THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

In the matter of Sections 1,3,5,8,10,13 & 16 of the Constitution of Saint Lucia, Cap. 1.01 of the Revised Edition of the Laws of Saint Lucia

And

In the matter of Sections 132(2) and 133 of the Criminal Code, Cap. 3.01 of the Revised Edition of the Laws of Saint Lucia

And

In the matter of Rules 56.1, 56.2, 56.3 & 56.4 of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 (as amended)

CLAIM NO. SLUHCV2021/0457

BETWEEN:

RANDALL THEODULE

VERNON BELLAS

UNITED AND STRONG INC.

Claimants

And

THE ATTORNEY GENERAL OF SAINT LUCIA

Defendant

Appearances:

Mrs. Diana Thomas Hunte holding papers for Mr. Douglas Mendes KC, with Ms. Veronica Cenac of Counsel for the Claimants

Mrs. Rochelle John-Charles, Crown Counsel, Attorney General's Chambers for the Defendant

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2023: March 23;
2025: July 29

JUDGMENT

[1] **INNOCENT**, **J**.: Mr. Randall Theodule ('Mr. Theodule') and Mr. Vernon Bellas ('Mr. Bellas'), the first and second claimants in the present proceedings are members of the LGBTQ community in Saint Lucia.

[2] The third named claimant, United and Strong Inc. is a not for profit company incorporated under the Laws of Saint Lucia and generally operates as a public interest group with the objects of promoting and safeguarding the interest of members of the homosexual and LGBTQ community in Saint Lucia.

[3] At the initial stages of the proceedings the Attorney General had applied to the court to strike out the claimants' claim in its entirety on the basis that they lacked locus standi to bring the constitutional motion substantially on the basis that the claimants had not identified any right guaranteed under the Constitution that had been breached or was being infringed or likely to be infringed in relation to them. The court had the benefit of written legal submissions from the parties on the locus standi point. However, on the hearing of the strike out application, the Attorney General conceded the issue of locus standi and the matter proceeded along its normal course.

[4] At the substantive hearing of the Constitutional Motion, the Attorney General informed the court that it did not intend to challenge the claimants' motion for relief under the Constitution. That being the case, the court is nevertheless required as a matter of sound practice and procedure, to give a written decision on the constitutional issues that arise on the claim. The parties are all agreed on this procedural point.

[5] The court is also fortified in its approach by the decision in **Attorney General and Minister of Home Affairs v Antigua Times Ltd**[1] which in the court's view clarified a judge's duty as regards agreed propositions. To paraphrase the learned Chief Justice in that case, the agreement by the parties on the propositions of law which they put before the trial judge did not absolve the trial judge from the responsibility of himself coming to a decision on the said propositions.

[1] [(1973)] 20 WIR 573

[6] The question before this court in this case is the constitutionality of the provisions of sections 132 and 133 of the Code. This is a legal question and it was not competent for counsel to usurp the function of the court and express any opinion thereon.

[7] Therefore, the court in this instance will not regard the Attorney General's concessions as being binding on it. The role of the court under the Constitution where the question of the constitutionality of legislation arises it is incompetent for parties by concession or by agreements to tie the hands of the court because the court is cast in the special role as guardian of the Constitution and is required to determine for itself whether the Constitution has been infringed or not.[2] The Privy Council on appeal from the decision of the Court of Appeal in the same case agreed with the sentiments expressed both by the trial judge and the Court of Appeal on this issue.[3]

Introduction to the constitutional challenge

[8] The claimants allege that the provisions of section 133 of the Criminal Code contravenes their constitutional rights and the constitutional rights of other LGBTQ persons guaranteed to them under sections 1, 3, 5, 8, 10 and 13 of the Constitution and that section 133 aforesaid is null, void and of no force and effect to the extent that section 133 applies to consensual activity or sexual intercourse per anum between consenting adults in private, each of whom has attained the age of at least 16 years or more. The claimants sought the following orders, declarations and relief, namely:

(1) An order that section 133(3) of the Criminal Code be read as if the words "except where it occurs in private and between consenting persons each of whom is 16 years of age or more" were added to the section.

(2) A declaration that section 132 of the Criminal Code contravenes the claimants' constitutional rights, as well as the rights of LGBTQ persons

[2] At p 584 H-I; P 585 A-D
[3] [(1975)] 2 WIR 560 at p 572 G-H

whose interest is represented herein by the third named claimant enshrined in sections 1, 3, 5, 10 and 13 of the Constitution, and is accordingly unconstitutional, null and void and of no effect to the extent that section 132 applies to consensual sexual activity, committed in private, by a person, or between persons each of whom has attained a least 16 years of age or more.

(3) An order that section 132(2) be read as if the words "an adult male person and an adult female person" were deleted and replaced with the word "persons".

(4) A declaration that the offence of gross indecency under section 132 is null and void and of no effect on account of its vagueness, to the extent that it does not sufficiently define the offence which it purports to create.

The statutory provisions

[9] Section 132 of the Criminal Code deals with the offence of gross indecency. Section 132(4) of the Criminal Code describes gross indecency in the following manner:

> "In this section "gross indecency" is an act other than sexual intercourse (whether natural or unnatural) by a person involving the use of the genital organs for the purpose of arousing or gratifying sexual desire."

Section 132(1) of the Criminal Code creates the offence of gross indecency and provides the penalty therefore. The section reads:

> "A person who commits an act of gross indecency with another person commits an offence and is liable on conviction on indictment to imprisonment for 10 years or on summary conviction to 5 years."

[10] The section sought to be impugned in the present proceedings is section 132(2) which provides what may aptly be described as a qualification or exemption to the substantive offence created by section 132(1) and reads:

> "Subsection (1) does not apply to an act of gross indecency committed in private between an adult male person and an adult female person, both of whom consent."

[11] Section 133 of the Criminal Code prohibits and provides a sanction for the offence of buggery and provides:

(1) A person who commits buggery commits an offence and is liable on conviction on indictment to imprisonment for—

(a) life, if committed with force and without the consent of the other person;

(b) ten years, in any other case.

(2) Any person who attempts to commit buggery, or commits an assault with intent to commit buggery, commits an offence and is liable to imprisonment for 5 years.

(3) In this section "buggery" means sexual intercourse per anus by a male person with another male person."

The constitutional provisions

[12] Section 1 of the Saint Lucia Constitution Order (the 'Constitution') under the chapeau "Fundamental rights and freedoms" provides that:

> "Whereas every person in Saint Lucia is entitled to the fundamental rights and freedoms, that is to say, the right, whatever his or her race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely—
>
> (a) life, liberty, security of the person, equality before the law and the protection of the law;
>
> (b) freedom of conscience, of expression and of assembly and association; and
>
> (c) protection for his or her family life, his or her personal privacy, the privacy of his or her home and other property and from deprivation of property without compensation,
>
> the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest."

[13] Section 10 of the Constitution guarantees the right to the protection of freedom of expression and provides:

> "(1) Except with his or her own consent, a person shall not be hindered in the enjoyment of his or her freedom of expression, including freedom to

hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his or her correspondence.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—

(a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health; that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts or regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting or television; or

(b) that imposes restrictions upon public officers that are reasonably required for the proper performance of their functions, and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

[14] Section 13 of the Constitution guarantees the right to protection from discrimination on the grounds of race, etc. and provides:

"(1) Subject to the provisions of subsections (4), (5) and (7), no law shall make any provision that is discriminatory either of itself or in its effect.

(2) Subject to the provisions of subsections (6), (7) and (8), no person shall be treated in a discriminatory manner by any person or authority.

(3) In this section, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by sex, race, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

(4) Subsection (1) shall not apply to any law so far as that law makes provision—

(a) for the appropriation of public revenues or other public funds; with respect to persons who are not citizens;

(b) for the application, in the case of persons of any such description as is mentioned in subsection (3) (or of persons connected with such persons), of the law with respect to adoption, marriage, divorce, burial, devolution of property on death or other like matters which is the personal law of persons of that description;

(c) whereby persons of any such description as is mentioned in subsection (3) may be subjected to any disability or restriction or may be accorded any privilege or advantage that, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society.

(5) Nothing contained in any law shall be held to be inconsistent with or in contravention of subsection (1) to the extent that it makes provision with respect to standards or qualifications (not being standards or qualifications specifically relating to sex, race, place of origin, political opinions, colour or creed) to be required of any person who is appointed to or to act in any office or employment.

(6) Subsection (2) shall not apply to anything which is expressly or by necessary implication authorised to be done by any such provision of law as is referred to in subsection (4) or (5).

(7) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention to the extent that the law in question makes provision whereby persons of any such description as is mentioned in subsection (3) may be subjected to any restriction on the rights and freedoms guaranteed by sections 7, 9, 10, 11 and 12, being such a restriction as is authorised by section 7(2), 9(5), 10(2), 11(2), 12(3)(a), 12(3)(b) or 12(3)(h), as the case may be.

(8) Nothing contained in subsection (2) shall affect any discretion relating to the institution, conduct or discontinuance of civil or criminal proceedings in any court that is vested in any person by or under this Constitution or any other law."

Summary of the claimants' contentions

[15] The main contentions advanced by the claimants can be summarised in the following manner.

[16] The claimants' primary contention is that the provisions of sections 132 and 133 of the Criminal Code in their present formulation contravene the constitutional rights guaranteed to LGBTQ persons and other persons in Saint Lucia. More specifically, the claimants contended that the provisions of the Criminal Code sought to be impugned contravene the rights to personal liberty; the right not to be discriminated against on the basis of sex which when properly construed includes sexual orientation; and the right to freedom of expression.

[17] It appears from the claimants' written submissions presented to the court that the claimants wholly abandoned and chose not to pursue their case as it pertained to the constitutional challenge relative to sections 3, 5 and 8 of the Constitution; that is, violation of their right to personal liberty, violation of the right not to be subjected to cruel and inhuman treatment, and the right to the protection of the law respectively.

[18] However, the claimants maintained their position relative to section 1 of the Constitution being fortified by the decisions of the Caribbean Court of Justice ('CCJ') in the cases of **Nervais v The Queen**,[4] **Severin v The Queen**[5] and **McEwan and Ors v The Attorney General**.[6]

[19] The claimants' motion relative to the provisions of section 132 of the Criminal Code also concerned the question of whether an extraordinarily wide provision prohibiting a certain very broad category of sexual activities by anyone within the jurisdiction of Saint Lucia is consistent with the Constitution.

Summary of the Attorney General's contentions

[20] Initially, the Attorney General had challenged the claimants' motion on the grounds that: (1) that the claimants were not charged with or threatened with criminal prosecution related to any offences either under section 132 or 133; (2) that the first and second named claimants' affidavit evidence only alluded to acts perpetrated

[4] [2018] CCJ 19 (AJ)
[5] [2018] CCJ 20 (AJ)
[6] [2018] CCJ 30 (AJ)

against them by private citizens and did not allege any act or conduct on the part of the State or organs of the State which had or was likely to contravene any of the constitutional guarantees which they claimed is, has been or is likely to be contravened in relation to them or any other person; (3) that on the foregoing premises, the first and second named claimants had failed to show demonstrably that they had any reasonable grounds for bring a claim for relief under the Constitution; (4) that in all the circumstances of the case, the claimants had not shown demonstrably the manner in which sections 132 and 133 had or was capable of infringing any of the rights guaranteed to them under sections 1, 3, 5, 8, 10 and 13 of the Constitution; and (5) that the claimants' reliance on section 1 of the Constitution did not create any enforceable rights which were capable of being infringed and for which the claimants could seek redress under section 16 of the Constitution.

[21] Although the Attorney General had wholly abandoned its position relative to the challenge mounted relative to the claimants' locus standi, the court thinks that it would be appropriate to address the issues raised by the Attorney General briefly at this juncture for the reasons already stated.

Locus standi

[22] The Attorney initially contended that the third named defendant, being a body corporate, purported to represent the rights of LGBTQ persons in Saint Lucia but had failed to be added as a representative party to the proceedings pursuant to CPR 21. 7. Secondly, the Attorney General relied on the argument that the provisions of sections 132 and 133 of the Criminal Code were inapplicable to corporate bodies such as the third named claimant. Therefore, it was on that basis that the Attorney General contended that the third named defendant had no locus standi in the matter.

[23] The Attorney General's arguments relative to the first and second named claimants' locus standi have already been captured at paragraph [20] above. However, the issue of locus standi was argued primarily within the context of what was daubed the "potential liability argument." This formed the crux of the legal contentions

between the parties and by process of osmosis permeated the broader constitutional points raised in the present case. In these circumstances, the question of locus standi will be discussed later on in this judgment within the broader constitutionality context. The court is of the view that this would make for better exposition as will be seen.

The issues

[24] The claimants' case, in the court's view, raises questions of general public importance, not only in Saint Lucia, but also across the region as a whole. The present proceedings interrogates the question of whether the continued criminalisation by the Criminal Code of consensual adult same-sex sexual conduct in private is consistent with certain provisions of the Constitution.

[25] The court has also been asked to consider the question whether the provisions of section 132 of the Criminal Code which in the claimant's view, creates an extraordinarily broad and generous category of prohibitions related to sexual activity by anyone within the jurisdiction of the courts in Saint Lucia, is consistent with the Constitution.

[26] Having examined the submissions of both parties relative to the points raised in the current proceedings, the court has distilled that the parties have raised the following issues which requires its consideration, namely:

(1) Whether sections 132 and 133 of the Code infringe the right of LGBTQ persons to the protection of the law guaranteed by section 1(a) of the Constitution.

(2) Whether sections 132 and 133 of the Code infringe the right of LGBTQ persons to privacy guaranteed by section 1(c) of the Constitution.

(3) Whether sections 132 and 133 of the Code infringe the right of LGBTQ persons to life, liberty and security of the person guaranteed by section 1(a) of the Constitution.

(4) Whether the provisions of sections 132 and 133 of the Code infringe the right of LGBTQ persons to freedom of expression guaranteed by sections 1(b) and 10 of the Constitution.

(5) Whether sections 132 and 133 of the Code infringe the right of LGBTQ persons to non-discrimination on the basis of sex guaranteed by sections 1 and 13 of the Constitution.

(6) What remedy should the court grant should the court determine that the provisions of sections 132 and 133 of the Code are inconsistent with the constitutional provisions relied on by the claimants.

[27] As the court sees it, the aforementioned issues raised in the parties' submissions can be clarified by answering the following questions, namely:

(1) Whether the provisions of section 132 and section 133 of the Criminal Code are unconstitutional;

(2) Whether section 132 and section 133 infringe the claimants' and the rights of homosexual persons under sections 1, 10 and 13 of the Constitution, namely, their right to the protection of the law, their right to privacy, their right to protection of liberty and security of the person and freedom of expression;

(3) Whether the provisions of sections 132 and 133 of the Code are reasonably justified in a democratic society.

[28] However, in the court's view, it would appear that the primary issue is whether the two sections are existing law as that term is defined by section 2(5) of the Constitution Order. If they are not existing law, the second question is whether they fall within the meaning of section 2(4) of the Constitution Order.

[29] The question whether these two provisions of the Code are not reasonably justifiable in a democratic society arises on the claimants' pleaded case and also as a section 124(13) consideration. In the latter case, the question is whether the provisions of the Criminal Code 1992 and its predecessor the Criminal Code Chapter 250 were

altered within the meaning of section 124(13) of the Constitution by the provisions of sections 132 and 133 of the Code.

[30] Section 132 of the Code prohibits an act other than sexual intercourse (whether natural or unnatural) by a person involving the use of the genital organs for the purpose of arousing or gratifying sexual desire. Section 132(2) may be perceived as being discriminatory. Section 132(1) creates the offence and section 132(2) makes provision for exception for sexual acts committed in private between an adult male person and an adult female person both of whom consent. Consequently, section 132 prohibits acts of gross indecency as defined by section 132(4) of the Code between consenting adult homosexual men and consenting adult homosexual women. Also, public acts of gross indecency whether same sex or heterosexual are prohibited crimes. Also the provision prohibits by implication acts of gross indecency by persons under the statutory age of adulthood.

[31] Section 133 (1) of the Code prohibits buggery by any person if committed with force and without the consent of the other person. Section 133 of the Code also prohibits buggery by a male person with another male person as is made clear by the definition of buggery contained in section 133(3) of the Code. There does not appear to be any prohibition or proscription in section 133 relative to buggery between a consenting adult male person and a consenting adult female person or two consenting adult females. In fine, section 133 does not prohibit anal sex between a consenting adult male and female couple.

[32] The claimants' arguments relative to the unconstitutionality of sections 132 and 133 of the Code can be summarized in the following manner. The claimants contend that the mere existence of section 132 and section 133 of the Code in their current formulation infringe upon their rights and the rights of all homosexual persons to the extent that they criminalise same sex (homosexual) sexual activity between consenting adults with severe penalties.

[33] In support of their case the claimants relied on the South African case of **National Coalition of Gay and Lesbian Equality v Minister of Justice**,[7] where Sachs J captured the gravamen of complaints of this nature when he said:

> "Only in the most technical sense is this a case about who may penetrate whom where. At a practical and symbolical level, it is about the status, moral citizenship and sense of self-worth of a significant section of the community. At a more general and conceptual level, it concerns the nature of the open, democratic and pluralistic society contemplated by the Constitution."[8]

[34] The claimants contended that similar considerations applied to Saint Lucia where difference, diversity and human dignity are fundamental constitutional values. To that extent they argued that section 133 criminalises buggery (sexual intercourse per anum) between a man and another man, even if they are each consenting adults engaging in the prohibited acts in private.

[35] In addition, the claimants contended that section 132 applies to almost all of the intimate sexual activity (other than sexual intercourse) which adults might choose freely to engage in. But whereas it does not criminalise such activity engaged in in private between an adult male person and an adult female person, both of whom consent, it criminalises such activities between all same-sex adults even though engaged in in private and with consent.

[36] The claimants further contended that the effect of sections 132 and 133 is to criminalise all intimate sexual activity which persons of the same sex (a man with another man, and a woman with another woman) engaged in consensually out of the gaze of the public.

[37] They also contend that the provisions of sections 132 and 133 of the Code amount to an unjustifiable interference with private life which curtails the freedom of choice of homosexual persons in matters which ultimately involve an expression and exercise of personal sexuality whereby homosexuals cannot freely and in the

[7] [1998] ZACC 15
[8] At para [107]

privacy of their own dwelling engage in sexual intimacy with other consenting same sex adults.

[38] Therefore, according to the claimants' arguments, sections 132 and 133 of the Code have the effect of forcing them and other homosexuals to either respect the law by refraining from private consensual homosexual activity or to commit the prohibited acts at the risk of criminal prosecution. The latter proposition being premised on the concept of potential criminality (the 'potential criminality argument'). Accordingly, in the eyes of the law they are perceived as criminals which has the effect of subjecting them to widespread social ostracism, prejudice, persecution, marginalization and stigmatism.

[39] By extension, the claimants appeared to have embraced the view that although sections 132 and 133 of the Code do not prohibit sexual acts between consenting adult males and females it operates disproportionately in the case of homosexual adults making them primary targets for criminal prosecution and stigmatization by the public.

[40] In keeping with the concept of 'potential criminal liability' the claimants say that sections 132 and 133 of the Code amounts to a breach of the right of homosexual persons to respect for family life since they effectually deny homosexual people the right to form a family unit because once a homosexually emotional attachment is formed it cannot be acted upon sexually without the fear of arrest, prosecution and conviction.

[41] The claimants also contended that the provisions of sections 132 and 133 of the Code breach their right and the right of homosexual persons in general to equality before the law because they unfairly discriminate against them solely, either expressly or impliedly, on the basis of their gender, sex and sexual orientation. In fine, sections 132 and 133 of the Code sanction homosexual but not heterosexual adults for sexual acts committed consensually. To that extent they argued, sections 132 and 133 of the Code is unequally applied and is primarily aimed at prosecution against homosexuals.

[42] Ultimately, the claimants also took the view that sections 132 and 133 in their current formulation amount to a breach of the claimants and homosexual persons generally right to life, liberty and security of the person and the right not to be deprived thereof except in the course of the due process of law.

[43] To buttress the foregoing contention the claimants' argument in a nutshell was that since the claimants and other homosexual persons have no autonomy to make decisions which directly affect their choice whether to enter into a homosexual relationship and whether to engage in homosexual conduct.; and that the discriminatory element which constitutes the offences under both sections 132 and 133 cannot be said to equate the due process of law.

[44] The Criminal Code came into force on 1st January 2005 and by virtue of section 1264 thereof expressly repealed the Criminal Code Chapter 250 of the Revised Edition of the Laws of Saint Lucia 1957. Surprisingly, the Criminal Code 2005 makes no mention of the repeal of Chapter 250's successor the Criminal Code of Saint Lucia 1992. Interestingly, the Criminal Code 1992 by virtue of its section 1414 expressly repealed its predecessor the Criminal Code Chapter 250.

[45] Therefore, neither the Criminal Code 2005 nor the Criminal Code 1992 can be regarded as existing law for the purpose of section 2(5) of the Constitution. The Saint Lucia Constitution Order 1978 came into operation on 22nd February 1979. Section 3 of the Order provided that the Constitution of Saint Lucia set out in Schedule 1 to the Order shall come into effect in Saint Lucia at the commencement of the Order subject to the transitional provisions set out in Schedule 2 to this Order.

[46] Section 2 of the Constitution Order preserves the provisions of the existing law by permitting their alteration within the meaning of section 124(13) of the Constitution. The question that arises is whether sections 132 and 133 of the Code do not alter the existing law at all but are instead complete replacement or re-enactment of the existing law, in which case the question will then turn to whether sections 132 and 133 of the Code are reasonably justifiable according to the proviso contained in the

relevant Constitutional provisions. This latter issue appears to be one that encapsulates the claimants' position.

[47] Section 2 of Schedule 2 of the Constitution Order under the rubric 'existing laws' provides:

> (1) The existing laws shall, as from the commencement of the Constitution, be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution and the Supreme Court Order.
>
> (2) The existing laws shall, as from the commencement of the Constitution, be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution and the Supreme Court Order. Where any matter that falls to be prescribed or otherwise provided for under the Constitution by Parliament or by any other authority or person is prescribed or provided for by or under an existing law (including any amendment to any such law made under this section), that prescription or provision shall, as from the commencement of the Constitution, have effect (with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the Constitution and the Supreme Court Order) as if it had been made under the Constitution by Parliament or, as the case may require, by the other authority or person.
>
> (3) The Governor General may by order made at any time before 31 December 1980 make such alterations to any existing law as may appear to him or her to be necessary or expedient for bringing that law into conformity with the provisions of the Constitution and the Supreme Court Order or otherwise for giving effect or enabling effect to be given to those provisions.
>
> (4) The provisions of this paragraph shall be without prejudice to any powers conferred by the Constitution or by any other law upon any person or authority to make provision for any matter, including the alteration of any existing law.
>
> (5) For the purposes of this paragraph, the expression "existing law" means any Act, Ordinance, rule, regulation, order or other instrument made in pursuance of or continued in force by or under the former Constitution and having effect as a law immediately before the commencement of the Constitution.

[48] In the premises, the existing law at the time the Saint Lucia Constitution Order came into operation was the Criminal Code Chapter 250 of the Revised Laws of Saint

Lucia 1957. Therefore, the Criminal Code 1992 and its successor the Criminal Code 2005 repealed and replaced the existing law rather than altering it by modification, amendment, qualifying or creating exceptions to it.

[49] Section 124 (13) of the Constitution provides that:

> "In this Constitution references to altering this Constitution or any other law, or any provision thereof, include references—
>
> (a) to revoking it, with or without re-enactment thereof or the making of different provision in lieu thereof;
>
> (b) to modifying it whether by omitting or amending any of its provisions or inserting additional provisions in it or otherwise; and
>
> (c) to suspending its operation for any period or terminating any such suspension."

[50] Therefore, the provisions of sections 132 and 133 in their re-enacted form derogate from the protected rights in a different manner and to a greater extent than the existing law by creating the offence of gross indecency only between homosexual men and homosexual women; and the act of buggery as only between men. It is noteworthy that the offence of gross indecency was not part of the existing law at the time of the coming into operation of the Constitution. Neither was it a criminal offence under the Criminal Code 1992.

Legislative chronology

[51] The claimants submitted quite correctly that in Saint Lucia, sections 132 and 133 can be traced back to the Criminal Code of Saint Lucia, 1920: A Code of Criminal Offences and Procedure prepared under the authority of the Criminal Law and Procedure Ordinance, No. 25 of 1918. This Code superseded the Criminal and Criminal Procedure Codes (Nos. 101 and 102) of the 1889 Edition and Ordinances amending these. The 1920 Criminal Code of Saint Lucia, Chapter 250 of the Revised Laws criminalised the offence of sodomy at sections 241 and 242: While there were a number of amendments to 1920 Criminal Code of Saint Lucia, Chapter 250 between 1921 and 1957, there were no amendments to the two provisions

above and sections 241 and 242 were reproduced in their entirety in next Revision of the Laws of Saint Lucia in 1957.

[52] Section 241 of the Criminal Code Chapter 250 of the Revised Laws of Saint Lucia, 1957 as modified in 1942 (the existing law) provided as follows:

> "If any two persons are guilty of unnatural connection, every such person is liable indictably to imprisonment for ten years.

[53] Section 242 of the Criminal Code Chapter 250 of the Revised Laws of Saint Lucia, 1957 as modified in 1942 provided as follows:

> "Whoever is convicted of unnatural carnal knowledge of any person, with force or without the consent of such person, is liable indictably to imprisonment for life."

[54] Section 241 of the Criminal Code 1992 under the chapeau "Unnatural Offences – Bestiality and Sodomy" provided that:

> "If any two persons are guilty of unnatural connection every such person is liable indictably to imprisonment for ten years."

Section 242 under the same heading provided that:

> "Whoever is convicted of unnatural carnal knowledge of any person, with force or without the consent of such person, is liable indictably to imprisonment for life."

[55] In 1992, the Criminal Code was amended and the words "and to flogging" were deleted from sections 241 and 241 respectively. In 2004, the Criminal Code was reviewed in its entirety and replaced by the Criminal Code Act No. 9 of 2004 wherein sections 241 and 242 criminalising the offence of "sodomy" were repealed and replaced by section 133 creating the offences of "buggery and a new section 132 creating the offence of "gross indecency" was introduced. Following a consolidation of the Laws of Saint Lucia in 2005 and again in 2008, sections 132 and 133 as originally introduced in the 2004 amendment continue in effect with no amendments in the Criminal Code Cap 3.01 of the Laws of Saint Lucia.

[56] As may be readily apparent, the penalties which could be imposed also evolved over time. The pre-independence sanction for unnatural connection with mankind was imprisonment for life and flogging. In the 1992 revision of the Criminal Code,

"and to flogging" was excluded. However, the penalty remained "life imprisonment". In the 2004 revision, the penalty for buggery remains "life imprisonment" where committed with force and without consent and reduced to 10 years even where the act is consensual and committed in private. Gross indecency between a man and a man and a woman and a woman carry a penalty of 10 years (on conviction on indictment) and 5 years (on summary conviction).

[57] In the court's view, the present case interrogates purely questions of law. It involves the interpretation of sections 132 and 133 along with the provisions of sections 1, 10 and 13 of the Constitution and section 2 of the Saint Lucia Constitution Order 1978. Notwithstanding that this judgment's primary concern is one of law, the court will examine the affidavit evidence placed before it by the claimants upon which they relied to substantiate the alleged breaches of their rights guaranteed under the Constitution.

[58] As the court has already pointed out, the Attorney General has adopted a non-adversarial stance and has filed no evidential material in opposition. However, the Attorney General had originally taken the stance that the court should not be entirely persuaded that matters of law are dependent on the claimants' personal experiences as a homosexuals.

[59] However, the court will refer to the contents of the claimants' affidavits to the extent that they purport to place reliance on it in support of their allegations of the infringement of the rights guaranteed to them under the Constitution.

Mr. Theodule's affidavit

[60] A reading of Mr. Theodule's affidavit seems to support the Attorney General's contention that the claimants' complaint does not interrogate any actions by the State or organs of the State which had or was likely to contravene any of the constitutional guarantees which they claimed is, has been or is likely to be contravened in relation to them or homosexual persons in general but only alluded to acts perpetrated or perceived acts against him by private citizens which had or

were likely to contravene any of the constitutional guarantees; and therefore, the claim for relief under the constitution was unreasonable in that they did present any proper basis for bringing the claim for redress under the constitution.

[61] It would also appear that Mr. Theodule's affidavit does not show demonstrably how his fundamental rights guaranteed to him under the Constitution have been infringed or are likely to be infringed by the State or organs of the State.

[62] In his affidavit, Mr. Theodule states essentially that he identifies as pansexual, which he said means that he is attracted to men, women and trans-persons, although he is predominantly seen as a homosexual or bisexual man. He claims that he has had romantic relationships with men and expressed the wish to engage in consensual sexual relationships with men.[9]

[63] Mr. Theodule's affidavit also chronicled his life experiences as a homosexual person since he commenced identifying as such. These life experiences concerned his personal relationships and his relationship with his family and how his relationship with his family was affected by his sexual identity or sexual orientation. He also mentioned and expressed his fears and anxiety fueled by societal impressions and general resentment shown by members of the general public relative to his sexuality or sexual orientation.[10]

[64] Later on in his affidavit, he chronicled his experiences of hostility and ridicule shown to him by the general public as a result of his sexual orientation and sexual preferences. He also expressed his fear and anxiety of being arrested and prosecuted on account of sexual orientation.[11]

Mr. Bellas' affidavit

[65] Mr. Bellas described his sexual orientation as that of a transgender woman. He said in his affidavit that he was born as a biological male but in terms of his gender

[9] At para 4
[10] At paras 6-25
[11] At paras 26-34

identity he feels like a woman trapped in a man's body. According to him he identifies and lives his life as a woman. He also stated that he dresses like a woman every time he goes out and that he is attracted to males. He claims to be treated as a gay man notwithstanding his appearance and his identification gender.[12] Mr. Bellas, nevertheless accepted that for the purposes of the law in Saint Lucia that he is still considered to be a man.[13]

[66] It appears from Mr. Bellas' affidavit that he failed to state with any degree of particularity evidence of positive discrimination whether institutional or on the part of the State or its organs as a consequence of his sex or sexual orientation. It appears that most of his complaints are directed at the treatment meted out to him by other employees and customers where he has been employed.[14]

[67] The court makes similar observations relative to the affidavit of this claimant as in the case of Mr. Theodule. This claimant's affidavit seemingly chronicled what he described as hostility, discrimination and offences of violence against him on account of his sexual orientation meted out to him by the general public.

[68] Having given consideration to the pith and substance of the claimants' affidavits, it seems only proper for the court to consider the question of whether the claimants' failure to make allusion to any action on the part of the State or organs of the State operates in such a way that it prohibits them from seeking relief under the Constitution. This aspect of the case also raises the question of whether the constitutional issues raised by the claimants ought to be examined within the broader societal context and not just confined to state action. Such an approach would envisage and interrogate the infringement of rights contemplated by sections 1 of the Constitution, namely, the right to the protection of the law in its broad legal sense and the protection of the right to freedom of expression and equality before the law.

[12] At paras 2 and 4
[13] At para 8
[14] At paras 29-30

[69] It is clear that the claimants' affidavits point to victimisation, stigmatisation, and vilification by the wider society which has resulted in fear and anxiety and the curtailment of their freedom of expression. When looked at within this context it would appear that the claimants' complaint is also predicated on the notion that they are entitled to the protection of the law against incursions from civil society which have a tendency to undermine their personal safety and security, feelings of self-worth and general acceptance in civil society. In other words, that they are entitled to the same equality of treatment before the law as every other citizen without reference to their sex, sexual orientation or sexual preference.

[70] It would also seem that by extension, the claimants' by virtue of what is contained in their affidavits have sought to highlight the fact that the provisions of sections 132 and 133 operate disproportionately to homosexual persons in general. That these provisions of the Code in their current formulation have a tendency to exacerbate if not condone the stigmatisation of homosexual persons in civil society and engender feelings of hostility fueled by persons who are inclined to take the moral high ground relative to the question of homosexuality.

Potential Criminal Liability

[71] The issue which the court has to determine under the rubric of "potential criminal liability" is two-fold: (1) whether it deprives each of the claimants from seeking redress under section 16 of the Constitution; and (2) by extension whether the claimants are entitled to the constitutional redress which they seek in the present claim given the fact that they have not shown demonstrably, as the Attorney General contended, how the State or organs of the State have infringed their constitutional rights to which they claim entitlement.

[72] The Attorney General took the view that the affidavits of the first and second claimants did not disclose that they have been charged with any offence pursuant to sections 132 or 133 of the Criminal Code. The affidavits do not even state that they have been threatened with arrest or prosecution. The Defendant/Applicant

therefore submits that they do not have the requisite standing to bring this claim pursuant to section 16(1) of the Constitution.

[73] The Attorney General placed reliance on the decision in **Attorney General v McKenzie Frank**,[15] where the Court of Appeal examined a similar provision in the Antigua and Barbuda Constitution. The Attorney General placed direct reliance Court's pronouncement: "The section operates to provide direct access to the High Court to any person who alleges personal violation of his or her rights." This reliance is indeed unfortunate and ignores the wider ambit, effect, interpretation and application of section 16.

[74] The Attorney General had also placed reliance on the decision of the CCJ in **Ya'axche Conservation Trust v Sabid** to buttress the argument that the claimants' case is academic or hypothetical. It is beyond dispute that a court has a discretion to decline to hear a purely academic matter. In the present case, it can hardly be said that the court is being called upon to decides a dispute between the parties and to pronounce on abstract or hypothetical questions of law where there is no dispute to be resolved.

[75] It was further submitted on behalf of the Attorney General that there was no feature of this case which required the court to rule on what was purely an academic matter. In the court's view, the Attorney General's reference to **Ya'axche Conservation Trust v Sabido**[16] where it was held that an academic appeal may be heard if it raises an issue of public interest involving a distinct or discrete point of statutory interpretation which has arisen in the past and may arise again in the future is indeed correct.

[76] The Attorney General appeared to have made much of the fact that the affidavit evidence on behalf of the claimants did not permit them to rely on the principles cited in **Ya'axche Conservation Trust**. It was reiterated that the affidavit evidence

[15] ANUHCVAP2018/0006
[16] (2014) 85 WIR 264

did not disclose that anyone including the claimants themselves have been charged pursuant to section 132 and 133 of the Criminal Code. Therefore, it was on that basis that the Attorney General maintained that the present claim for constitutional relief raised no live issue and that the court should decline to hear it.

[77] The Attorney General recognised however that in the cases of **Orozco v Attorney General**[17] and **Jason Jones v Attorney General**[18] the Claimants were held to have the standing to challenge laws similar to sections 132 and 133 of the Criminal Code. This was despite not having been charged for a breach of the respective laws. The Attorney General sought to make a distinction between these two cases and the present case by highlighting that those cases emanated from Belize and Trinidad and Tobago respectively. It appears that despite not being charged pursuant to any of the impugned laws the courts ruled that the claimants in **Orozco** and **Jones** had the requisite locus standi.

[78] The Attorney General buttressed its position on the basis of there being a significant difference between the constitutions of Belize and Trinidad & Tobago and Saint Lucia's Constitution; in that the former constitutions contained an express right to privacy including a right to personal and family life not expressly conferred by the Saint Lucia Constitution.

[79] It was contended on behalf of the Attorney General that unlike these jurisdictions Saint Lucia dis not have a free-standing right to privacy. The only mention of privacy and protection of family life is at section 1(c) of the Constitution. The Attorney General appeared to have discounted any notion that the provisions of section 1 of the Constitution created any enforceable rights.

[80] Ultimately, the Attorney General held steadfastly to the position that even if the approach to locus standi in the cases of **Jones** and **Orozco** was adopted in this

[17] [2020] 2 LRC501
[18] [2018] 3 LRC 651

instance, the claimants still had not demonstrated any breach of any provision of the Saint Lucia Constitution.

[81] Contrary to the arguments advanced by the Attorney General on this point, the claimants contended that the very nature of this case is a constitutional challenge to legislation which is action of the State through the Legislature. The Criminal Code is legislation promulgated by the State and the claimants allege that the legislation contravenes their rights under the Constitution. Further, the legislation is enforced by an arm of the State, the police and prosecuted by an arm of the State. The court in this instance subscribes to a similar view.

[82] The claimants took the view, relying on the decision of the Constitutional Court of South Africa in **National Coalition**, that the "symbolic effect of anti-sodomy laws is to state that in the eyes of our legal system all gay men are criminals". The Court concluded that, as a result of the criminal offence, homosexual men were "at risk of arrest, prosecution and conviction of the offence of sodomy simply because they seek to engage in sexual conduct which is part of their experience of being human."

[83] The claimants also placed reliance on **National Coalition** where the court reasoned that such criminalisation reinforces already existing societal prejudices and severely increases the negative effects of such prejudices on the lives of gay men even when these provisions are not enforced as they reduce gay men to "unapprehended felons" thus entrenching stigma and encouraging discrimination in employment and insurance and in judicial decisions about custody and other matters bearing on orientation.

[84] It was on the foregoing basis that the claimants adopted the posture that the very challenge to the legislation, in this case sections 132 and 133 of the Code, and which amounted to state action, is a proper subject of a claim for constitutional relief. The court is inclined to adopt a similar posture.

[85] The Attorney General relied ostensibly on the decision in **Maharaj v Attorney General**[19] in support of the proposition that constitutional motions must allege some contravention on the part of the state. They relied on the dicta of Lord Diplock giving the majority decision citing with approval the following statement by Phillips J.A in the Court of Appeal:

> "The combined effect of these sections in my judgment gives rise to the necessary implication that the primary objective of Chapter I of the Constitution is to prohibit the contravention by the state of any of the fundamental rights or freedoms declared and recognised by section 1."

[86] The Attorney General also relied on the following passage in Lord Diplock's judgment where he stated:

> "Read in the light of the recognition that each of the highly diversified rights and freedoms of the individual described in section 1 already existed, it is in their Lordships view clear that the protection afforded was against contravention of those rights or freedoms by the state or by some other public authority endowed by law with coercive powers. The Chapter is concerned with public law, not private law."

[87] No doubt the submissions made by the Attorney General on this discrete point is framed within the context of a clear exposition of the law. However, the Attorney General appears to fall into error by virtue of a misapplication of these principles in the context of modern constitutional jurisprudence that has evolved over the years as it pertains to the enforcement of rights guaranteed under the Constitution.

[88] To the contrary, the claimants submitted that first of all, a court should not adopt an overly narrow or legalistic interpretation of constitutional provisions dealing with fundamental rights guaranteed by the Constitution. They should instead adopt a generous interpretation to ensure that persons receive the full measure of the rights described in broad language in Chapter I (Protection of Fundamental Rights and Freedoms) of the Constitution.

[89] The court agrees with the claimant's submission that this principle was well articulated by oft cited dicta of Lord Wilberforce in the case of **Minister of Home**

[19] [1978] 2 WLR 902

Affairs v Fisher. A modern formulation of the principle is to be found in the judgment of Anderson JCCJ of the CCJ in **Attorney General v Cedric Richardson**[20] where his Lordship stated:

> "It was submitted on behalf of the claimants and with which this court concurs that the judiciary has long accepted that in interpreting human rights provisions the language of the Constitution should not be construed in a narrow and legalistic way but broadly and purposively so as to give effect to the spirit of the provisions and to avoid what has been called "the austerity of tabulated legalism."[21]

[90] The principles of constitutional interpretation espoused in **Fisher** obtained further elucidated further in the cases of **Nervais**, **McEwan** and **Severin** upon which the claimants relied to counter the arguments advanced by the Attorney General and upon which this court will ultimately place significant reliance.

The section 1 point

[91] The Attorney General appeared to have taken the view that the claimants' allusion to section 1 of the Constitution not being formulated as part of the rights guaranteed to them under sections 2 to 15 inclusive as provided by section 16 of the Constitution precluded them from seeking redress under section 16 as these rights were unenforceable rights under section 16. It would seem that the Attorney General's angst was with reference to the provisions of sections 1(a) and 1(c).

[92] Section 16 of the Constitution of Saint Lucia provides: (1) If any person alleges that any of the provisions of sections 2 to 15 inclusive has been, is being or is likely to be contravened in relation to him or her (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

[20] [2018] CCJ 17 (AJ)
[21] At para [146]

[93] In fine, the Attorney General argued that the claimants were not entitled to rely on the right to the protection of law guaranteed by section 1 of the Constitution because the section is a preamble and merely declaratory and did not confer any enforceable rights. The Attorney General relied on a line of authorities culminating in the most recent decision is **Newbold v Commissioner of Police & Ors**.[22] The argument advanced on behalf of the Attorney General that section 1 of the Constitution conferred no separate and independent or freestanding rights that could be relied upon to provide redress not available under the subsequent provisions of Chapter I of the Constitution.

[94] In the case of **Nervais**, the CCJ rejected the approach to section 1 adopted by the Attorney General in this instance.[23] The CCJ reaffirmed its position in previous cases and held, in a nutshell, that section 11 of the Barbados Constitution declares the entitlement of the fundamental and inalienable rights of the citizens of Barbados. Sections 12 – 23 afford protection to those rights and freedoms conferred by section 11 subject to such limitations of that protection as are contained in those provisions. The court is of the view that similar treatment ought to be given to section 1 of the Saint Lucia Constitution.

[95] The Attorney General's arguments relative to the exclusion of section 1 from section 16 of the Constitution was also explored in **Nervais**. The CCJ held relative to the Barbados Constitution that:

> "It is a general principle of constitutional interpretation that derogations from the fundamental rights and freedoms must be narrowly construed and there should be applied an interpretation which gives voice to the aspirations of the people who have agreed to make this document their supreme law should be applied. In the preambular context, the point was made that the people of Barbados have, over centuries, resisted attempts to derogate from those fundamental rights which they have entrenched in their written Constitution. This Court should give effect to the interpretation which is least restrictive and affords every citizen of Barbados the full benefit of the fundamental rights and freedoms."[24]

[22] (2014) 84 WIR 8
[23] At paras [22] – [37]
[24] At para [39]

[96] It was substantially on the foregoing basis that the CCJ found that section 11 of the Barbados Constitution, which substantially mirrors section 1 of the Saint Lucia Constitution, was separately enforceable.

[97] The Attorney General has argued that since the Claimants have not been charged with an offence under section 132 or 133 of the Criminal Code they cannot bring a claim. This is a challenge to the standing of the first and second named claimants.

[98] The claimants' arguments on this point has already been framed with the context of what has been described in these proceedings as "potential criminal liability. The claimants developed this argument in the manner hereinafter appearing.

[99] The court agrees with the claimants' contention that it is common for constitutional litigation in this and other spheres to be brought by an individual or a Non-Governmental Organisation even where there has yet to be any formal action against them, whether in the form of arrest, investigation or prosecution. It is equally common for a Government department or State to seek to meet such claims by suggesting that a claimant has no adequate standing to bring such a challenge in the absence of such action.

[100] The court also finds favour with the claimants' argument that the right to bring constitutional challenges despite the lack of enforcement action is particularly acute in relation to legislation criminalising forms of sexual behaviour. The criminal law, by its very existence, restricts what a person may do. By reaching into a sphere as intimate as sexual behaviour, the criminal law has an immediate and obvious impact on people's relationships and personal lives. The mere existence of a law which criminalises acts done consensually in private is a restraint on the activities of the individuals to which the law applies. Put simply, they only engage in those activities at the risk of prosecution.

[101] The claimants submitted that an absence of recent prosecutions provides no answer to this problem as in many cases there will not be a stated policy of non-prosecution by prosecuting authorities.[25] It was also submitted on behalf of the claimants that even where there might be such a policy it could not prevent a private prosecution from being brought.[26] The claimants argued that crucially, the mere existence of criminal sanctions against homosexual acts reinforces prejudices against homosexuals and therefore impacts directly on their lives. They must therefore be able to challenge such sanctions.

[102] The claimants also relied on the position in South Africa and Hong Kong, where it has been recognised that the existence of criminal sanctions against homosexual acts affects the "status, moral citizenship and sense of self-worth" of homosexuals, and that they must therefore have standing to challenge such sanctions.[27]

[103] Having looked closely at the claimants' affidavit and arguments fashioned in terms of "potential liability" the court was initially inclined to accept the Attorney General's argument that the claimants' complaint does not point to any action of the State but rather, on the other hand, points to a wider social attitude than to any concerted or organised activity of the State against the claimant or homosexuals in general.

[104] The Attorney General's argument that the complaint towards which the court must align its focus is towards the actions of the State and not the actions of private individuals at first blush seemed attractive. The Attorney General seemed to have adopted the posture that the mere allusion to the criminalisation of buggery part and parcel of the potential liability to criminal prosecution argument, is farfetched when analysed in the foregoing context.

[25] Dudgeon v UK; Norris v Ireland 1988 ; Modinos v Cyprus,
[26] Modinos v Cyprus at para 23
[27] National Coalition for Gay and Lesbian Equality v Minister of Justice, at paras 28, 107 and 163; Leung v Secretary of Justice53, paragraphs 29(3)

[105] The court disagrees with this argument for the reasons that follow and particularly in light of the arguments advanced on behalf of the claimants which are set out herein.

[106] In Belize in **Orozco v Attorney General**, as indicated by the Attorney General, the Belize Supreme Court was faced with the same argument and rejected it. The Chief Justice stated the following:

> "The question of standing emanates from section 20 which enacts the following: "20(1) If any person alleges that any of the provisions of sections 3 to 19 inclusive of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleged such a contravention in relation to the detained person), without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the Supreme Court for redress." The Claimant urged the Court to adopt a generous interpretation by accepting that, by virtue of the Claimant having averred that he is a homosexual male who engages in consensual homosexual activity in private, there is sufficient evidence.
>
> Having regard to the 1st Affidavit of Caleb Orozco, it is plain that by continuing to engage in sexual activity in breach of section 53 he perpetually runs the risk of being prosecuted. The statistics of Nicole Haylock showed the prosecutions are in fact brought however few, and this is confirmed by the interviews with ACP Aragon and Crown Counsel Trienia Young. I decline to accept the authority of R v H.M's Attornev General ex p. Rusbridqer [2003] UKHL 38 which speaks to proceedings brought against the Crown by a member of the public for a declaration.
>
> In the first instance decision of Naz Foundation v Government of NOT of Delhi 160 (2009) DLT 277, it is of note that a similar challenge was raised in respect of public interest litigation brought by an NGO challenging the criminalization of male homosexuality and it was held to be purely academic. On appeal, the matter was remitted for consideration of the merits.
>
> In Dudgeon v UK A 45 [1981] ECHR 7525/76, the European Court of Human Rights stated the following in its judgment in a reference made to the Court by a homosexual male in Northern Ireland: "In the personal circumstances of the applicant, the very existence of this legislation continuously and directly affects his private life; either he respects the law and refrains from engaging - even in private with consenting male partners - in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes

> liable to criminal prosecution." This dictum encapsulates the situation in which the Claimant finds himself and I gratefully adopt the words.
>
> As I see it, section 20(1) is open to the interpretation that the Claimant can be taken as being an "unapprehended felon(s) in the privacy of (his) home" (see Tan Eng Hong v Attornev General [2012] SGCA 45 (at paragraph 184) and labours under the apprehension that he may be prosecuted. In that case, the Singapore Court of Appeal rejected the proposition that a violation of constitutional rights can only be shown by a subsisting prosecution. On this reasoning, I am fully content to hold that the Claimant enjoys the requisite standing to bring the claim for constitutional redress."[28]

[107] The Attorney General sought to distinguish **Orozco** and **Jones** on the basis that the Courts in those jurisdictions found a breach of a right to privacy which the Attorney General submitted is not present in Saint Lucia. This argument, say the claimants, is wholly misleading as in those cases, the Court's found that the law infringed more than the right to privacy including, the right to freedom of expression and prohibition against discrimination which are present in the Constitution of Saint Lucia and are live issues before this Court.

[108] The court pauses to state emphatically, that the Attorney General's argument relative to the section 1 issue makes an artificial distinction concerning the application of the various constitutions. As has already been noted, this issue of the declaratory nature of section 1, in the court's view has already been put to rest by the decisions in **Nervais** and **Severin**. The point is merely moot and there appears to be no need to elucidate and explore it further at this stage.

[109] It is for this reason that the court is inclined to find that the claimants have sufficient interest to challenge laws which criminalise homosexual conduct. Whether or not they are enforced, the mere existence of sections 132 and 133 infringe their rights. In other words, it is the law itself which violates their constitutional rights. They do not have to await prosecution under those sections to experience a violation.

[28] At paras [46] – [50]

[110] In the court's view, the claimants have correctly and rightfully argued that section 3 of the Constitution prohibits the deprivation of personal liberty, save as may be authorised by law in the cases listed in the sub-sections of section 3. It is the Claimants' case that the right to liberty is multi-faceted and includes the right to choose a sexual or intimate partner and to engage in consensual sexual intercourse with anyone of one's choosing and, in any way, one wishes.

[111] The claimants, in the court's view, having correctly described the claim here as pertaining to the question of sexual autonomy. The court accepts the claimants' submission that the right to liberty goes beyond mere freedom from physical restraint or detention and includes the protection of decisions of fundamental importance and it includes and protects inherently private choices, free from undue influence, irrational and unjustified interference by others. That matters of personal intimacy and choice are central and key to personal liberty and autonomy and that it is not the business of the law to choose for a person their intimate partner.

[112] This principle of sexual autonomy was eloquently stated in the case of **Johar and Ors v Union of India**[29], where Misra CJ said:

> "The sexual autonomy of an individual to choose his/her sexual partner is an important pillar and an insegregable facet of individual liberty. When the liberty of even a single person of the society is smothered under some vague and archival stipulation that it is against the order of nature or under the perceptions that the majority population is peeved when such an individual exercises his/her liberty, despite the fact that the exercise of such liberty is within the confines of his/her private space, then the signature of life melts and living becomes a bare subsistence and resultantly the fundamental right of liberty of such an individual is abridged."

[113] In **Motshidiemang v Attorney General**,[30] Leburu J also held that sexual orientation is innate to a human being. It is not a fashion statement or posture. It is an important attribute of one's personality and identity; hence all and sundry are entitled to complete autonomy over the most intimate decisions relating to personal life,

[29] 2018 SC 4321
[30] [2019] 4 LRC 507

including choice of a partner. The right to liberty therefore encompasses the right to sexual autonomy.

[114] The court is in agreement with the submission that section 133 of the Criminal Code abridges the rights of homosexual men to have sexual intercourse in the way of their choosing and with the partner of their choice and therefore infringes their right to liberty. A law which prohibits anal sexual penetration abridges a homosexual man's right to choose a sexual intimate partner. However, the impugned provisions force him to engage in private sexual expression not according to his orientation; but according to statutory dictates. Without any equivocation, his liberty has been emasculated and abridged.[31]

[115] The court accepts as an adequate description that sections 132(2) and 133 of the Code infringe the rights of homosexual couples by dictating the kind of intimate sexual acts they may engage in consensually and in private. They together constitute an all-out assault on the personal autonomy of members of the public. They both violate section 3 of the Constitution.

[116] Section 10(1) guarantees the enjoyment of freedom of expression. Section 10(2) provides examples of what freedom of expression entails but makes no attempt to limit the wide ambit of the right. It says that freedom of expression 'includes' the things thereafter listed. It does not say that freedom of expression is limited to those things. Freedom of expression is a critical ingredient for individual self-development and fulfilment. It extends to forms of expression that might be regarded as offensive to some. It also extends to conduct as a form of expression and is not limited to the verbal or written expression or communication of ideas.

[117] In **McEwan**, the CCJ accepted this extension of ambit of the right; their Lordships expressed the following view:

> "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

[31] Per Leburu J in Motshidiemang v AG

> 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.
>
> These conclusions are not novel. The Indian Supreme Court in National Legal Services Authority v Union of India reached a similar determination when it held that expression of one's identity through words, dress, action or behaviour is included in the right to freedom of expression under the comparable Article of the Indian Constitution. Other courts have also arrived at similar conclusions."[32]

[118] In **National Coalition**, the South African Constitutional Court noted that sexual conduct not only constitutes a form of expression, but one directly linked to the right to privacy. In the premises, it is follows axiomatically that sections 132 and 133 of the Criminal Code violate the right to freedom of expression guaranteed by section 10 of the Constitution.

[119] The Claimants' case is that sections 132 and 133 of the Criminal Code violate their right to equality of treatment by discriminating against homosexual men in the case of section 133 and homosexual men and women in relation to section 132. It therefore violates their rights not to be discriminated against on the basis of their sex which when properly construed includes sexual orientation. A person's right not to be discriminated against on the basis of their sex is infringed when he or she is discriminated against on the basis of his or her sexual orientation or sexual preference.

[120] The claimants expressed the view that it is the undeniable reality that a biological male is likely to be discriminated against because he does not conform to expectations of how a man should behave, and that this would inevitably amount to discrimination on the basis of sex. The claimants argued that the impugned provisions, by prohibiting sexual conduct between homosexual males because they do not conform to societal expectations of sexual behaviour and defy gender

[32] At paras [76] – [77]

stereotypes are perceived and labelled as persons who have stepped out of line with perceived gender stereotypes.

[121] It is beyond peradventure that section 133 only applies to homosexual males while section 132 only applies to consenting heterosexual adults. The sections therefore plainly target persons on the basis of their sexual preferences. Therefore, it was on the foregoing basis that the claimants lamented the discrimination caused to the LGBTQ community as a whole by virtue of challenged provisions which they say is in breach of section 13 of the Constitution.

Discussion

[122] For the avoidance of doubt it is not the role of the court to adjudicate on the arguments in the public domain on the meaning of "gender" or "sex", nor is it to define the meaning of the word "woman" or "man" or "male" and "female" other than when it is used in the provisions of sections 132 and 133 of the Criminal Code and sections 1 and 13 of the Constitution. The Court has a more limited role which does not involve making policy.

[132] The principal question which the court seeks to address on this motion is the meaning of the words which Parliament has used in the provisions of the Criminal Code in legislating to prohibit buggery and gross indecency between consenting homosexual males and consenting homosexual females. The Court's task is to see if those words can bear a coherent and predictable meaning within the context which is consistent with the Constitution. The question for this court is a matter of statutory interpretation.

[133] The terminology used in the Constitution is "sex". The provisions of the Criminal Code refer to "man" and "woman" or "male" and "female". In the court's view, these words can readily be taken within the context of "biological male" and "biological female". Neither the Constitution nor the Criminal Code make reference to the terminology "sexual orientation" or "sexual identification" or "gender identification" or "sexual identity". Also, there is no legislative scheme which alludes to or makes

provision for any of these terminologies. In the premises, the court concludes that neither the Constitution nor any legislative creature of Parliament has created a "separate category" of protected persons.

[134] Therefore, the court's main concern in these proceedings is the question of whether the provisions of the Criminal Code in their current formulation where it uses the terminology "man" and "woman" or "male" and "female" infringes the rights guaranteed to the claimants and other homosexual and trans-sexual persons under sections 1, 10 and 13 of the Constitution and by implication whether the abrogation of such rights guaranteed to them is reasonable in a democratic society.

[135] The court's analysis clearly must involve the interpretation of the provisions of sections 132 and 133 of the Criminal Code. The general approach to statutory interpretation in this jurisdiction is well established.

[136] The courts in conducting statutory interpretation are 'seeking the meaning of the words which Parliament used'.[33] More recently, Lord Nicholls of Birkenhead stated: 'Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context'.[34]

[137] Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained.

[138] Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory

[33] Black-Clawson International Ltd v Papierwerke Waldhof Aschaffenburg AG [1975] AC 591, 613 per Lord Reid of Drem

[34] (R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd [2001] 2 AC 349, at 396

words which are being considered. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.

[139] Where the statute did not contain any express words that abrogated a constitutional right, the question arises whether there was a necessary implication to that effect. The test to be applied in those circumstances involves distinguishing between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably would have included and what the express language of the statute clearly shows that the statute must have included: A necessary implication is a matter of express language and logic not interpretation. This test has been applied to the provisions of sections 132 and 133 when considering their meaning and what they were intended to achieve.

Court's approach to the constitutional question

[140] If the court were to find that sections 132 and 133 of the Code are existing laws for the purposes of section 2 of the Constitution Order and that once it is found to be existing law for the purposes of section 2, the question is whether it infringes the provisions of sections 1, 10 and 13 of the Constitution becomes irrelevant.

[141] The purport and effect of section 2 is that it saves or preserves existing law from invalidation by anything contained in Chapter 1 of the Constitution. That even if sections 132 and 133 of the Code were not existing laws they were enacted in accordance with section 2 (4) of Schedule 2 and sections 40 and 47 of the Constitution, therefore the claimants had to show demonstrably that the sections of the Code sought to be impugned fell within the provisos to sections 1, 10 and 13 of the Constitution. The claimants are required to discharge that burden. The question therefore is whether the claimants in this case have discharged that burden.

[142] It follows therefore, that the question which also arises is whether the Code repealed and re-enacted the offence of buggery as it existed prior to the coming into operation of the Constitution and whether it repealed and re-enacted the Criminal Code 1992. Put simply, whether the Code was a wholly new piece of legislation which altered the existing law.

[143] If the question is answered in the affirmative, then it puts the Code completely outside the protection of section 2(1) of the Constitution Order. Therefore, even though it had been passed pursuant to section 40 of the Constitution or section 2(4) of the Constitution Order, sections 132 and 133 are subject to scrutiny by the High Court for infringement of sections 1, 10 and 13. Section 40 is subject to the provisions of the Constitution.

[144] Section 120 of the Constitution proclaims the Constitution as the Supreme Law of Saint Lucia and expressly provides:

> "This Constitution is the supreme law of Saint Lucia and, subject to the provisions of section 41, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."

[145] The ratio in **Matthew v The State**[35] was that an existing law although it infringed the provisions of Chapter 1 rights under the Constitution remained valid and subsisting despite that infringement. The decision in **Matthew v The State** was reaffirmed by the decision of the JCPC in **Chandler v The State**[36] where they held that section 6(1) of the Trinidad and Tobago Constitution as a savings clause for existing law was not merely a transitional provision which had become spent.

[146] It was held in **Trinidad Island Wide Cane Farmers Association Inc. and The Attorney General v Prakash Seereeram**[37] that an amendment which substantially changed the nature and character of an existing law excluded the amended law from protection of the savings provision.

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[35] 2005] 1 AC 433; Roodal v The State of Trinidad and Tobago [2005] AC 328
[36] [2002] UKPC 19
[37] [1975] 27 WIR 362

[147] It has already been established that the existing law at the time of the coming into operation of the Constitution was the Criminal Code Chapter 250 of the Revised Laws of Saint Lucia 1957. The question which the court has earlier alluded to was whether the provisions of sections 132 and 133 of the Code altered the existing law. Section 241 of the Criminal Code Chapter 250 later appeared as section 241 of the Criminal Code 1992. The Criminal Code 1992 was repealed and replaced by the Code which enacted section 133.

[148] It is worthy to note that neither the Criminal Code Chapter 250 nor the Criminal Code 1992 contained a provision akin to section 132 which created the offence of gross indecency. Therefore, the question becomes whether either section 132 or section 133 or both of them fell to be considered as existing law within section 2 of the Constitution.

[149] The answer relative to section 132 is straightforward, no question of whether section 132 altered existing law. It was clearly a new enactment which created an offence not previously known to the criminal law. Therefore, section 132 is not immune to scrutiny by the High Court with respect to its constitutional propriety.

[150] It remains to be decided whether section 133 repealed and reenacted sections 241 and 242 of the Criminal Code Chapter 250 without alteration or modification; and if the answer is that section 133 did repeal, reenact and alter the provisions of Chapter 250, did those alterations derogate from the claimants' Chapter 1 rights in a manner greater than Chapter 250? If the alterations derogated further than the provisions of Chapter 250 did, then sections 2 (1) and (2) of the Constitution do not apply (that is section 133 is not saved by sections 2(1) and (2)). If it does then the provisions of the existing law will have to be substituted.

[151] In the premises, the further derogation is subject to the proviso contained in sections 1, 10 and 13 as to whether it is reasonably justifiable in a democratic society. If shown not to be reasonably justifiable then on one view the provisions of the existing law are still to be substituted.

[152] Another question which arises in the context of section 124 of the Constitution is whether section 133 of the Code repealed and reenacted sections 241 and 242 of the Criminal Code Chapter 250; and if yes, did section 133 of the Code "alter" it as that term is defined in section 124(13).

[153] At first blush, the Code is a totally new and comprehensive piece of legislation which repealed and replaced the provisions of the Criminal Code Chapter 250 and the Criminal Code 1992 as it related to buggery offences. However, upon closer examination of both statutes it would appear that the Code repealed and reenacted the provisions of both the Criminal Code Chapter 250 and the Criminal Code 1992 with modifications which included making provisions with respect of them, such as to fall within section 2 (2) of the Constitution.

[154] The term "replace" suggest a complete change in law. However, is this really the case? In the court's view, the previous sections of the Criminal Code Chapter 250 and the Criminal Code 1992 related to the crime of buggery were reenacted with modifications which did not include stiffer penalties in the case of the Criminal Code Chapter 250 – the penalties remained the same as under the section 241 of the Criminal Code 1992. In the case of section 133 it appears to have excluded heterosexual couples from the crime of buggery by virtue of the definition of buggery contained in section 133(3).

[155] Upon closer inspection section 241 and section 133 are not exactly dissimilar. Section 241 refers to "unnatural connection" and unnatural carnal knowledge" whereas section 133 refers to "buggery". The two terms refer to the same act although using distinct terminology. The comparable provisions in each of the Codes makes the act of anal sex a crime. Each piece of legislation contemplates the commission of the same crime. However, section 133 unlike its predecessor which created an absolute and general prohibition against the act of buggery, only creates a prohibition relative to homosexual men.

[156] The mischief that the previous Criminal Codes was directed at was the act of buggery, no doubt founded on the religious or moral doctrine that anal sex even

within marriage was unnatural and sinful or otherwise morally blameworthy. Homosexual men were not the primary target. These previous legislative provisions did not distinguish between public and private acts. The prohibitions were directed at the act of buggery or unnatural connection rather than the targeting of homosexual men. It appears, in the court's considered view that they applied to both homosexual men and heterosexual people. It is the court's view that section 133 of the Code repealed and reenacted the offence of buggery with modifications. Although keeping the same sentences for the offence of buggery, it seemed to have exempted its application to heterosexual couples.

[157] Section 132 created the offence of gross indecency which hitherto did not exist as a substantive offence under the previous Codes. Section 132 in its present formulation exempted from the offence of gross indecency acts of gross indecency committed in private between an adult male and an adult female both of whom consent. The complaint made by the claimants is that section 132 appears to target homosexual men and homosexual women. In the court's view, section 132 impliedly prohibits or may be construed as prohibiting acts of gross indecency between adult homosexual males and adult homosexual females who consent.

[158] The enactment of section 132 did not amount to an alteration by way of modification made to existing law. To that extent it did not abolish any previously existing offence but instead created a new offence. Therefore, there is no question of amendment, revocation, with or without reenactment thereof or the making of different provisions in lieu thereof; of modifying it whether by omitting or amending any previous provisions or inserting additional provisions or otherwise as contemplated by section 124(13) of the Constitution.

[159] The changes to the existing criminal legislation made by the Code relative to section 133 are modifications made to existing law. The relevant question therefore is whether or not these alterations or modifications derogated any further, or at all, than the existing law did in relation to the fundamental rights of homosexual persons.

[160] The term derogation can readily be interpreted to mean infringement by section133 of the Code in which case section 133 falls to be scrutinised under Chapter 1 and section 120 of the Constitution.

[161] The court has given consideration to the question whether any infringement by section 132 and 133 of the Code is greater than that of the provisions of Chapter 250. Section 120 has two features. First there must be a finding that the succeeding enactment derogates from the fundamental right to a greater extent than the existing law did. Second, the enactment is subject to sections 40 and 41 of the Constitution. That is the power of Parliament to make laws and to alter the provisions of the Constitution which would make the enactment constitutional.

[162] Any override pursuant to section 41 renders it unnecessary to substitute the old law provision. However, there is the proviso that the enactment must be reasonably justifiable in a democratic society. 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 120.

Discussion

[163] In **McEwan and Ors v The Attorney General of Guyana**, the CCJ examined as a preliminary issue of where a pre-independence law is alleged to be contrary to the fundamental rights laid out in the Constitution. In our present context it concerns the question whether sections 132 and 133 are "existing laws", and, if they are, whether they are therefore immune from judicial scrutiny.

[164] Although the Attorney General did not frame its objections to the claimants' case specifically on this ground, it is crucial for the court in this instance to deal with this issue in so far as it affects the constitutionality of the impugned sections of the law. The argument that section 133 of the Code infringes the claimants' constitutional rights can be countered seemingly on the basis that the section is nonetheless part of a protected law; a law preserved and protected by a "savings law clause.

[165] It appears to the court that this discussion is fueled by the perception that indubitably what section 241, and its successors sections 241 of the 1992 Code and section 133 of the Criminal Code intended to achieve was the absolute proscription against buggery. This perception in the court's view is fallacious. That may have been the intention behind section 241 of the Criminal Code Chapter 250; which to large extent was preserved by the provisions of section 241 of the Criminal Code 1992.

[166] However, section 133 of the Criminal Code 2005 in large measure criminalised buggery between consenting homosexual adult males while decriminalising it in the case of consenting heterosexual couples. Therefore, for all intents and purposes, section 133 is not an existing law within the meaning of section 2 of the Constitution Order. Therefore, it is not impervious to constitutional review it not having been saved under the transitional provisions in the Constitution Order.

[167] As the CCJ opined in **McEwan**, the conventional view was that the general savings clause was included in independence constitutions for a limited purpose only, that of securing an orderly transition from colonial rule to independence. The CCJ commented that "After more than 50 years of independence it is quite a stretch to say that Guyana (or indeed any other independent Commonwealth Caribbean state) is still in that transition phase." The CCJ also commented in **McEwan**, that the broad effect of the savings clause, read literally by many, is that these human rights, so carefully laid out in the Constitution, must give way to the dictates of a pre-Independence law until and unless the legislature amends the pre-independence law.[38]

[168] This court shares the same views expressed by the CCJ in **McEwan** relative to the savings provisions in the Saint Lucia Constitution where the court made the following commentary:

> "Until this Court's recent decision in Nervais, it has been the conventional wisdom that the savings clause completely immunised pre-independence laws from being held to be in contravention of the human rights laid out in the Constitution. The courts below adopted the conventional wisdom. They

[38] At para [37]

> held that the cross-dressing law was an existing law and was therefore "saved" from constitutional challenge; that Article 152 of the Constitution barred the court from declaring section 153(1)(xlvii) to be inconsistent with anyone's fundamental rights.
>
> 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.[39]

[169] The CCJ in **McEwan** gave useful guidance on the interpretation of the savings law clause in the determination of the constitutionality of legislative provisions.[40] The CCJ in assessing the approach taken relative to the savings law clause by the courts below in **McEwan** opined:

> "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."[41]

[170] The CCJ espoused the following approach in **McEwan** which is accepted and adopted by the court in this instance:

> "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."[42]

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[39] At paras [38] – [39]
[40] At paras [42] – [46]
[41] At para [48]
[42] At para [49]

Can sections 132 and 133 pass the test of constitutionality?

[171] Where legislation affects rights such as freedom of thought and expression and the enjoyment of property, they become qualified rights which might be limited, either by general legislation or in the particular case. However, that qualification or limitation must pursue a legitimate aim which must also be proportionate to it. It is for Parliament in the first instance to strike the balance between individual rights and the general interest. Whereas the courts might on occasion have to decide whether Parliament had achieved the right balance, there is the requirement that the balance which Parliament had struck in terms of sections 132 and 133 of the Code was justifiable and consistent with the Constitution.[43]

[172] Sections 132 and 133 of the Code do impinge upon freedom of expression and the right to privacy and go further in doing so than section 241 in Chapter 250 and the 1992 Code. It in fact does go further, by expressly and impliedly excluding heterosexual couples from its ambit. It cannot be said their enactment brought the law into conformity with all modern human rights instruments, which include sex or gender among the prohibited grounds of discrimination.

[173] The claimants argued that having shown that there is a breach of the rights to liberty, nondiscrimination, privacy and freedom of expression, the burden shifts to the Attorney General to show that restriction on those rights fall under acceptable limitations. The rights guaranteed by section 1 of the Constitution are expressed to be "subject to respect for the rights and freedoms of others and for the public interest." Section 10(2) provides that: Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision – a. that is reasonably required in the interests of defence, public safety, public order, public morality or public health. There is a similar provision in section 13(4)(d).

[43] Suratt v The Attorney General [2007] 71 WIR 291 at para 53

[173] It is settled law that once the claimants prove a prima facie infringement of a constitutional right the burden then shifts to the State to establish the infringement is justified. Any restrictions imposed on the freedom of expression must be restrictions which were reasonably required for the protection of the public or in the public interest and must be reasonably justifiable in a democratic society. It is the court's view that sections 132 and 133 did not satisfy the criterion of being reasonably required for the protection of the public interest, that is, for public safety, public order, public morality or public health.

[174] That even if sections 132 and 133 of the Code could be said to satisfy the criterion of being reasonably required in the public interest, they would not have satisfied the criterion in those constitutional provisions of being reasonably justifiable in a democratic society. This is the case because the quality of reasonableness in that criterion being infringed by arbitrary or excessive invasion of a guaranteed right.

[175] To determine whether or not a limitation was arbitrary or excessive it was necessary to consider whether the legislative intent was sufficiently important to justify limiting the right, whether the measures to effect the legislative intent were rationally connected to it, and whether the means used to limit the right were no more than was necessary. Even though sections 132 and 133 of the Code could be viewed as satisfying the other criteria of reasonableness, it was otiose on the ground of being disproportionate in that they distinguished between classes of individuals as to the restraints imposed on freedom of expression and the right to privacy.[44]

[176] In the end, however, the question for the court is the objective one, that is, whether in excluding heterosexual couples, sections 132 and 133 of the Code are provisions that are reasonably required for the purpose of protecting the rights and freedoms of other persons. If that is shown, the onus falling on those who support the exclusion, the burden will shift to the claimants to show in terms of the proviso to

[44] de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing (1998) 53 WIR 131

the constitutional provisions that they are not reasonably justifiable in a democratic society.[45]

[177] In **Worme and Anor v Commissioner of Police**,[46] the Privy Council, relying on the decision in **Cable and Wireless (Dominica) Ltd v Marpin Telecoms and Broadcasting Co Ltd**[47] held that it is common ground that the crime of intentional libel constitutes a hindrance to citizens' enjoyment of their freedom of expression under s 10(1) of the Constitution. It was therefore necessary for the respondent to show that the provisions of the Code are reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons. If that is established, the burden shifts to the appellants to show, in terms of the last limb of s 10(2), that the provisions are not reasonably justifiable in a democratic society.

[178] Therefore, the onus is on the legislature, or the party relying on the legislation, to establish the justification, and not for the party challenging it to show that it was not justified. It is also incumbent on the state to justify the law with evidence.

[179] The burden therefore rests on the Attorney General to establish that sections 132 and 133 of the Criminal Code are required in order to accord respect for the rights and freedoms of others and for the public interest and/or are reasonably required in the interests of defence, public safety, public order, public morality or public health. The state must meet the requirements by providing evidence that the law had a legitimate goal, was rationally connected to a legitimate goal and proportionate in meeting that goal.

[180] The Attorney General has not argued that section 132 and 133 of the Code are reasonably required in the interests of defence, public safety, public order, public morality or public health or in order to accord respect for the rights and freedoms of others and for the public interest. If therefore this Honourable Court is persuaded

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[45] Cable and Wireless (Dominica) Ltd v Marpin Telecoms and Broadcasting Co Ltd (2000) 57 WIR 141

[46] (2004) 63 WIR 79 at para [41]

[47] (2000) 57 WIR 141

that section 132 and 133 infringe sections of the Constitution the next question is what relief ought to be granted.

[181] Having already indicated its expressed its agreement with the submissions advanced by the claimants, the court must now to the question of whether sections 132 and 133 of the Code pursue a legitimate aim and are the limitations placed on the rights of the claimants proportionate to it.

[182] In the court's view, the legislative intention behind sections 132 and 133 is to prohibit and deter acts of indecency between homosexuals and to prohibit and deter the commission of buggery between adult males who consent whether committed in private or otherwise. It is an absolute prohibition against homosexual acts which section 133 espouses.

[183] The court is unable to see how prohibition and deterrence can be successful relative to acts that take place in private and performed in the home between two consenting adult males or two consenting adult females. It is simply impossible to police or enforce without any complaint being made. Detention and punishment is clearly the hallmark of any such policy. It is inconceivable that deterrence can occur short of the police entering the home by force. In the case of consenting adult males and consenting adult females or even against homosexual males, it is unclear what would give rise to reasonable suspicion that buggery or gross indecency has been occurring to enter the home. As between consenting adult females and males there would be no complaint. The same can be said for consenting males. Therefore, if the aim is to punish and deter, it is an outright dismal failure.

[184] If on the other hand the aim is morality then 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. However, as repugnant as it may be to many, it is a question of choice. Should such morality be imposed upon those who chose the unnatural or the sinful? Are they to be judged by that moral or religious standard? The limitations imposed by the impugned sections can hardly be said to be necessary in the pluralistic societies in which we live. How can the law rationally

determine the extent to which an individual's moral compass can be extended? Morality is something which is innate.

[185] It may arguably be possible to control individual action by the imposition of laws which provide sanctions for actions which part of society may deem immoral. However, it is impossible for the legislature to control what exist in the hearts and minds of individual citizens. To that extent it cannot be said that the existence of laws formulated in terms of sections 132 and 133 can achieve any rational objective in modern society.

[186] Free choice is a basic democratic right. While it is not absolute, it means that citizens are to be left to their choices and are to be free to choose to go to eternal damnation if they wish. Choice is not to be imposed upon them. It means therefore, 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 chose to indulge in acts of gross indecency or sodomy, however repugnant it may be to many.

[187] 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 interference with these rights are disproportionate. The stiff penalties and the clear and deliberate targeting of homosexual men and homosexual women puts the enactment of section 132 and the modification of section 133 made by the Code beyond the degree of derogation by the process of enactment.

[188] It appears, in the court's view that the criminalisation of homosexual conduct may also have the tendency to deprive homosexual individuals of their right to the protection of law. It is not inconceivable that public humiliation, vilification and even physcial attacks on homosexuals would be a concomitant effect of the stigmatisation created by the criminalisation of such conduct. It can hardly be said that such eventualities are in keeping with the dignity of certain categories of citizens and are in accordance with evolving standards of decency in a free and democratic society.

[189] As the court has already pointed out, the question that must be answered is whether the legislation in question strikes an acceptable balance between the rights and freedoms of individuals and the general interest of the community. In other words, whether the provisions of sections 132 and 133 of the Criminal Code strike an acceptable balance between the rights and freedoms of individuals and the general interest of the public. The court is inclined to answer this question in the negative.

[190] The court accepts and takes into account the great weight to be attached to the legislature's judgment regarding the importance of the public interest. However, in the court's considered opinion, it is difficult to see or to conceptualise the benefit to the public interest in criminalising behaviour which is largely undetectable and undetected. Therefore, the proscriptions, presumptions and penalties imposed by the provisions of sections 132 and 133 are in large measure futile; which leads the court to the conclusion that they are not reasonably justifiable in a democratic society.

[191] In the premises, it seems that the reenactment and ultimately the modifications created by section 133 of the Criminal Code derogated from the fundamental rights in a manner far greater than its predecessor did. Whereas section 241 of Chapter 250 and section 241 of the 1992 Code created a general proscription against buggery. Section 133(3) created a specific prohibition targeted specifically at consenting homosexual persons.

[192] Likewise, having accepted that the provisions of section 132 did not reenact, amend or modify existing law, but instead created new offences, and accordingly is not saved by the provisions of section 2 of the Constitution Order, it is the substance of section 132 that the court must interrogate. The label placed on the enactment is immaterial, it is the substance and effect of the enactment which is critical. Section 132(2) by implication includes the operation of section 132(1) in the case of acts committed in private between consenting adult homosexual persons while excluding acts committed in private between consenting heterosexual persons.

Orders and declarations sought

[193] The court being satisfied that sections 132(2) and 133 of the Act are in breach of the Constitution, then section 132(2) and 133 must prima facie be declared void to the extent of their inconsistency. The question is whether it is possible to sever the inconsistent parts from sections 132(2) and 133 and so avoid striking down the provisions altogether.

[194] The classic test of severability continues to be that stated by Viscount Simon **in Attorney General for Alberta v Attorney General for Canada**[48]:

> "The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all."

[195] The CCJ in **Attorney General of Belize v Zuniga**,[49] explored at length the doctrine of severance, that is, the power of the Court to sever such offending parts of impugned laws to bring such provisions in conformity with the Constitution:

> "In mandating that a law inconsistent with the Constitution is void to the extent of its inconsistency, the Constitution sanctions the principle of severance and encourages its exercise where possible. When faced with a statute that contained material that is repugnant to the Constitution the Court strives to remove the repugnancy in order, if possible, to preserve that which is not."

The Court continued:

> "In performing the exercise of severance the court has no remit to usurp the functions of Parliament. Assuming severance is appropriate, the aim of the court is to sever in such a manner that, without re-drafting the legislation, what is left represents a sensible, practical and comprehensive scheme for meeting the fundamental purpose of the Act which it can be assumed that Parliament would have intended … The Court seeks to give effect, if possible to the legitimate will of the legislature, by interfering as little as possible with the laws adopted by Parliament … Striking down an Act frustrates the intent of the elected representatives, and therefore, a court should refrain from invalidating more of the statute than is necessary…"

[48] [1947] AC 503
[49] [2014] 5 LRC 1

[196] Respectfully, it is not possible to sever the objectionable parts of section 133. The section is constitutionally offensive because it is overbroad. It applies to the acts of consenting male adults committed in private. There are no words in section 133 which could be severed to remove the offending parts. The section in its entirety must go. Section 132 applies to the acts of same-sex consenting adults committed in private. There are no words that could be severed to remove the offending parts without striking down the provision in its entirety.

[197] The question put simply is whether the provisions of sections 132 and 133 can be modified pursuant to section 2 of Schedule 2 to the Constitution Order. The purport and effect of section 2 of the Constitution Order was discussed at length in **Nervais**.[50]

[198] The relief sought by the claimants in this instance is consonant with the observations made by the CCJ in **Nervais**. In **Nervais**, the CCJ said:

> "Section 4 (1) of the Independence Order prescribes a mandatory direction to construe the existing laws to bring them into conformity. The method of bringing into conformity is not limited to modification and adaptation, but it includes the wide powers of qualifications and exceptions. No existing law is excluded from the requirement of being brought into conformity. The Constitution is the supreme law and the laws in force at the time when it came into existence must be brought into conformity with it. Of course, in exceptional cases a court must be sensitive to the warning in San Jose Farmers' Co-operative Society Ltd v Attorney General that where the nature of the inconsistency with the Constitution is such that it cannot be modified without a usurpation of the legislative power it should leave that task to the legislature."[51]

[199] In answering the question posed by the court herein, the court is swayed by the conclusion arrived at by the CCJ in **Nervais**:

> "…Where there is a conflict between an existing law and the Constitution, the Constitution must prevail, and the courts must apply the existing laws as mandated by the Independence Order with such modifications as may be necessary to bring them into conformity with the Constitution. In our view, the Court has the duty to construe such provisions, with a view to harmonizing them, where possible, through interpretation, and under its

[50] At paras [60] et seq.
[51] At para [63]

> inherent jurisdiction, by fashioning a remedy that protects from breaches and vindicates those rights guaranteed by the Bill of Rights."[52]

[200] The claimants have, in the court's view, made out a case for the modification of the provisions of sections 132 and 133 of the Code. The modification of section 132 appears relatively less problematic. However, there appears to be some difficulty with the suggested modification to section 133 which the claimants seek.

[201] The legislative intent of section 132 of the Code was to prohibit acts of gross indecency as defined by the provision itself where such acts were committed without consent or by force and against persons who had not yet attained adulthood and were therefore incapable of giving their consent. Likewise, it appears that the legislative intent behind section 133 was not only primarily to prohibit anal intercourse between consenting adult males but also to prohibit the commission of such acts against nonconsenting persons including persons who had not attained adulthood and the commission of the act of sodomy by force.

[202] Assuming that this was the legislative intent behind sections 132 and 133, then it would seem irrational and perhaps absurd to decriminalise such acts only as between consenting heterosexual couples when committed in private. The legislative intent behind this exclusion seems illusive or otherwise inexplicable. The exception relative to acts committed "in private" may properly be justified on the grounds of the preservation of public morality and decency.

[203] The claimants have suggested that section 132 be modified to the extent that the provisions of section 132(2) be modified by reading the section as if the words "an adult male person and an adult female person" were deleted and replaced with the words "persons". Therefore, the section when modified would read: "Subsection (1) does not apply to an act of gross indecency committed in private between adult persons both of whom consent." By this method the legislative intent is maintained while avoiding constitutional impropriety.

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[52] At para [68]

[204] It has also been suggested that section 133 of the Code be modified to the extent that the provisions of section 133(3) be read as if the words "except where it occurs in private between consenting persons each of whom is 16 years of age or more" were added to the section. Therefore, the modified section 133(3) would read: "In this section "buggery" means sexual intercourse per anus by any person with another person except where it occurs in private between consenting persons each of whom is 16 years of age or more. In the court's view, such modification would bring the provision into conformity with the Constitution and avoid striking down section 133 in its entirety without the effect of frustrating the legislative intent.

Order

[205] In light of the reasons which the court has given in this judgment, the court makes the following declarations and orders and grants the following relief:

(1) The court declares that sections 132 and 133 of the Criminal Code infringe the claimants' right and the rights of LGBTQ persons to the protection of the law guaranteed by section 1(a) of the Constitution.

(2) The court also declares that sections 132 and 133 of the Criminal Code infringe the claimants' right and the right of LGBTQ persons to privacy guaranteed by section 1(c) of the Constitution.

(3) The court also declares that sections 132 and 133 of the Criminal Code infringe the claimants' rights and the right of LGBTQ persons to life, liberty and security of the person guaranteed by section 1(a) of the Constitution.

(4) The court also declares that the provisions of sections 132 and 133 of the Criminal Code infringe the claimants' right and the right of LGBTQ persons to freedom of expression guaranteed by sections 1(b) and 10 of the Constitution.

(5) The court further declares that sections 132 and 133 of the Criminal Code infringe the claimants' right and the right of LGBTQ persons to non-discrimination on the basis of sex guaranteed by sections 1 and 13 of the Constitution.

The court having determined that the provisions of sections 132 and 133 of the Criminal Code are inconsistent with the constitutional provisions mentioned above, is of the view that the provisions be modified in the following manner to bring them into conformity with the Constitution:

(6) Section 132 be modified by reading the section as if the words "an adult male person and an adult female person" were deleted and replaced with the words "persons". Therefore, the section when modified would read: "Subsection (1) does not apply to an act of gross indecency committed in private between adult persons both of whom consent."

(7) Section 133 of the Code be modified to the extent that the provisions of section 133(3) be substituted so that the section be read as if the words "In this section "buggery" means sexual intercourse per anus by any person with another person except where it occurs in private between consenting persons each of whom is 16 years of age or more".

(8) The court makes no order as to costs.

Shawn Innocent
High Court Judge

By the Court

Deputy Registrar