgeon v UK** (1982) 4 EHRR 149; **Norris v Ireland** (1991) 13 EHRR 186; **Modinos v Cyprus** (1993) 16 EHRR 485; **Toonen v Australia** Communication No. 488/1992; **Lawrence v Texas** 539 US 558; **Orozco v AG of Belize** Claim No. 688 of 2010 and **Johar v Union of India** [2018] 7 SCR 379:

a. **Dudgeon v UK**- In this case the applicant was a homosexual who complained against the existence in Northern Ireland of laws which have the effect of making certain homosexual acts between consenting adult males criminal offences. The majority held that particular sexual activities is an interference with an inherent aspect of private life and that legislation that makes it a criminal offence for consenting adults to engage in homosexual acts in private offends Article 8 of the European Convention on Human Rights.

b. **Norris v Ireland**- The applicant was a practising homosexual and had challenged as unconstitutional domestic legislation which prohibited sexual acts between men. The applicant lodged a complaint under Article 8 of the European Convention on Human Rights alleging that the prohibition of homosexual acts between adult males in private was contrary to his right to a private life. It was held that although there was a legitimate aim, to protect public morals, the requirement of proportionality had not been satisfied. The detrimental effect which the legislation had on the lives of homosexual men outweighed such justifications as there were for retaining the law in force without

amendment, particularly when the activities concerned took place in private between consenting adults and there was a breach of Article 8.

c. **Modinos v Cyprus**- The applicant, a homosexual, stated he suffered great strain, apprehension and fear of prosecution because of legal provisions in Cyprus which criminalised certain homosexual acts and made an application that the existing provisions violated his rights under the European Convention on Human Rights, Article 8. It was held that the existence of a statutory prohibition continuously and directly affected the applicant's private life and that constituted an interference. There was therefore a breach of the Convention, article 8.

d. **Toonen v Australia**- In this case the applicant challenged 2 provisions of the Tasmanian Criminal Code which criminalised various forms of sexual contacts between men including all forms of sexual contacts between consenting adult homosexual men in private. The applicant claimed to be a victim of violations by Australia of articles 2(1), 17 and 26 of the ICCPR. In holding that there was a breach of articles 2(1) and 17(1) as far as the public health argument of the Tasmanian authorities was concerned, the Committee noted that the criminalization of homosexual practices could be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV.

e. **Lawrence v Texas-** A Texas law criminalising consensual, sexual conduct between individuals of the same sex violates the Due Process Clause of the Fourteenth Amendment. Justice Kennedy stated that homosexuals had a fundamental right in engaging in private sexual activity and that the state

did not have the right to impose its own moral perspective on individuals.

f. **Orozco v AG of Belize**- Section 53 of the Belize Criminal Code provided that every person who has carnal intercourse against the order of nature with any person or animal shall be liable to imprisonment for ten years. The claimant challenged the constitutional validity of section 53 to the extent that it operated to criminalise anal sex between two consenting male adults in private. The Chief Justice granted a declaration that section 53 contravened, inter alia, the right to privacy to the extent that it applies to carnal intercourse against the order of nature between persons. The court also held that Personal privacy, protected by arts 3(c) and 14(1) of the Constitution, emanated from the concept of human dignity. The court also held that on the question of public morality, from the perspective of legal principle, the court could not act on the majority view or what was popularly accepted as moral. It had to be demonstrated that some harm would be caused if the proscribed conduct were unregulated.

g. **Johar and another v Union of India and another**- The petitioners sought declarations in the Supreme Court that the right to sexuality, the right to sexual autonomy and the right to choose a sexual partner were part of the right to life and personal liberty guaranteed by art 21 of the Constitution of India and that s 377 of the Indian Penal Code, in so far as it applied to consensual acts between adults in private, was unconstitutional. The Indian Supreme Court held that the view that s 377 of the Indian Penal Code could be upheld because the LGBT community comprised only a minuscule fraction of the total population and that the fact that s 377 was being misused was not a reflection of the vires of the section was

constitutionally impermissible; The Constitution was a living and organic document capable of expansion with the changing needs and demands of society.

I. THE SAVINGS LAW -A BRIDGE FROM THE PAST TO THE FUTURE

"…that the meaning of the savings clause does not change over time, unlike the general statements of rights and freedoms in section 4 of the 1976 Constitution…" Lord Hodge in Chandler v The State [2022] UKPC 19 at paragraph 73.

(274) There is no dispute that the Offences Against the Person Ordinance is an existing law and saved from being declared unconstitutional. It is also not in dispute that sections 13 and 16 of the SOA was passed after the commencement of the Constitution and unless it constitutes "existing law" will be subject to being declared unconstitutional if it contravenes sections 4 and 5 of the Constitution. The question in this appeal lies in the definition of a saved law and in particular such laws that "alters an existing law" under section 6 (1)(c) and 6(2) of the Constitution. While the trial judge did not properly analyse these sections I have arrived at the same conclusion but by a different route.

(275) The savings law provisions are unique to each Caribbean territory. However, they all seek to achieve the singular aim of creating stability in a period of transition for post-independence societies emerging from colonial rule. Interestingly, one effect of these savings law clauses is that the laws made under the new Legislature created by the Constitution is cribbed by its observance of constitutional principles and fundamental human rights when

its colonial counterpart has not. The colonial legislature is afforded a free pass.

(276) **Section 6 of the Constitution** provides:

> "6. (l) Nothing in sections 4 and 5 shall invalidate—
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> (a) an existing law;
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> (b) an enactment that repeals and re-enacts an existing law without alteration; or
>
> (c) an enactment that alters an existing law but does not derogate from any fundamental right guaranteed by this Chapter in a manner in which or to an extent to which the existing law did not previously derogate from that right.
>
> (2) Where an enactment repeals and re-enacts with modifications an existing law and is held to derogate from any fundamental right guaranteed by this Chapter in a manner in which or to an extent to which the existing law did not previously derogate from that right then, subject to sections 13 and 54, the provisions of the existing law shall be substituted for such of the provisions of the enactment as are held to derogate from the fundamental right in a manner in which or to an extent to which the existing law did not previously derogate from that right.
>
> (3) In this section—
>
> "alters" in relation to an existing law, includes repealing that law and re-enacting it with modifications or making different provisions

in place of it or modifying it;

"existing law" means a law that had effect as part of the law of Trinidad and Tobago immediately before the commencement of this Constitution, and includes any enactment referred to in subsection (1);

"right" includes freedom.

(277) Section 6 creates obvious constitutional anomalies. It immunises from any challenge any saved law which violates a fundamental right even though there was no conscious thought by the Legislature as to whether it is reasonably justifiable. The future Legislatures from 1976 are being held to a different and higher standard. It set ups a social order giving colonial parliaments a "free pass" from constitutional scrutiny yet subjecting our Republican Parliament to the scrutiny of section 13. Existing law even if passed by a slim majority can be in breach of fundamental human rights, can be disproportionate and can be not reasonably justifiable in a democratic society.

(278) Curiously section 6, in immunising such laws from judicial constitutional scrutiny, in effect reintroduces a type of constitutional ouster which under modern constitutional theory has very little value when juxtaposed with the role of the court to ensure that the Legislature does not violate the supreme law. It is indeed unsettling that our Republic exists on a baseline of unconstitutionality of pre-1976 laws forever demarcating our modern constitutional future.

(279) Lord Nicholls underscored these anomalies in **Charles Matthew**:

> "69. I do not believe the framers of these constitutions ever intended the existing laws savings provisions should operate to deprive the country's citizens of the protection afforded by rising standards set by human rights values. The savings clauses were intended to smooth the transition, not to freeze standards for ever. The constitutions of these countries should be interpreted accordingly, by giving proper effect to their spirit and not being mesmerized by their letter. A literal interpretation of these constitutions means that the law of Jamaica, a country which has taken steps to distinguish between different types of murders, is held to be unconstitutional, whereas the laws of Barbados and of Trinidad and Tobago, where no ameliorating steps have been taken, are held to be constitutional. This is bizarre.
>
> [70] Self-evidently, an interpretation of the constitutions which produces this outcome is unacceptable. A supreme court of a country which adopts such a literal approach is failing in its responsibilities to the citizens of the country. A constitution should be interpreted as an evolving statement of a country's supreme law.
>
> [71] This is not to substitute the personal predilections of individual judges for the chosen language of the constitution. Rather, it is a recognition that the values underlying a constitution should be given due weight when the constitution falls to be interpreted in changed conditions. A supreme court which fails to do this is not fulfilling its proper role as guardian of the constitution. It is abdicating its responsibility to ensure that the people of

a country, including those least able to protect themselves, have the full measure of protection against the executive which a constitution exists to provide."

(280) **Chandler** and **Maharaj** however provide us with authoritative guidance, which superseded the judgment of Rampersad J on the interpretation of our section 6. In **Maharaj** the Board stated at paragraph 52:

"52. That straightforward interpretation of the language of the Constitution is reinforced by the consideration that, were it otherwise, there would be the risk of great legal uncertainty. In giving the judgment of the Board in Chandler [2023] AC 285, Lord Hodge explained the underlying rationale for the savings clause in section 6 of the Constitution, at para 72:

> "The introduction of such Constitutions in the absence of a savings clause, or with a savings clause which took effect only after the existing law had been modified so far as was possible by judicial interpretation, would have called into question the interpretation and application of existing statutes and laws and have risked creating substantial legal uncertainty. The legal challenges that might have arisen in the aftermath of the adoption of a written Constitution would have covered many areas of life and imposed a great burden on the courts to re-establish a degree of legal certainty."

(281) In interpreting our savings law provisions there have emerged in the Caribbean two views of apex courts i.e. of our own apex court in **Chandler**

and that of the CCJ in **Mc Ewan**. In **Chandler** the Law Lords summarised the interpretation of our savings laws in the following terms:

"32. The jurisprudence of the Board on the constitutional validity of a mandatory death sentence following the judgment in Matthew and the opinion in Boyce can be summarised thus:

(i) The 1976 Constitution, which the 1976 Act brought into effect, is the supreme law of Trinidad and Tobago. If anything in the 1976 Act had been intended to modify or qualify some provision of the Constitution, it would have been included in the Constitution itself.

(ii) The savings clause, which is contained in the 1976 Constitution and which is not a transitional provision, makes existing laws conform with the Constitution by disapplying sections 4 and 5 of the Constitution to such laws.

(iii) The Parliament of the independent Trinidad and Tobago decided in 1976 not to dispense with the savings clause which has this effect.

(iv) The power in section 5 of the 1976 Act to modify a law to make it conform to the 1976 Constitution is available only where the law in question is not in conformity with the Constitution. The 1976 Act does not give the courts power to modify a law whose validity is preserved by the Constitution.

(v) Otherwise, there would be the perverse result that the only existing laws which would be saved by the savings clause would be those which could not be modified because (a) they were the most incompatible with the 1976 Constitution or (b) because the mode of expression of the legal provision was such as would prevent modification.

(vi) The living instrument doctrine enables broadly worded statements of fundamental rights to be adapted to reflect changing attitudes and changes in society; but not all provisions in a Constitution are of that nature. The meaning and purpose of a savings clause which preserves existing law does not change over time.

(vii) Giving priority to a modification clause in the 1976 Act over the savings clause in the 1976 Constitution would in large measure destroy the effect of the savings clause which is part of the supreme law of the state and which reserves to the legislature the power to determine whether and if so how to change any existing law to conform with the fundamental rights articulated in the 1976 Constitution and changing social attitudes.

(viii) The scope of the doctrine of the separation of powers between the legislature and the judiciary depends on the arrangements within a particular Constitution. In Trinidad and Tobago, legislation by Parliament prescribing a fixed penalty to be imposed on all persons found guilty of a defined offence is a

legislative function and is not inconsistent with the separation of powers."

(282) In **Mc Ewan** the Caribbean jurisprudence is heavily critical of the impenetrable shield of the savings law clause. At paragraphs 39 to 41 Saunders P (as he then was) stated:

> "39. By shielding pre-Independence laws (referred to as "existing laws", because they were laws in existence at the time of Independence) from judicial scrutiny, savings clauses pose severe challenges both for courts and for constitutionalism. The hallowed concept of constitutional supremacy is severely undermined by the notion that a court should be precluded from finding a pre-independence law, indeed any law, to be inconsistent with a fundamental human right. Simply put, the savings clause is at odds with the court's constitutionally given power of judicial review.
>
> 40. On 27th June 2018, a day before the hearing of the present appeal, this Court delivered its judgment in the appeals of Nervais v The Queen and Severin v The Queen. In those consolidated cases, the Court addressed the Barbados savings law clause. At [59] of the judgment we noted that:
>
> > "With these general savings clauses, colonial laws … are caught in a time warp continuing to exist in their primeval form, immune to the evolving understandings and effects of applicable fundamental rights. This cannot be the

meaning to be ascribed to that provision as it would forever frustrate the basic underlying principles that the Constitution is the supreme law and that the judiciary is independent."

41. We reiterate those statements here. Law and society are dynamic, not static. A Constitution must be read as a whole. Courts should be astute to avoid hindrances that would deter them from interpreting the Constitution in a manner faithful to its essence and its underlying spirit. If one part of the Constitution appears to run up against an individual fundamental right, then, in interpreting the Constitution as a whole, courts should place a premium on affording the citizen his/her enjoyment of the fundamental right, unless there is some overriding public interest. That was this Court's approach in Joseph & Boyce when we held that, in order to assure a condemned man the right to the protection of the law, a constitutional ouster clause did not prevent the courts from inquiring into the decisions of the local Mercy Committee**."**

(283) To ask which view should be preferred by a Trinidadian court, a member of the Caribbean, is like asking a child to choose between two parents. I equally recognise the binding effect of **Chandler** but also a synergy between the two views both recognising the importance to give effect to the meaning and effect of the supreme law. While approaches significantly differ with the manner in which section 6 is to be interpreted Lord Hodge, in **Chandler** it recognised the useful approach of the CCJ jurisprudence in **Mc Ewan** to exclude the operation of the savings law clause by (a) an amendment to the

law since the Constitution came into effect which had the effect of removing its status as existing law (b) the impugned law was contrary to rights which were added to the Constitution since Guyana gained independence and the savings law clause did not protect the cross dressing law from constitutional challenge which rely on such provisions and (c) the judicial interpretation of Article 39(2) of the Guyana Constitution involved the incorporation of international human rights into domestic law. What their Law Lords put to rest was the ability of the Courts to adopt an approach to all saved law as having to be modified to conform to the Constitution.

(284) At paragraphs 72 and 73 the Board stated:

> "72. Turning to the two arguments on which the Board and the CCJ have reached differing views, the first concerns the relationship between the savings clause in a Constitution and the modification clause in the Act establishing the Constitution. In para 32 above the Board has summarised the position which the Board in Boyce and Matthew reached on, among other matters, the question of that relationship. In the Board's view, the interpretation which was laid down in Boyce and Matthew is consistent with the wording of the 1976 Constitution and, properly, gives priority to the Constitution as the supreme law of Trinidad and Tobago over the statute which enacted it. It also is consistent with the historical purpose of the savings clause when newly independent states adopted for the first time written Constitutions which contained generally worded statements of fundamental rights. The introduction of such Constitutions in the absence of a savings

clause which took effect only after the existing law had been modified so far as was possible by judicial interpretation, would have called into question the interpretation and application of existing statutes and laws and have risked creating substantial legal uncertainty. The legal challenges that might have arisen in the aftermath of the adoption of a written Constitution would have covered many areas of life and imposed a great burden on the courts to re-establish a degree of legal certainty. To take but three examples which have come before the Board from Trinidad and Tobago in recent years, challenges could have been made as to the constitutionality of (i) the law of defamation in the face of the protection of the expression of political views (Panday v Gordon [2005] UKPC 36; [2006] 1 AC 427), (ii) the Police Service Commission Regulations 1962 and the Statutory Authorities Service Commission Regulations 1968 in the face of the prohibition of discrimination by reason of sex in relation to the right to equality before the law (Johnson), and (iii) the Public Health Ordinance 1940 in the face of the protection of freedom of assembly (as in the appeals which the Board has recently heard: Dominic Suraj v Attorney General and Attorney General v Vijay Maharaj). In the absence of an effective savings clause, at least as a transitional measure to enable the legislature to adapt existing laws to the new Constitution, the potential for such challenges was legion. If the correct interpretation since 1962 had been one of "modify first", the savings clause would have been deprived of almost all utility.

73. In the Board's view there is force in the suggestion that savings

clauses served a historical purpose in avoiding the legal uncertainty which the unqualified introduction of a written Constitution would have entailed. In Belize, the savings clause was only for a transitional period of five years; in other countries, including Trinidad and Tobago, no time limit was imposed on the savings clause, but the purpose of avoiding legal uncertainty was the same. The "modification first" approach is open to the criticism that it ignores the historical context in which the savings clauses were enacted in the 1962 and 1976 Constitutions and in the Constitutions of other Caribbean nations. Further, there is surely force in the Board's observation, summarised in para 32(vi) above, that the meaning of the savings clause does not change over time, unlike the general statements of rights and freedoms in section 4 of the 1976 Constitution which, in accordance with the living instrument doctrine, can adapt to changes in a society's understanding of those rights and freedoms. In the Board's view, the problems caused by the preservation of laws that were enacted in a different time do not entitle the Board to overlook the historical purpose of the savings clause."

(285) **Mc Ewan's** restrictive approach is particularly attracting and lends itself to the coherency principles of constitutionalism. It was an approach which was endorsed by the Law Lords in **Chandler**.

(286) Saunders P (as he then was) in **Mc Ewan** stated at paragraphs 46 to 49:

"46. A restrictive interpretation and/or application of the savings

clause is always warranted. There is a simple reason for this. It is the duty of the court to adopt a generous interpretation of the provisions related to fundamental rights. As far as possible, full effect should be given to the guarantees promised to the citizen in those rights. Several judges have affirmed this essential principle that savings law clauses must be given a narrow construction.

47. A classic example of a restrictive interpretation can be seen in the consolidated Eastern Caribbean cases of Hughes v R and Spence v R . The question at issue was whether the death penalty was saved by a savings clause. A majority of the Court of Appeal held that although the clause, in the Saint Lucia and St Vincent and the Grenadines Constitutions respectively, may have immunised challenges to the law prescribing the death penalty, it did not save from attack challenges to the mandatory death penalty. This restrictive approach was affirmed by the Privy Council in Spence v R where a fine distinction was made between that which was required and that which was authorised.

48. Guyana's cross-dressing law did not remain in its pristine form after it was enacted in 1893. It was repeatedly amended after the country's independence in 1966. Acts Nos. 1 of 1989, 8 of 1997 and 10 of 1998 all amended it by imposing harsher penalties on convicted persons. When the courts below had to consider whether this law was an "existing law", it was open to them to regard these amendments as having altered the law so that it was no longer to be regarded as an existing law i.e. a law that was in existence at the time of independence. This approach would have

been consistent with a narrow application of the savings clause. The courts below neglected to take that approach. They opted instead for a somewhat liberal application. They held that the repeated amendments to the penalties laid out in the law did not cause the law to lose its status as an existing law because the essence of the law remained un-altered.

49. In our view, in light of all that has been said above, the courts below should have construed the clause strictly. They should have held that section 153(1)(xlvii) in its current form is not what the colonial legislature had enacted; that it was not an "existing" (i.e. pre-Independence) law; that it had lost its character as an existing law by reason of the post-Independence amendments that had been made to it by the legislature. This restrictive approach would have allowed the appellants to challenge the constitutionality of the law so that, if it were found to be unconstitutional, the courts could declare it invalid."

(287) How the saved law has been treated in our local courts demonstrate both the restrictive approach to the interpretation of section 6 and a strict approach to interpreting section 6.[24]

[24] In a decision which was pre **Chandler**, **Sharon Roop v AG** CV2017-03276 (judgment of 9 November 2018) the Court had to determine whether the claimant's rights under section 4(h) of the Constitution were infringed. In this case, the claimant was a practising Muslim and a special reserve police officer. She sought permission from the Commissioner of Police to wear the hijab whilst on duty but this was denied. The justification as proffered by the defendant was for the maintaining of a neutral environment in the TTPS which is critical to its functioning irrespective of the faith of its members. The defendant relied on Regulation 121 of the Police

Service Regulations. The defendant submitted that the regulations were saved by section 6 (1) of the Constitution and contended that it mirrored the regulations passed in 1971 and not invalidated since it formed 'existing law'. In this case, there was a 7 month gap between the repeal of the 1965 Police Service Act and the 2006 Police Service Act. The Court had to determine, *inter alia*, whether Regulation 121 was saved and immune from constitutional challenge. In determining that the impugned regulation was not saved, the court took a narrow approach to interpreting section 6(1)(b) of the Constitution and held that the conjunctive words 'repeal and re-enact' must be connoted as a single event and done without any lapse in time and since based on the factual matrix of that case the repeal and re-enactment of the Regulations was not a single event, the said provision was not saved by section 6(1)(b).

In **Edwards v AG** CV2020-04256 (post **Chandler**) the Claimant sought a declaration that her rights under section 4(b) of the Constitution were infringed. In that case the claimant was successful in an interview for the position Works Supervisor I by the Acting Director of Personnel Administration but she was subsequently informed by the Acting DPA that despite her success in the interview, she was no longer eligible for the post since she attained the age of 52 years by virtue of the Regulation 16(1) of the Civil Service (Amendment) Regulations 1984. The main issue for the court's determination was whether Regulation 16(1) was saved law and immune from constitutional challenge. The Civil Service Act was enacted in 1965 and its regulation made in 1967. Pursuant to those regulations, the retirement age was 45 years and after discussion with the Recognised Majority Union of the Public Service, the PSA, it was agreed that the maximum recruitment age be increased from 45 to 50 years and this amendment was made in 1984. According to the claimant, there was also another amendment in 1982 whereby Regulation 16(1) was amended by repealing and replacing it. In holding that the regulation was saved law, the court held that the substance of the regulation remained the same in that it provided for the maximum age for recruitment to the Civil Service and the court considered section 6(3) of the Constitution in relation to in relation to the word 'alters'. The court further held that neither amendment in 1982 nor 1984 derogated from any fundamental right in the manner which the existing law did not previously derogate from that right and therefore saved by section 6 of the Constitution.

In **Cohen v AG** CV2022-02240 (post **Chandler**) challenged the constitutionality of the savings for existing law clause in the Constitution. The claimant contended that the inclusion of the

(288) In determining the extent to which new law has the effect of being "saved" or immunised from challenge by being entombed in a savings law provision the court should lean against such a construction when it is possible to do so and when it is plainly obvious that Parliament intended to remove its immunity. **R v Pinder** is an example of gleaning the intention of Parliament to restore a punishment authorised in pre-existing law which would have made it immune from constitutional challenge. In that case flogging was

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savings clause was unconstitutional as it saved the mandatory death penalty. The court considered the decisions of the Board in Matthew v The State 64 WIR 412 and Chandler and held that the High Court did not have the jurisdiction to make a determination that the savings clause at section 6 of the 1976 Constitution is unconstitutional based on either the section's inconsistency with the rights enshrined at sections 4 and 5 of the Constitution or with the Independence Constitution.

In **Khan v AG** CV2023-00323 (post **Chandler**) the claimant alleged a breach of his rights under section 4(b) and 4(h) of the Constitution. His case concerned the policy of the TTPS that male officers on duty should present a clean shaven face. In this case Regulation 143(3)(b) of the Police Service Regulations was under scrutiny. In determining whether the impugned provision was unconstitutional, the court had to determine whether Regulation 143(3)(b) was saved law. The court considered Regulation 51 of the 1965 Police Service Regulations which specifically provided in part that, "In the case of male police officers the hair on the head shall be kept short, the chin and under lip shaven…." And Regulation 143(3)(b) which is identical to Regulation 51 in that respect. Regulation 143(3)(b) states "In the case of a male officer on duty – (b) the chin and under lip shaven;…". The defendant's case was that the repeal of the Police Service Regulations on 1st January 2007 and the re-enactment of same on 6th August 2007 did not negate the application of section 6(1)(b) of the Constitution. The court was guided by the case **Miguel v The State** [2012] 1 AC 361 and held that section 6(1)(b) contemplates that there should be no lapse of time between the repeal and re-enactment of legislation and as a consequence the regulation fell within section 6(1)(b) and within the definition of existing law. The approach by the court in this case is diametrically opposed to the decision in **Roop.**

abolished after the commencement of the constitution. It was later introduced in the very same terms in the 1991 Act as a response to the increase in crime. Despite the fact that flogging constituted cruel and inhuman punishment the punishment was immune from challenge as Parliament made a deliberate choice to reintroduce existing law. As discussed below this is far removed from the clear intention of Parliament to introduce new laws to govern sexual immorality and break from the Offences Against the Person Ordinance.

(289) While the issue resolves itself to a question of interpretation and the approach to be taken in interpreting laws which have the effect of being treated as saved or new, the dissenting opinion of Lord Nicholls and Lord Hope deserves repeating. At paragraph 55 and 56 their Lordships noted:

> "55. What, then, was the scope of this transitional provision? It by no means follows from the inclusion of this saving provision in the Constitution that the framers of the Constitution are to be taken to have intended that a form of inhuman punishment, once abolished, could thereafter lawfully be re-introduced without further ado years or decades in the future. That would be a surprising intention to attribute to those responsible for framing and adopting this Constitution. That would preserve for ever the lawfulness of forms of inhuman punishment existing in 1973, even after they had long been abandoned and discarded. Other forms of inhuman punishment could not lawfully be introduced after 1973. But those existing in 1973 were to be lawful for ever and could be re-introduced at any time. On this footing art 17(2) was a permanent

licence to re-introduce forms of inhuman punishment. That would be a surprising result of a transitional provision. Constitutional guarantees of human rights are forward-looking, not regressive.

56. The more natural expectation would be that once a form of inhuman punishment had been abolished, the saving provision would be spent. The practical problem arising on Independence would then be resolved by the legislature itself choosing to render unlawful the form of punishment inherited from the pre-Independence laws. The saving provision, of a transitional nature, would have served its transitional purpose. Once a form of punishment had become unlawful post-Independence, as occurred with flogging in 1984, the constitutional guarantee in art 17(1) would apply in full measure. The transitional proviso could not then be prayed in aid to render lawful what had become unlawful. From then onwards future legislation must comply with the constitutional guarantee. Either that, or the constitutional guarantee should first be abrogated in accordance with the special procedures set out in art 54 of the Constitution. These special procedures were not followed in 1991."

(290) The key to the question whether sections 13 and 16 are saved laws is resolved on an interpretation of section 6 (1), (2) and (3) in particular what is meant by "alter". In this respect the analysis of the Board in **Suraj** to conclude that the regulations passed under an existing law deserves repeating. At paragraphs 109 to 116 the Board stated:

“109. First, an existing law is defined in section 6(3) to mean “a law that had effect as part of the law of Trinidad and Tobago immediately before the commencement of this Constitution, and includes any enactment referred to in subsection (1)”. Clearly the Rules themselves do not fall within this provision.

110. The Rules did not have effect as part of the law of Trinidad and Tobago immediately before the commencement of the Constitution or indeed at any time before 2020 when they were issued pursuant to the Minister’s powers under section 105 and published in the Royal Gazette in accordance with section 132 of the Ordinance. Nor were the Rules an enactment otherwise “referred to in subsection (1)”. Aside from an existing law, subsection (1) covers enactments which repeal and reenact an existing law without alteration, or which alter an existing law but do not derogate from any fundamental right in a manner or to an extent that an existing law did not previously so derogate. Although a strictly limited type of future laws are therefore to count as existing law, this does not include future regulations passed under existing laws. It could easily have been so provided, as it is in some other Constitutions which retain an express saving for things authorised by existing law, such as in section 30(1) of the Constitution of the Bahamas.

111. Secondly, there is a distinction between the vires of the Rules and their constitutionality. The fact that the Rules were intra vires the Ordinance does not determine their constitutionality. That

depends on whether they meet the definition of “existing law” set out in section 6, since only “existing laws” are exempted from having to satisfy the constitutional requirements in sections 4 and 5. They do not do so for the reasons set out above.

112. Thirdly, it is difficult to see why the framers of the Constitution would have wanted to save a power for the executive to pass secondary legislation to infringe the fundamental rights under section 4 of the Constitution, in circumstances where they were taking away such a power from Parliament itself, unless it obtained a special majority, or there was an emergency calling for the use of the President’s powers. This reinforces the point made above that the vires of the Rules should not be conflated with their constitutionality. Sections 4 and 5 of the Constitution, read alongside the precise and limited definition of “existing law” in section 6, introduced constitutional standards which all new laws are required to meet, whether they are contained in primary legislation or subordinate legislation.

113. Fourthly, it is well established that, in case of doubt, exceptions to the rights and freedoms protected under a Constitution, such as the savings clause in section 6, are to be construed restrictively - see, for example, R v Hughes [2002] UKPC 12; [2002] 2 AC 259 at para 35 and the recent decision of the Board in Chandler (No 2), at para 43.

114. In support of its case the respondent relied on the Board’s

decision in de Freitas v Benny [1976] AC 239. That case involved a challenge to the death penalty under the 1962 Constitution. Although it was accepted that the death penalty was constitutional by reason of the savings clause, it was argued on behalf of the appellant that the executive act of choosing to carry it out was not. A distinction should be drawn between the protected legislation and administrative acts done in furtherance of such legislation. This argument was rejected by Lord Diplock in giving the opinion of the Board. He stated as follows at p 246C:

> "It is in their Lordships' view clear beyond all argument that the executive act of carrying out a sentence of death pronounced by a court of law is authorised by laws that were in force at the commencement of the Constitution."

115. By analogy, Mr Roe submitted in the present case that once one accepts that the Ordinance, an existing law, gave the Minister authority to make the Rules, it follows that the executive act of exercising that authority was authorised by that existing law and therefore constitutional.

116. There is, however, an obvious and important distinction between an authorised executive or administrative act in the implementation of an existing law and the issue of regulations under such a law. Such regulations are themselves laws. Regulations such as the Rules are law and they are "new" rather than "existing" law unless they fall within the definition of existing law set out in section 6."

(291) In determining whether sections 13 and 16 are 'new law' a break from the past, I also took into account that **Chandler** emphasised the point that the savings law serves a historical purpose, a transitional measure to allow the Legislature to adapt existing laws to the new Constitution which was not time sensitive. It was by no means an attempt to always hold back the development of new laws imbued with the sensibilities inbuilt of fundamental human rights even if Parliament was to endorse societal views that were current at the time when the Constitution was enacted. Its historical purposes were emphasised by Lord Hodge at paragraph 73:

> "73. In the Board's view there is force in the suggestion that savings clauses served a historical purpose in avoiding the legal uncertainty which the unqualified introduction of a written Constitution would have entailed. In Belize, the savings clause was only for a transitional period of five years; in other countries, including Trinidad and Tobago, no time limit was imposed on the savings clause, but the purpose of avoiding legal uncertainty was the same. The "modification first" approach is open to the criticism that it ignores the historical context in which the savings clauses were enacted in the 1962 and 1976 Constitutions and in the Constitutions of other Caribbean nations. Further, there is surely force in the Board's observation, summarised in para 32(vi) above, that the meaning of the savings clause does not change over time, unlike the general statements of rights and freedoms in section 4 of the 1976 Constitution which, in accordance with the living instrument doctrine, can adapt to changes in a society's

understanding of those rights and freedoms. In the Board's view, the problems caused by the preservation of laws that were enacted in a different time do not entitle the Board to overlook the historical purpose of the savings clause."

(292) **Maharaj v AG** also saw the restrictive nature of the saving law clause. It is a question of fact, does the relevant law have effect as part of the law before the commencement of the Constitution? Implicitly does it modify such a law. In that case the Sedition Act was amended after the commencement of the Constitution but this did not prevent the Act from falling within the category of saved law-it still exists it was modified.

(293) There are three categories that constitute saved law (a) an existing law which had effect as part of the law of Trinidad and Tobago before the commencement of the Constitution- this is not applicable here; (b) an enactment that repeals and re-enacts- that is also not applicable here as demonstrated earlier in this judgment; and (c) an enactment that alters an existing law but does not derogate from a fundamental rights to an extent which the existing law did not previously derogate.

(294) Senior Counsel for the Attorney General argued that sections 13 and 16 are simply modifications of the old law. As Mr Jeremie SC submitted that in substance the provisions of the 1925 Ordinance were materially re-enacted by sections 13 and 16 of the SOA. It was also submitted that the offence of buggery is a crime rooted in the common law at the time when the Constitution was enacted.

(295) However, these submissions make it clear that the savings law clause has a more potent effect. Rather than a mechanism of transition it has become a troubling comfort zone of stultifying the development of our social order. Unless it is made clear by Parliament that it is breaking away from the past, the social values of our history, inconsistent with fundamental rights, will unnecessarily be foisted in the future. It is clear from **Suraj** however that a strict interpretation of section 6 means that its reach should not exceed its grasp. I am attracted to the restrictive approach to interpreting the legislative act of Parliament in conducting its legislative exercise of modernising existing law. It should be strictly confined to exactly what is defined as an existing law and ambiguity must be resolved in favour of giving life to the intrinsic constitutional values and principles discussed above.

(296) The deliberate repeal and replacement of the law by Parliament could not mean that the law was repealed and "altered". "Alters" carries the meaning that, in my view, the laws could be re-enacted with modifications. This is not applicable. It also can include making different provisions in place of it or modifying it. In my view if this is meant to capture any law which replaces an existing law, any law which replaces an existing law may always be 'saved'. This cannot be the intention of section 6. It must mean that the law has been modified or amended as distinct from its replacement. It is important that the Legislature was aware of the word "replace" and deliberately did not use that word in section 6. 'Replace' carries the notion that the original ceases to exist.

(297) The PC in **Suraj** by adopting a purposive approach to interpreting the reach of section 6 understood the importance of subjecting legislative

interventions after Independence to constitutional scrutiny where there was "new law". The rules in **Suraj,** it was argued, was part of the original Ordinance. But as the Board reasoned (a) it was a conscious act after the commencement of the Constitution; (b) it was designed to capture "a strictly limited type of future laws" as existing laws; and (c) in the case of doubt exceptions to the rights and freedoms protected under a Constitution such as the savings law are to be construed restrictively.

(298) In my view, following the underlying proposition of **Chandler** that it is for Parliament to update its existing laws, there could be no greater convincing deliberate attempt by Parliament to fulfil its mandate of updating its archaic 18th century laws. In doing so it deliberately broke from the past.

(299) This intention of Parliament can be gleaned by the application of the rules of statutory construction. See the **Law Association of Trinidad and Tobago v The Honourable Chief Justice of Trinidad and Tobago** CA No. P075 of 2018 Jamadar JA (as he then was) where at paragraphs 5 and 6 it was stated:

> "5. First, there is textual analysis. One looks to the actual language and structure used in the statute in order to ascertain meaning. If the language is plain and unambiguous, then the literal meaning of the words used is considered. One also looks at the statute as a whole, considering structure, context and the impact of different parts of the statute on the provisions that fall to be interpreted and applied. This intratextual approach can deepen understanding, and so assists in the task of statutory interpretation. Finally, one considers the hallowed 'canons of construction' that have evolved

over time as guides to the discovery of meaning. Second, the intention of the makers of the statute is also an aid to interpretation and application. Textual analysis may fully reveal intent, but at times it is necessary to look elsewhere, such as to prior versions of the statute/provision, the historical background, supporting green/white papers, relevant and jurisprudentially permissible parliamentary debates, and even contemporary commentaries.

6. Third, judicial precedents which have considered, interpreted and applied the same or similar provisions, may be relevant. Here relevance is influenced by similar fact patterns, principles, values, and language/intent - what are described as analogous situations. Extrapolation that is logical and consistent with the principles/values/reasoning in the precedents considered is permissible. Fourth, policy considerations may at times be deployed and determinative. This is when one first determines the likely outcomes/consequences that flow from one interpretation/application or another - a predictive assessment; one then determines which outcome is preferable and aligned with the underlying values, purposes and intent of the law - an evaluative judgment."

(300) Furthermore, in **Black-Clawson International Ltd. Appellants and Papierwerke Waldhof-Aschaffenburg A.G.** [1975] AC 591 Lord Reid stated at page 613G – 614A:

> "... We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used. We are seeking not what Parliament meant but the true meaning of what they said. In the comparatively few cases where the words of a statutory provision are only capable of having one meaning, that is an end of the matter and no further inquiry is permissible. But that certainly does not apply to section 8.
>
> One must first read the words in the context of the Act read as a whole, but one is entitled to go beyond that. The general rule in construing any document is that one should put oneself "in the shoes" of the maker or makers and take into account relevant facts known to them when the document was made. The same must apply to Acts of Parliament subject to one qualification. An Act is addressed to all the lieges and it would seem wrong to take into account anything that was not public knowledge at the time. That may be common knowledge at the time or it may be some published information which Parliament can be presumed to have had in mind."

(301) A textual analysis, an examination of the actual language, structure and the statute as a whole, reveal the intent to modernise the law to repeal the sodomy and gross indecency laws of the Offences Against the Person Ordinance.

(302) Firstly, the long title expressly declares the intent to repeal and "replace".

The central pillar of the doctrine of repeal of a statute is "to obliterate it as completely passed form the records of the parliament as if it had never passed and it must be considered as a law that has never existed…" Lord Tindal CJ **Kay v Goodwin** (1830) 6 Bing 576 582-3. This is subject to the provisions of the Interpretation Act.

(303) The draftsman deliberately chose the words "repeal and replace". The effect was simply to repeal the existing law and replace it with something new. The draftsman did not use the words "repeal and re-enact" nor did it seek to "amend" the OAP Ordinance which would have brought home the point that it was altering or changing something that existed. Some useful examples of the use of this term of art can be seen in other pieces of legislation. The **Children Act Chap 46:01** at Section 122 provides: "The Children Act is hereby repealed." This is in relation to the Act No. 4 of 1925. The **Adoption of Children Act Chap. 46:03** at Section 41 provides in relation to the Adoption of Children Act No. 31 of 1946: "The Adoption of Children Act is repealed". The **Environment Management Act Chap. 35:05** provides in its long title, "An Act to repeal and re-enact the Environmental Management Act, 1995 and to validate all acts and things done thereunder."[25] The **Industrial**

[25] Section 97 also provides for the validation of acts or omissions in the 1995 Act and provides as follows:

> "97. Notwithstanding the repeal of the Environmental Management Act, 1995 by this Act (hereinafter referred to as the "Former Act") all acts and things done or omitted to be done under the Former Act shall, notwithstanding any law to the contrary, be deemed to have been lawfully done under this Act, as if this Act had been in force at the commencement of the Former Act and all legal proceedings pending and all decisions issued or taken or in force at the commencement of this Act, shall continue to have full force and effect as if commenced, made or issued under this Act."

Relations Act Chap. 88:01 in its long title provides, "An Act to repeal and replace the Industrial Stabilisation Act 1965, and to make better provision for the stabilisation, improvement and promotion of industrial relations." Section 18 of the **Customs (Amendment) Act No. 43 of 1996** (which sought to amend the Customs Act, Chap. 78:01) in its marginal note stated, "Section 228 repealed and a section substituted". The relevant part of the section provides as follows: "Section 228 of the Act is repealed and replaced by the following section".

(304) It also demonstrates a conscious decision, as the Respondent submitted, of an undertaking of a fresh legislative exercise to reconsider the policy issue under our sexual offences in this country. It was not a step backwards but a step forward. Inevitably, in modernising laws one must have regard to the prevailing legislative regime and social and policy objectives of reform. The fact that offences bear similarities does not mean the original offences remain in an amended form but they have been replaced.

(305) There was no modification or amendment of the main offences of sodomy and gross indecency. Section 35 specifically repealed those sections. It was later removed in 2000 due to the advent of the amendment to the OAP Act. A look at the updated legislation will show that the offences of sodomy and gross indecency was completely removed. It no longer represents our law. In its place are the crimes of buggery and serious indecency.

(306) The crime of serious indecency, unlike gross indecency, is not a misdemeanour.

(307) In passing this new law there was a deliberate attempt to embrace modern constitutional principles by invoking the section 13 procedure of utilising the supermajority. Such a supermajority or certification by section 13 is not necessary to validate an existing law. To do so will subject the existing law to the proportionality analysis contemplated under section 13. The moment Parliament chose that route it reemphasised its intention and implanted the section 13 proportionality analysis unto these offences. It is a clear signal in my view of creating the new sexual offences of buggery and serious indecency mindful of the wide import of the fundamental rights enshrined in sections 4 and 5, a consideration which was never in the minds of the legislative council in 1925 or 1939.

(308) It is of no moment that the new legislation seeks to treat with the same type of activity of sexual conduct as under the old law. That is inherently the exercise of modernising laws and inevitably to update an old law and to remove it altogether one must still treat with how should the modern society view this type of sexual activity. In this case there is the new offence of buggery and the new offence of serious indecency. Penalties have been increased and made more nuanced. It deals with both penetration and non-penetration offences. Buggery can be committed with a woman and offences with women were created.

(309) The structure of the legislation demonstrates that these are treated as much more serious offences. The severity of the penalties serves only to make the changing view of society to target the mischief of an upsurge of criminal sexual behaviour and to update its disapproval of same sex intimacy.

(310) Finally, if resort to the Hansard is made to understand the context of the introduction of this legislation the following is made pellucid by the remarks of the then Attorney General who piloted the bill, (a) the purpose of the bill was to provide a comprehensive code to deal with sexual and related offences and to modernize the law to bring it up to date with moral and current thinking in the society; (b) it was a fresh consideration of the extent to which the criminal law should deal with sexual conduct, morality and public standard of decency; (c) was cognisant of 'modern' moral values; (d) it was legislation available for public comment but met with disappointing poor public participation.

(311) The trial judge was therefore not wrong to conclude at paragraph 72 that this was not a re-enactment and that therefore a section 13 analysis of the law was therefore required.

J. REMEDIES

> "A hundred and fifty eight years is too long a period for the LGBT community to suffer the indignities of denial. That it has taken sixty eight years even after the advent of the Constitution is a sobering reminder of the unfinished task which lies ahead. It is also a time to invoke the transformative power of the Constitution." Chandrachud J in Johar v Union of India at page 715-G

(312) Having determined that the trial judge was not plainly wrong in declaring that sections 13 and 16 are unconstitutional and are not saved law, there were two options available to the trial judge. First make a declaration of

unconstitutionality and read down the provisions of sections 13 and 16 of the SOA, or second, make that declaration but suspend the order for a period of time pending Parliament's reconsideration of the impugned legislation.

(313) The first option is loosely considered permissible judicial law making; the second is a reinforcement of the co-operation of power principle guiding (not derogating from) Parliament in its law-making function. The second option would have given Parliament the final say on the shape of the modern sexual offences and encouraged fresh debate with the insight of the constitutionality of the present offences given by the court.

(314) The appellant has argued, that the effect of the unconstitutionality of sections 13 and 16 would mean that those provisions must be modified to comport with the old law.

(315) This is, in my view, an untenable position. Firstly, the SOA is not saved law. Second, its provisions are now subject to the full measure of constitutionality, including the Court's power to sever or modify the law for it to conform with basic fundamental human rights. Third, it would be a retrograde step, incoherent and antitherapeutic to assert the provisions of old law as a modification of a new law that it was meant to replace. For the court to revert to the Offences Against the Person Ordinance in the face of Parliament’s deliberate attempt to modernise the law would be judicial overreaching.

(316) Senior Counsel for the Attorney General made reference to Lord Hoffman in

Boyce and Joseph v R 64 WIR 37 at paragraphs 48 to 50:

"48. The objection to Mr Starmer's construction is not to the breadth of the power of modification but to the circumstances in which he submits that the power may be used. The power may be as broad as one pleases, but its obvious purpose is to save existing laws from being declared wholly void; not to allow the courts to modify laws which would otherwise be valid. As Lord Hobhouse of Woodborough said in Browne v R [2000] 1 AC 45, [1999] 3 WLR 1158, 49 of a statutory proviso inconsistent with the constitution:

> "It is the duty of the court to decide what modifications require to be made to the offending provision in the proviso and to give effect to its modified form, not to strike down the proviso altogether."

49. Thus the purpose of s 4(1) is to ensure that so far as possible, substance will prevail over form. The courts are empowered and encouraged not to reject provisions to which there can be no substantive objection merely because as a matter of language and form they are bound up with provisions inconsistent with the Constitution. Instead, there is a broad power to remould language and form to sever the good from the bad. It is unnecessary to discuss the extent of the power; it obviously has substantive limits; for example when it presents the court with choices which are more appropriately made by the legislature. But whatever the breadth of the power, it is truly incidental or supplementary to the Constitution because it is ancillary to the supremacy of the Constitution over other law. Its purpose is to enable the courts to preserve the effect of

existing laws as far as it is possible to do so.

50. Thus in the burglary example mentioned earlier, if there had been no s 26, the 1962 Act would have been declared void. If there had been a consolidation Act, it would have been modified to excise the punishment of flogging. Whatever the form of the legislation, the substantial result would have been the same. Powers to modify and adapt are ways of giving effect to the declaration in s 1 that laws inconsistent with the Constitution shall to that extent - and only to that extent - be void. But they make no sense in relation to laws which would otherwise be valid."

(317) He contends that sections 13 and 16 can be modified to delete parts that are not consistent with section 4 and 5 and does not satisfy the section 13 test. However, it is not suggested how that could be done differently from what the trial judge accomplished as the act of criminalising consensual sexual activity between males or adult persons is not reasonably justifiable and should be modified to target non-consensual activity.

(318) Senior Counsel for the Attorney General also contended that section 60 and 62 should be reinstated, in other words strike down sections 13 and 16. Then subject sections 60 and 62 to a review under section 5(a) of the Constitution Act that is modify it so it comports with the Constitution. This would however amount to judicial overreach. It ignores the useful learning of **Chandler** in limiting the extent to which the Judiciary will interfere with the legislative language only when it is clear and obvious what the modification should be. To adopt the approach as contended by counsel will put the Judiciary in the Parliament's seat. It is clear that Parliament with the

introduction of sections 13 and 16 in 1986 and its amendment in 2000 set about to modernise the laws in relation to sexual offences. It is not for the Court to reinvent the wheel with respect to sentence structures or the nature of the offence. It is an unworkable solution.

(319) It is therefore not shown that the option adopted by the trial judge was plainly wrong.

K. CONCLUSION

"People are not born hating one another. They learn to hate. And if people can learn to hate, they can be taught to love. For love comes naturally to the human heart than its opposite" Nelson Mandela

(320) The journey to preserve one's identity is as much a journey for Mr. Jones as it is for post-colonial courts. To chart our future and breathe life into visionary documents of our Constitution requires continuous thought, interrogation, and re-affirmation. It requires a love for ourselves as a proud nation to shape our own destiny.

(321) I wish to record my appreciation for the diligence of the legal teams for all parties and to Senior Counsel and King's Counsel for their able and comprehensive submissions. I do regret the delay in delivering this judgment and to the parties I unreservedly apologise for it. I do acknowledge the strongly held moral views that have divided certain groups in our society who are impacted by this judgment. The delay could only have added to their anxiety. While we can hope that our judgments can bring peace, I continue to encourage those impacted by this judgment to continue their

debate and interrogations of who we are as a society, mindful and respectful of the inherent dignity and nobility of us all.

(322) For completeness I return to the joint issues:[26]

i. Whether sections 13 and 16 of the Sexual Offences Act Chap 11.28 ("the Act") violate the Claimant/Respondent's fundamental rights, especially his right to respect for private and family life; Yes

ii. Whether sections 13 and 16 of the Act are saved by section 6 of the Constitution of the Republic of Trinidad and Tobago ("The Constitution"); No

iii. Whether any claim that sections 13 and 16 of the Act are to be treated as "Existing Law" for the purposes of section 6 of the Constitution is compatible with the fact that they were enacted utilising the procedure provided for by section 13 of the Constitution; No

iv. Whether the terms of the long title and preamble to the Act are relevant to this issue; Yes

v. Whether sections 6 and 13 of the Constitution ought to be construed on a purposive basis; Yes

vi. Whether sections 13 and 16 of the Act fall to be determined on an

[26] The parties filed their joint list of agreed issues on 6th May 2022

application of section 13 of the Constitution; Yes

vii. Whether sections 13 and 16 of the Act were in breach of sections 4 and 5 of the Constitution or were disproportionate; Yes

viii. Whether sections 13 and 16 of the Act have been proven to not be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual; Yes

ix. Subject to sections 13 and 54 of the Constitution, whether the provisions of sections 60 and 62 of the Offences Against the Person Ordinance ("the Existing Law") or any part thereof, ought to be substituted for sections 13 and 16 of the Act; No

x. Whether sections 13 and 16 of the Act altered or alternatively repealed and re-enacted with modifications sections 60 and 62 the Existing Law; No

xi. Whether sections 13 and 16 of the Act ought to have been modified; Yes

xii. Whether the prescribed penalty of 25 years imprisonment provided for in section 13 of the Act ought to have been severed and "imprisonment for a term not more than 5 years but not less than 2 years imprisonment" in section 60 of the Existing Law substituted in its place; No

xiii. Whether the prescribed penalty of 5 years imprisonment provided for in section 16 of the Act ought to have been severed and "imprisonment for a term not exceeding 2 years with or without hard labour" be substituted in its place. No

(323) For these reasons the appeal will be dismissed.

Vashiest Kokaram
Justice of Appeal