IN THE SUPREME COURT OF BELIZE, A.D. 2016

CLAIM NO. 668 of 2010

IN THE MATTER OF THE CONSTITUTION OF BELIZE

AND

IN THE MATTER OF THE ALLEGED UNCONSTITUTIONALITY OF SECTION 53 OF THE CRIMINAL CODE

AND

IN THE MATTER OF AN APPLICATION MADE PURSUANT TO SECTION 20(1) OF THE SAID CONSTITUTION

BETWEEN:

CALEB OROZCO	**Claimant**
AND	
THE ATTORNEY GENERAL OF BELIZE	**Defendant**
AND	
1. THE COMMONWEALTH LAWYERS ASSOCIATION **2. THE HUMAN DIGNITY TRUST** **3. THE INTERNATIONAL COMMISSION OF JURISTS** **4. THE ROMAN CATHOLIC CHURCH OF BELIZE** **5. THE BELIZE CHURCH OF ENGLAND CORPORATE BODY** **6. THE BELIZE EVANGELICAL ASSOCIATION OF CHURCHES** **7. UNITED BELIZE ADVOCACY MOVEMENT**	**Interested Parties**

In Court.

BEFORE: Hon. Chief Justice Kenneth Benjamin.

Appearances: Mr. Christopher Hamel-Smith SC, Ms. Lisa Shoman SC, Mr. B. Simeon Sampson SC and Mr. Westin James for the Claimant and the 7th Interested Party.

Mr. Nigel Hawke, Deputy Solicitor General, Ms. Magali Perdomo, Senior Crown Counsel, Ms. Iliana Swift and Mr. Herbert Panton, Crown Counsel, for the Attorney General.
Lord Goldsmith QC and Mr. Godfrey Smith SC for the 1st, 2nd and 3rd Interested Parties.
Mr. Eamon Courtenay SC, Mr. Michel Chebat SC, Mr. Rodwell Williams SC, Mrs. Jacqueline Marshalleck and Mr. Christopher Coye for the 4th, 5th and 6th Interested Parties.

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JUDGMENT

[1] The present proceedings are for constitutional redress pursuant to Rule 56.7 of the Supreme Court (Civil Procedure Rules), 2005 by Fixed Date Claim Form dated September 24, 2010. The Claimant seeks the following relief:

> "1. A Declaration that section 53 of the Belize Criminal Code, Chapter 101 which provides that:
>
> > 'Every Person who has carnal intercourse against the order of nature with any person or animal shall be liable to imprisonment for ten years'
>
> contravenes the constitutional rights of the Applicant enshrined in sections 3, 6 and 14 of the Belize Constitution and affirmed in the Preamble of the Belize Constitution, and is accordingly, null and void and of no effect to the extent that it applies to carnal intercourse between persons;
>
> 2. An Order striking out the words "with any person or" appearing in the said section 53;
>
> 3. Such other declaration and orders and such directions as this Honourable Court may consider appropriate for the purpose of enforcing or securing the enforcement of the aforementioned Declaration and Order;

4. Such further or other relief as the Court thinks just;

5. Costs."

[2] The Claim is a challenge to the constitutional validity of section 53 of the Belize Criminal Code to the extent that it operates to criminalize anal sex between two consenting male adults in private. The grounds of the Claim are set out in the Fixed Date Claim as follows:

"1. The accepted statutory interpretation of 'carnal intercourse against the order of nature' is that section 53 of the Criminal Code criminalises anal sex between two consenting male adults in private.

2. In the premises, and in the light of the preamble to the Constitution of Belize which recognises "the dignity of the human person and the equal and inalienable rights with which all members of the human family are endowed by their Creator", section 53 violates

(i) the right to the recognition of human dignity guaranteed by section 3(c) of the Belize Constitution;

(ii) the right to the protection for personal privacy guaranteed by section 3(c);

(iii) the right to the protection of the privacy of the home guaranteed by section 3(c);

(iv) the right not to be subjected to arbitrary or unlawful interference with privacy or unlawful interference with privacy guaranteed by section 14(1);

(v) the right to respect for private life guaranteed by section 14(1); and

(vi) the right to the equal protection of the law without discrimination guaranteed by section 6(1).

CHRONOLOGY OF THE CLAIM

[3] The original Fixed Date Claim at the time of filing named the United Belize Advocacy Movement ("UNIBAM") as a Claimant along with Caleb Orozco. The Court has granted an application dated April 11, 2011 by the Commonwealth Lawyers Association, the Human Dignity Trust and the International Commission of Jurists to be added as Interested Parties. At trial these bodies appeared as 1st, 2nd and 3rd Interested Parties and presented arguments in support of the Claim.

[4] By an application dated May 17, 2011, the Roman Catholic Church of Belize, the Belize Church of England Corporate Body and the Belize Evangelical Association of Churches ("the Churches") were granted permission to be added as the 4th, 5th and 6th Interested Parties. The Churches presented arguments complementary to the case for the Defendant in opposition to the challenge.

[5] By an application dated October 17, 2011, the Court ordered that UNIBAM be struck out as a Claimant on the basis that as an inanimate body constitutional rights were not guaranteed by sections 3, 6 and 14(1) of the Constitution. Thereafter, UNIBAM successfully made an application dated December 8, 2011 to be added as an Interested Party representing men who have sex with men (MSM) and persons who are lesbian, gay, bisexual and transgendered (LGBT). At trial, the Claimant and UNIBAM as the 7th Interested Party were commonly represented and relied on the same arguments in support of the Claim.

[6] In the course of the trial, the Deputy Solicitor General supported by learned Senior Counsel for the Churches objected to the reliance by the Claimant in his submissions without amendment upon alleged violations to section 11 (freedom of conscience), section 12 (freedom of expression) and section 16 (protection from discrimination). Arguments were heard and additionally the Claimant applied to add section 16 as one of the grounds. It was ruled that the Statement of Case be amended

to add section 16 as a ground. As to the submissions relating to sections 11 and 12, learned Senior Counsel for the Claimant pointed out that the invoking of those sections were in response to submissions by the Churches as to the importance of God in the interpretation of the Constitution, to which explanation there was no demur. The basis of the ruling was that the Defendant was not taken by surprise, that the Claim before the Court for determination was not thereby varied and that it was desirable that the challenge be comprehensively addressed.

THE HISTORY OF SECTION 53

[7] The common law of England recognised the crime of sodomy as an offence against God as recorded in the treatises of Freta and Britton in the years 1290 and 1300 respectively. The former mandated that those connected to Jews and guilty of bestiality and sodomy be buried alive in the ground. Britton wrote of sodomists being burnt upon public conviction. The offence was then tried in the Ecclesiastical courts.

[8] With the rift from the Catholic Church during the reign of King Henry VIII in the sixteenth century, a statute of 1533 reinstituted the offence of sodomy which became triable in secular courts. The statute rendered the "detestable and abominable Vice of Buggery committed with mankind or beast" punishable by death. The 1533 statute was re-enacted in 1563 and subsequently was superseded by section 61 of the Offences Against the Person Act, 1861. The death penalty for buggery was replaced by a sentence of life imprisonment or any term of not less than ten years.

[9] Prior to 1861, the British colonial rulers commissioned Thomas Babington Macaulay to draft a comprehensive criminal code. The result was the Indian Penal Code completed in 1837 but it did not come into force until 1860. The IPC included the offence of buggery as section 377, which has been the subject of legal challenge in India. The march towards codification descended on the British colonial possessions in the Caribbean when R.S. Wright, an English Barrister, was in 1870 assigned the task of drafting a criminal code of Jamaica and as a model for the Caribbean colonies. The code was brought into force in Belize (then, British Honduras) though it was never enacted in Jamaica (see: M.L. Friedland, R.S. Wright's Model Criminal Code: A

forgotten Chapter in the History of the Criminal Law, 1 Oxford J. Legal Studies (1981); pp. 307-346). The Criminal Code was brought into force on December 15, 1888. The second bore the side note 'Unnatural crime' and provided:

> "Whoever is convicted of unnatural carnal knowledge of any person, with force or without the consent of such person, shall be liable to imprisonment with hard labour for life, and in the discretion of the Court to flogging."

Noticeably, buggery (with consent) and bestiality were classified separately as public nuisances.

[10] The offence of unnatural crime was repealed and replaced by Ordinance No. 4 of 1944 with the wording substantially similar to the present section 53, remaining in force up to the present. The requirement of use of force and lack of consent were removed and the element of bestiality introduced.

[11] The point was made by the 1st, 2nd and 3rd Interested Parties that the legislative history of section 53 shows that the law was not indigenous to Belize but was a relic of British colonial rule (see: also The Alien Legacy: The Origins of "Sodomy" Laws in British Colonialism: Human Rights Watch (2008).

[12] For completeness, it is worthy of mention that the Report of the Departmental Committee on Homosexual Offences and Prostitution chaired by Lord Wolfenden ("the Wolfenden Report") made sweeping recommendations for change to the law regarding homosexuality in England. The Report urged that "homosexual behaviour between consenting adults in private should no longer be a criminal offence. The rationalization in the following passage:

> "The law's function is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others ... It is not, in our view, the function of the law to intervene in the private life of citizens, or to seek to enforce any particular pattern of behaviour." (see: The Wolfenden

Report: Report of the Committee on Homosexual Offences and Prostitution – New York: Stein and Day, 1963, at p. 22).

The decriminalisation of consensual homosexual conduct did not achieve legal recognition until 1967 in England and Wales by the Sexual Offences Act 1967.

INTERPRETATION OF SECTION 53

[13] The scope of section 53 has not been judicially explored within the jurisdiction of Belize. The section is classified under Title VII of the Criminal Code under the Category of "Criminal Force to the Person". There is no known statutory or clear judicial definition of the terms "carnal intercourse" or "against the order of nature". Learned Senior Counsel for the Claimant surmised that the literal interpretation of "carnal knowledge" hinges on the word "carnal" meaning "in the flesh". He posed the question as to what is "against the order of nature" but stopped short of answering it.

[14] In its submissions, the Defendant conceded the Claimant's first ground that section 53 criminalises anal intercourse between consenting male adults in private. It went on to say that the wide ambit of the term "against the order of nature" included anal intercourse between male and female and oral sexual intercourse between consenting adults. The Churches' submissions concurred with this interpretation and commended decided cases from Commonwealth jurisdictions to support an interpretation that section 53 does not embrace only homosexuals. In interpreting section 175(a) of the Penal Code of Fiji, which read "Any person who has carnal knowledge of any person against the order of nature is guilty of a felony", Gerard Winter, J had this to say in **Nadan & McCoskar v State [2005] FJHC 500**:

> "...Section 175(a) and (c) apply to males and females of any sexual orientation.
>
> The section is gender and sexual orientation neutral. As such I accept the State's contention that the proscription of the law in section 175(a) and (c) is of wide and equal application and describe offences for sex acts against the order of nature committed with or upon a male or female person. As

such the section is distinguishable from those sections that proscribe only buggery or male specific sex offences"

On this basis of this dictum, it was submitted that section 53 is gender neutral and is of general application to both males and females.

[15] The submission referred to the expert report of Nicole Haylock submitted on behalf of the Claimant ("Haylock Report"). The report was in relation to the incidence of reports and arrests in Belize in relation to "unnatural crime", ergo, section 53. The research revealed that in the Supreme Court in the year 2008 there were three reports but only one arrest of a male person. There was one female victim but the report did not indicate whether her report related to the arrested men. In 2009, there were four reports countrywide resulting in three arrests. Two of the victims were under the age of 18 and of the four victims one was female. Again, no indication is given as to whether the arrest involved a female victim although at least one minor must have been a victim.

[16] The Haylock Report does not clarify whether arrests have been made in relation to female victims although it can easily be concluded that the prosecution of an act of rape per vaginum coupled with forcible intercourse per annum would not escape prosecution. Be that as it may, none of the persons arrested were female. Thus, no clear pattern of application of section 53 emerged from the data save that, as is common ground between the parties, section 53 included anal intercourse between consenting male adults. At the least, there is the suggestion of the unequal application of section 53 to male persons, notwithstanding the gender-neutral language employed.

THE PARTIES

[17] The Claimant is a citizen of Belize resident in Belize City and by his own admission on oath, a homosexual adult male disposed to engaging in anal intercourse. He seeks the relief sought in the Fixed Date Claim Form.

[18] The Attorney General has been made the Defendant in the capacity as the principal legal adviser to the Government and pursuant to section 42(5) of the Belize

Constitution. The said section mandates that "legal proceedings for or against the State shall be taken, in the case of civil proceedings, in the name of the Attorney General."

[19] The 1st, 2nd and 3rd Interested Parties were granted permission to intervene in the proceedings. The order of April 20, 2010 allowed for the filing of evidence on affidavit and the making of submissions, written and oral, at the hearing of the Claim. Pursuant to the said Order, the 1st, 2nd and 3rd Interested Parties caused an affidavit by Allison Jernow, a US Attorney of the New York Bar, to be filed.

[20] The Commonwealth Lawyers Association ("CLA") is an entity concerned with the advancement of the rule of law in the Commonwealth and behind. It has an impressive track record of intervention in major human rights cases worldwide. The CLA has made representations to the Commonwealth Law Ministers on the issue of criminalisation of homosexuality. Its stated role is to assist the Court in the development of the law consistent with respect for fundamental human rights and the rule of law.

[21] The Human Dignity Trust ("HDT") is registered in London, England as a non-governmental organisation ("NGO"). Its Board of Patrons include eminent jurists from the Commonwealth and other parts of the world. It derives its expertise from a panel of international law firms and barristers specialising in constitutional law and international law. Quite like the CLA, the HDT supports the promotion of human rights including issues related to the criminalization of consensual sexual activity between persons of the same sex.

[22] The International Commission of Jurists (ICJ) is renowned as an international human rights organisation. It is comprised of 60 eminent jurists drawn from different legal systems worldwide. The ICJ Secretariat is based in Geneva, Switzerland but there are offices in other countries. The ICJ enjoys an impressive track record of interventions and before international UN bodies in addition to issuing publications on human rights issues.

[23] The written and oral submissions on behalf of the 1st, 2nd and 3rd Interested Parties iterated in the affidavit of Allison Jernow were proffered in support of the Claim.

At paragraph 3, Ms. Jernow stated that the affidavit was being made "in support of the Interested Parties' submissions that any criminalisation of private sexual conduct between consenting adults should be held incompatible with the rights to dignity, equality, privacy and health enjoyed by all human beings".

[24] The 4th, 5th and 6th Interested Parties are the Roman Catholic Church in Belize, the Belize Church of England Corporate Body and the Belize Evangelical Association of Churches ("the Churches") respectively. The Churches were jointly represented and the leaders of each denomination swore to and filed affidavits in Opposition to the Claim. It is fair to say that collectively these religious bodies represent the vast majority of Christians in Belize.

[25] The 7th Interested Party is UNIBAM which, as previously stated, was struck out as a Claimant but was subsequently permitted to be added as an Interested Party. UNIBAM was incorporated under the Companies Act, Chapter 250 as a Charitable Company limited by guarantee without a share capital. It is a voluntary organisation registered as an NGO representing men who have sex with men (MSM) and LGBT persons. The Claimant is the executive President of UNIBAM which advocates on behalf of MSM and LGBT in relation to human rights issues and HIV/AIDS prevention. The work of UNIBAM is documented in the first affidavit of Caleb Orozco and the 2nd affidavit of Kendale Trapp.

[26] The objects of UNIBAM as set out in the Memorandum of Association include:

> "(a) To review or promote any legislation that aids in the reduction of stigma and discrimination for vulnerable or marginalized populations as described in the National HIV/AIDS policy.
>
> (b) To conduct research nationally to advocate for a national response to HIV/AIDS/STI prevention gaps in both the urban and rural areas in the country that does not serve vulnerable or marginalized populations' health needs.

(c) To advocate for stigma reduction strategies in the workplace, at schools, the community, heads of government departments, health providers and security forces or any other place of business.

(d) To address male sexual and reproductive services gaps in healthcare and to address vulnerable population needs in areas like HIV/STI care and treatment, sexual and reproduction health rights information in both the urban and rural areas.

(e) To have a human right and science based focus in HIV/AIDS prevention in any activity carried out nationally that serves vulnerable populations in both rural and urban areas.

(f) To address the economic needs for PWLHA's by providing employable skills services and training programs that will allow for revenue generation.

(g) To provide supports groups or other services on sexual care and treatment to vulnerable populations in regards to their ability to deal with family members that are PWLHA's.

(h) To seek the support of partners like the church, the international community, government, with individuals in authority or positions of influence to reduce stigma and discrimination in the workplace or in the larger society for people living with HIV/AIDS."

The Claimant and UNIBAM presented joint submissions in support of the Claim.

THE CLAIMANT'S EVIDENCE

[27] The evidence in support of the Claimant's case was provided in the 1st, 2nd and 5th Affidavits of Caleb Orozco and the 2nd Affidavit of Kendale Trapp, the Secretary of UNIBAM.

[28] The Claimant deposed to being a homosexual male and a health educator employed by UNIBAM of which he is the Executive President. Paragraphs 21 to 23 of the Claimant's 1st affidavit detail his experience up to the age of 15 years when he accepted that he was a homosexual. He spoke of being aware from the age of three years that he was regarded as different from other boys and his non-traditional traits, interests and behaviour were the subject of ridicule. Conflict arose between himself and his father and siblings. At school, he was taunted and called disparaging names. He referred to being the object of "constant harassment, mocking and stigmatisation" which caused him to be angry and very depressed as a teenager. The Claimant deposed in paragraphs 24 and 25 of his first Affidavit as follows:

> "24. In my late teenage years and early adulthood, many others sought to discourage and rid me of my effeminacy and presumed homosexuality and to make me into a "man". I was told by a civil servant at age nineteen that my effeminacy and presumed homosexuality would impede my ability to secure and hold a job. All these attempts to change who I am were upsetting and wounding and greatly impaired my self-esteem. By the time I felt confident and secure enough to begin an intimate relationship with someone I was in my mid-twenties. At twenty six years old, I began my first intimate relationship.
>
> 25. Even though I am an adult and the expression of my sexuality is consensual and conducted in private with other adults and is therefore not harmful to others, my worth and dignity as a human being and value as a member of society are not recognised. Indeed, my constitutional rights to dignity, equality, freedom of expression and privacy are violated by criminalising the free expression of my sexuality and, worse, having my sexuality linked with sexual practices involving animals. Further, the general prejudice and abusive conduct of the public which the law engenders and encourages affects my right to express my human

> sexuality and to establish and nurture relationships with consenting male partners without outside interference."

In paragraph 26, the Claimant stated that as an openly gay man in Belize he has been the victim of violence, hostility and discrimination. He described four incidents involving vulgar abuse and menacing threats of violence.

[29] Reference was made in the 1st Affidavit to an assessment conducted by Dr. Chad Martin for the purpose of which the Claimant interviewed men. The report of the assessment was not exhibited and the results were too general to be of any assistance to the Court as evidence.

[30] The Claimant referred to reports received by UNIBAM of verbal attacks and threats of violence by MSM and members of the LGBT community. Two such incidents involving violence upon unnamed persons were described as arising from homophobic encounters. In addition, it was said that many men had reported to UNIBAM their fear of prosecution under section 53 and its restriction on their private intimate relationship. There was also reference to reports from gay men as to their reluctance to report acts of violence or rapes visited on them for fear of lack of protection from the Police. Paragraph 34 chronicled reports of three encounters involving the Police. The latter incidents formed part of the National Report of May 2009 on Belize presented to the Working Group on the Universal Periodic Review at the Fifth Session of the UN Human Rights Council in Geneva.

[31] The following representation appears at paragraph 31 of the Claimant's first affidavit:

> "Many MSMs shun testing and treatment for HIV/AIDS because of the stigma and discrimination against gay men in the society which is reinforced by criminalisation of sex between consenting adult men."

In the following paragraph 32, the Claimant referred to a Report of June 2008 of consultations to gather information from MSM in Belize South, (San Ignacio) Belize North (Orange Walk) and San Pedro on access to quality Voluntary Counselling and

Testing (VCT). The consultations focused on the sexual rights of HIV positive and negative MSMs and the extent to which the violation of those rights affect access to VCT services in Belize. The Report reads:

> "Two major issues arising out of the consultations include lack of confidentiality and the fear of being labelled when accessing VCT sites. These issues are affected by the perception that private information regarding a person's status is not necessarily kept private within these institutions especially by the individual who is already discriminated due to sexual orientation."

The point being made was that fear of being stigmatised by virtue of being males who have sex with other males gives rise to reticence in seeking services for HIV/AIDS counselling and testing. The importance of this issue is linked to the expert reports submitted by the Claimant.

[32] In his 5th Affidavit, the Claimant described the purport of UNIBAM and its status as the only NGO representing MSM/LGBT persons in Belize locally, regionally and internationally. The affidavit exhibited the resolution of the Board of Directors of UNIBAM authorising the body to join these proceedings in a representative capacity. In relation to its membership, the Claimant averred (at paragraph 25):

> "UNIBAM has over 121 LGBT/MSM members who have the same interest in these proceedings of challenging the constitutionality of section 53 of the Belize Criminal Code. As a result of the stigma and possible physical and verbal attacks of which LGBT and MSM individuals are subject, those members are reluctant to be named individually as Claimants in this matter but have the same interest in these proceedings of challenging the constitutionality of section 53 of the Belize Criminal Code and wish to do so as members of UNIBAM."

[33] Kendale Trapp is the Secretary of UNIBAM. He is also its Health Educator/ Director with responsibility for education on HIV/AIDS testing. The content of Mr.

Trapp's 2nd Affidavit repeated the averments in the affidavits of Caleb Orozco and need not be recounted.

CLAIMANT'S EXPERT REPORTS

[34] Dr. Jacqueline Sharpe is a Child and Adolescent Psychiatrist with qualifications and experience as a Consultant Psychiatrist dating back to 1973. She rendered her scientific and professional opinion by responses to specific questions. As to the social impact of laws prohibiting sexual intercourse between consenting male adults, her response was that there exists considerable literature that points to a negative impact on the individual status and the way he is viewed and discriminated against in the society. She posited that such laws contribute to and fuel the HIV epidemic as MSM are reluctant to seek VCT and treatment for HIV for fear of stigma and discrimination.

[35] The expert report made reference to and quoted from a study by Dr. Christopher Carrico entitled "Collateral damage: The Social Impact of Laws Affecting LGBT Persons in Guyana". The results there stated mirror those of the Report referred to in the first and second Affidavits of the Claimant.

[36] Dr. Sharpe offered the following definition of homosexuality in psychiatry:

> "Homosexuality is defined in psychiatry as 'the persistent sexual and emotional attraction to someone of the same sex. It is part of the range of sexual expression'. Sexual thoughts and feelings first emerge for many homosexuals during childhood and adolescence and this is confirmed by American Academy of Child and Adolescent Psychiatry of which I am a member in its document titled 'Facts for Families: No. 63' which was updated January 2006."

The expert went on to unequivocally state that sexual orientation is not a mental disorder. The unanimous view of present-day professional psychiatry is that homosexuality is part of the range of human sexuality and sexual expression and not a disorder to be treated. Accordingly, a reputable psychiatrist would not diagnose homosexuality as a mental disorder. To this extent, homosexuality has been removed

from the classification of mental disorders published by the American Psychiatric Association ("APA") and from the International Classification of Diseases of the World Health Organisation.

[37] The expert's response was sought as to the opinion of psychiatrists on attempts to change someone's sexual orientation. She responded that the so-called 'conversion' therapy is not considered acceptable treatment within the profession of psychiatry. The APA has opposed such treatments and cautioned that it could usher in depression, anxiety and self-destructive behaviour. She went on to add the follows:

> "In its submission to the Church of England's Listening Exercise on Human Sexuality in 2007, the Royal College of Psychiatrists pointed to a large body of research evidence that shows that being gay, lesbian or bisexual is compatible with normal sexual health but that societal discrimination and stigmatisation can lead to mental health difficulties."

[38] Ms. Joan Burke is the Executive Director of the Belize Family Life Association. Her expert report revealed that Belize has the highest adult HIV prevalence among Central American countries as at 2009, standing at 2.3% relative to the rate for Central and South America of 0.5% (see: Keeping Score III Report). She spoke of a climate of hostility towards MSM driving their sexual behaviour underground thus hampering efforts by BFLA to promote safer sex, promote health education and roll out health care. It was opined that "Knowledge about an individual's particular sexual orientation and sexual behaviours is crucial in the health care setting to the provision of appropriate, sensitive and individualized care". This allows for the identification of risk factors.

[39] The report of Nicole Haylock was previously referred to and its purport analysed in paragraphs 15 and 16. The research was stated to be aimed at highlighting whether or not the criminal justice system as it pertains to section 53 is being employed to violate the fundamental human rights of LGBT persons. The statistical results are:

> August to December 2007: Two reports were made and one person was arrested (gender unknown).

> January to December 2008: Three reports by one female and two males were made to the Police and one male person was arrested.
>
> January to December 2009: Four persons (one female and three males of whom one was below the age of consent) made reports and three males were arrested.
>
> For the period 1997 to 2008, 43 cases of unnatural crime were lodged in the Supreme Court and 32 such cases were disposed of.

[40] The expert interviewed then Assistant Commissioner of Police Aragon who informed that the Police did not target for arrest homosexuals in Belize based on their social orientation or sexual behaviour. However, if anal intercourse is revealed during an investigation, an arrest would be made and in most cases, the persons would be released with a warning. Crown Counsel was also interviewed in 2010 and she stated (consistent with the statistics) that: Arrests for unnatural crimes involving consensual adults are very uncommon, and by extension convictions for consensual homosexual acts among adults are even more extremely rare.

[41] The fourth expert report filed on behalf of the Claimant was rendered by Professor Chris Beyrer of the Center for Public Health and Human Rights of John Hopkins University. Professor Beyrer conceded that while HIV prevalence disproportionately burdens MSM worldwide, there is a paucity of data. Consequently, there is a gap in the data with regard to one of the groups most vulnerable to HIV Infection. He wrote:

> "Criminalization and stigmatization not only perpetuate systematic discrimination and violence that limit the study of HIV risks for MSM; they also restrict the extent to which health care providers can effectively offer and MSM can safely access health care services that would reduce HIV transmission and treat HIV infection (Sullivan et al, 2012). Criminalization and stigmatization, therefore, complicate the health needs of MSM and act

as severe barriers to individual country and global responses to the HIV epidemic."

This conclusion accords with the opinion of Joan Burke.

DOES THE CLAIMANT HAVE STANDING?

LOCUS STANDI:

[42] In the course of the submissions made on behalf of the Churches, Learned Senior Counsel impugned the entitlement of the Claimant to bring the Claim. By reference to the averments in the 1st Affidavit of the Claimant, the Court was invited to conclude that the affidavit is not sufficient to ground the Claim. While conceding that paragraph 25 where the Claimant refers to the expression of his sexuality being consensual and in private it was said that the Claimant must present evidence of fear of prosecution.

[43] The argument stripped bare was that the Claimant must not only show that he is a homosexual but also that he is likely to be prosecuted. The case of **Chief of Police and the Attorney General of St. Christopher Nevis v NIAS** – Civil Appeal No. 10 of 2007 was cited to support the argument. In that case the challenge to the constitutionality of the offence of using abusive language in a public place was put forward by a person charged with the offence. However, in that case, both sides were ad idem that by virtue of section 18 (which is on all fours with section 20 of the Belize Constitution), the applicant had the necessary locus standi to present the application.

[44] The issue was raised in the written submissions of the Churches and made the subject of oral submissions at the hearing. The said written submissions were received on the eve of trial, thus the Claimant's response was made in the course of the reply and the 1st, 2nd and 3rd Interested Parties presented their response in the form of written submissions received on the last day of the hearing. Although belated and inasmuch as the Churches did not raise the issue when a similar objection was successfully made in relation to UNIBAM during case management, the Court entertained the challenge to the Claimant's standing.

[45] Both the Claimant and the 1st, 2nd and 3rd Interested Parties rejected the proposition that the Claimant must have been charged or must have demonstrated that he is likely to be charged to sufficiently ground his standing. In this regard, the case of **Chief of Police et al v NIAS** is hardly an authority given that the applicant had actually been charged.

[46] 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.

[47] 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 Attorney General ex p. Rusbridger [2003] UKHL 38** which speaks to proceedings brought against the Crown by a member of the public for a declaration.

[48] In the first instance decision of **Naz Foundation v Government of NCT 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.

[49] 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.

[50] 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 Attorney 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.

SEPARATION OF POWERS

[51] The Defendant has invoked the doctrine of the separation of powers in the 1st affidavit of Oscar Ramjeet at paragraph 12 which reads:

> "The Court ought not to enter the domain of the National Assembly to change the provision under challenge since that is not the role and function of the Court and any purported attempt to do so would infringe the sacred constitutional doctrine of separation of powers."

Both the Defendant and the Churches have questioned the cogency of the Court embarking upon what is the province of the Legislature. As the Deputy Solicitor

General put it, the Claim is an invitation to embark on judicial legislation. In so saying, the learned Deputy Solicitor General invoked the dictum of Justice Scalia in the case of **Lawrence v Texas 539 U.S. 558 (2003) (at p. 603)** when he said in his dissenting judgment:

> "Let me be clear that I have nothing against homosexuals or any other group promoting their agenda through normal democratic means. Social perceptions of sexual and other morality change over time, and every group has a right to persuade its fellow citizens that its view of such matters is best. That homosexuals have achieved some success in that enterprise is attested to by the fact Texas is one of the remaining States that criminalize private, consensual sexual acts. But persuading one's fellow citizens is one thing, and imposing one's views in absence of democratic majority will be something else. I would no more require a State to criminalize homosexual acts – or, for that matter, display any moral disapprobation of them- than I would forbid it to do so. What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new 'constitutional right' by a court that is impatient of democratic change."

This passage was offered to buttress the submission that for the Court to endorse the constitutional violation alleged by the Claimant, "it would be in effect substituting its own moral judgment for those of the people's elected representatives, the National Assembly of Belize."

[52] The Churches argued that the Claim has joined issue on matters that represent a clash of world views with the Defendant; accordingly, it is for the National Assembly to amend the law. This proposition was linked to the question of standing given that the Claimant is not facing prosecution under section 53.

[53] It needs to be made pellucid that this Claim stands to be decided on the provisions of the Belize Constitution and in this regard, the Court stands aloof from adjudicating on any moral issue. The source of the Court's remit is firmly grounded in

the Constitution itself which reflects the separation of powers. The Claimant has approached the Court on the basis of alleged violations of stated fundamental rights provisions in Part II of the Constitution and the Court is tasked by section 20(1) to inquire into same. The Supreme Court is the designated guardian of the rights conferred under the Constitution. It cannot shirk from such responsibility by asserting that any change to legislation is matter best left to the legislature. To do so would be to act in defiance of the mandate of the Constitution itself.

[54] Justice Gerard Winter in the case of **Nadan & McCoskar v The State [2005] FJHC 500** in the High Court of Fiji upheld a challenge to sodomy laws as being unconstitutional. His Lordship stated (at pp. 7-8):

> "The primary duty of a judge when considering such constitutional provisions must be to give them a wide and purposive interpretation to ensure that under this Supreme law there is only ever a legitimate exercise of governmental power and an unremitting protection of individual rights and liberties."
>
> The judicial function in a case such as this is, therefore, to lay the impugned statutory provisions down beside the invoked constitutional provisions and if, in the light of the established facts, a comparison between the two sets of provisions shows an invalidity, then the statutory provisions must be struck down either wholly or in part to cure that invalidity and make those statutory provisions consistent with the Constitution."

The role of the Court is a salutary one and is fundamental to the preservation of democracy.

[55] Before leaving this matter, it is curious that in the following paragraph to that previously cited, Mr. Ramjeet accepted the role of the court in these words:

> "The Court's function is to operate as the guardian of the Constitution and its duty to interpret the Constitution and laws to maintain the Rule of Law in Belizean society."

Needless to say, such function extends to the interpretation and application of the fundamental rights provisions set out in Part II of the Constitution.

[56] Lest the role of the Court be misunderstood against the background of strong views emanating from the religious and other sectors of the community, it bears emphasis that the issue before the Court must be determined by reference to the fundamental rights provisions of the Constitution and not be recourse to public views. Such a caution was issued by Lord Bingham of Cornhill in **Patrick Reyes v The Queen – PC Appeal No. 34 of 2001 [2002] UKPC 11**, when he said (at paragraph 26):

> "The Court has no licence to read its own predilections and moral values into the constitution, but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society ... In carrying out its task of constitutional interpretation the court is not concerned to evaluate and give effect to public opinion."

The respect and influence of the Churches in Belize cannot be ignored as has been reflected in the acknowledgement of the Supremacy of God in the Preamble to the Constitution. However, as iterated by Conteh, CJ in **Maria Roches v Clement Wade – Action No. 132 of 2004**, Belize is a secular state with a written Constitution which provides for the protection of fundamental human rights and freedoms.

THE BELIZE CONSTITUTION

[57] The Preamble to the Constitution in paragraph (a) "affirms that the Nation of Belize shall be founded upon principles which acknowledge the supremacy of God, faith in human rights and fundamental freedoms, the position of the family in a society of free men and free institutions, the dignity of the human person and the equal and inalienable

rights with which all members of the human family are endowed by their Creator". No authority is required to state that though Belize is predominantly Christian, the reference to God and the Creator goes beyond Christianity. This is borne out by the protection accorded to freedom of conscience inclusive of freedom of thought and religion in section 2 of the Constitution itself. However, the reference to God and the Creator does not import religious principles into the interpretation of the Constitution. The plain language of the Constitution must be given a liberal and purposive interpretation.

[58] It have been judicially pronounced that the Constitution is a 'living instrument' (See: **Boyce v R (2004) 64 WIR 37**(para 24) and **R v Lewis (2007) 70 WIR 75** (at para. 74). The Belize Constitution owes its provenance to the European Convention on Human Rights which in turn was influenced by the UN Declaration on Human Rights. As such, decisions in relation to human rights issues have been informed by developments in international law (See: **Boyce**, per Lord Hoffman (at para. 27). Indeed, the final appellate court of Belize, the Caribbean Court of Justice has acknowledged the application of the jurisprudence from international bodies to domestic law (See: **AG v Jeffery Joseph et al – CCJ Appeal No. CV2 of 2005** (at para. 106).

[59] In construing the human rights provisions of the Constitution in these proceedings, I have taken the liberty of examining the jurisprudence of international bodies as an aid to interpretation. It cannot be now gainsaid that the streams of domestic law and international law ought to flow in the same direction in establishing fundamental norms applicable to the rights conferred by the Constitution.

[60] The Constitution is the Supreme Law of Belize and any law that is inconsistent with the Constitution is rendered pro tanto void (section 2). Accordingly, should this Court conclude that section 53 is to any extent inconsistent with the Constitution, such inconsistency shall be declared void.

[61] Upon promulgation of the Constitution on September 21, 1981, section 134 of the Constitution provided for the transitional arrangements with regard to existing laws.

Sub-section (1) prescribed that all existing laws shall continue in force on or after Independence Day as if made pursuant to the Constitution subject to changes necessary to bring them into conformity with the Constitution

[62] The fundamental rights provisions are to be found in sections 3 to 19 of Part II of the Constitution. The Claimant has invoked sections 3(c), 6(1), 11, 12 and 14(1) of the Constitution. The issue before the Court is whether section 53 of the Criminal Code is inconsistent with the fundamental rights guaranteed to the Claimant by the Constitution.

RIGHT TO DIGNITY

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

> "Human Dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to the individual needs, capacities or merits. It is enhanced by laws which are sensitive to the needs, capacities and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalised, ignored or devalued, and is enhanced when laws recognise the full place of all individuals and groups within Canadian society."

[64] Learned Senior Counsel for the Churches questioned whether the reference to human dignity in section 3(c) creates an enforceable 'free-standing' right. It was

submitted that the right to human dignity in section 3(c) is not enforceable pursuant to section 20. I do not agree. Section 20 of the Belize Constitution, unlike other earlier Constitutions in the Commonwealth Caribbean, does include section 3 as being a provision enforceable by seeking redress in the Supreme Court.

[65] The Claimant submitted that section 53 of the Criminal Code is in breach of his fundamental right to recognition of his human dignity by:

(i) stigmatising him as being a criminal by virtue of being a homosexual; and

(ii) categorising consensual male homosexual acts in private with forced intercourse, sex with minors and sex with animals.

Inasmuch as section 53 embraces acts involving both males and females the impact on the dignity of a homosexual man is disproportionate given the deep stigmatisation caused by them being the primary targets.

[66] The Constitution of South African provides at section 10 that: "Everyone has inherent dignity and the right to have their dignity respected and protected." In **National Coalition for Gay and Lesbian Equality vs Minister of Justice [1999] (1) SA 6**, the Constitutional Court of South Africa held the common law offence of sodomy to be unconstitutional. In so doing, the right to human dignity was upheld. Ackermann, J had this to say (at paragraph 28):

> "[28] ... As we have emphasized on several occasions, the right to dignity is a cornerstone of our Constitution ... Dignity is a difficult concept to express in precise terms. At its least it is clear that the constitutional protection of dignity requires us to acknowledge the value and work of all individuals as members of society. The common law prohibition on sodomy criminalises all sexual intercourse per anum between men: regardless of the relationship of the couple who engage therein, of the age of such couple, of the place where it occurs, or indeed any other circumstances whatsoever. In so doing it punishes a form of sexual conduct which is identified by our broader society with homosexuals. Its

> symbolic effect is to state that in the eyes of our legal system all gay men are criminals. The stigma thus attached to a significant proportion of our population is manifest. But the harm imposed by the criminal law is far more than symbolic. As a result of the criminal offence, gay men are 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. Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of section 10 of our Constitution ..."

The foregoing dictum is in all respects applicable to the plight of the Claimant based on the averments in his 1st affidavit. He is entitled to pray in his aid, section 3(c) of the Constitution and assert a violation of his right to human dignity as a person. Observations in the same vein were made by Cory, J in the Supreme Court of Canada in the case of **Vriend v Alberta [1998] 1 SCR 493**.

[67] I hold that section 53 is in breach of the dignity of the Claimant and in violation of section 3(c). Further, such breach operates to inform the other rights from which the concept of human dignity emanates.

RIGHT TO PRIVACY– section 14

[68] Personal privacy is associated with and indeed emanates from the concept of human dignity. Section 3(c) also states that every person in Belize is entitled to his personal privacy. Section 14(1) creates a free-standing right and states:

> "A person shall not be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on

his honour and reputation. The private and family life, the home and the personal correspondence of every person shall be respected.

Sub-section (2) enacts the limitation clause by importing section 9(2) which so far as relevant to the arguments reads:

> "9(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 reasonable provision -
>
> (a) that is required in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development and utilisation of mineral resources or the development or utilisation of any property for a purpose beneficial to the community;
>
> (b) that is required for the purpose of protecting the rights or freedoms of other persons;
>
> (c) ...
>
> (d) ...

[69] The sole limitation relied upon by the Defendant is that of public morality. In paragraph 8 of the Ramjeet affidavit, section 9(2) is cited. At paragraph 16, it is stated that Belizean society is deeply religious, founded upon strong Christian values, morals and the family. However, this was just a bald assertion not supported by any evidence.

[70] In applying the limitations under section 9(2), the Court must first be satisfied that section 53 is engaged and that the privacy of the Claimant has been affected. This is the first stage of a two-stage process. The second stage is dependent upon the first question being affirmatively satisfied. Only then would the Defendant be required to provide evidence to demonstrate the applicability of one or more of the limitations.

[71] The Churches have raised the limitation as to public health relying upon the expert report of Professor Brendan Bain. The learned Professor recognised that some public health practitioners have stated that decriminalizing the practice of anal intercourse among consenting adults would lead to a reduction in the incidence of infection rates for HIV infection among MSM, but he went on to say that there has been no published data to support this hypothesis. That having been said, he made reference to an article published in relation to the Belize Central Prison which concluded that MSM in Belize are at a higher relative risk of being infected with HIV. (see: HIV seroprevalence and associated risk factors among male inmates at the Belize Central Prison: Ethan Gough and Paul Edwards).

[72] Joan Burke in her capacity as a public health practitioner, gave credence in her report to the hypothesis that decriminalization of anal intercourse between consenting males would greatly enhance the fight against HIV/AIDS and assist in VCT, treatment and education.

[73] Given the state of the evidence before the Court, it is more likely than not that the retention of section 53 so far as it relates to MSM hinders rather than aids testing and treatment as a matter of public health. The second stage of the test fails on evidence.

[74] In **Dudgeon v UK [1981] ECHR 7525/76**, the European Court of Human Rights upheld a breach of the right to privacy (Article 8) of the European Convention in relation to legislation in Northern Ireland that criminalized certain homosexual acts between consenting males (see: also **Norris v Ireland [1988] ECHR 105812/83**; and **Modinos v Cyprus** [1993] ECHR 15070/89 which followed **Dudgeon v UK**).

[75] The Churches relied on the affidavits of the Church Leaders in support of the limitation of public morality. Both the Defendant and the Churches urged the Christian composition of the population (see: paragraph 16 of the Ramjeet affidavit)). In essence, Learned Senior Counsel for the Churches developed his argument on the basis that the evidence on oath from their Lordships the Bishops and Pastor Crawford satisfied the limitation under section 9(2) as to public mortality.

[76] The head of the Anglican Church in the Diocese of Belize, Bishop Philip Wright commenced his affidavit by reference to the Preamble of the Constitution and asserted that section 53 is not inconsistent with the dictates of the Constitution. He posited that section 53 is integral to the protection of the common good and public mortality to the extent that its repeal would be inimical to the preservation of society as ordered by the Creator. The Lord Bishop stated that human sexuality is to be seen as a gift from God to enable human beings to express their affection, love and companionship for each other within marriage and secondly to procreate and multiply the species. He speaks of the majority of the 16,500 Anglicans believing that heterosexuality and celibacy is required of Christians, while believing in tolerance towards others. He affirmed that the Church did not condone discrimination but stood on the principles of the Scriptures as dictated by the Constitution. As such, the Church holds to the view that the practice of homosexuality (homosexual acts) is inconsistent with the witness of sacred scripture; also, that creation and how it unfolds shows that homosexuality is against what is the natural order. The Church extends pastoral and spiritual support to those who demonstrate an orientation towards homosexuality.

[77] Inherent in the Lord Bishop's affidavit is an admission that there are persons of homosexual orientation in the society. However, the practice of homosexual activity is not condoned by the Church.

[78] Pastor Eugene Crawford is the President of the Belize Association of Evangelical Churches. He too made reference to the Preamble to the Constitution which acknowledged the Supremacy of God. He stated that section 53 exists in the public interest for reasons of safety, public order, public morality and public health. He swore that the Constitution recognises that God is the ultimate authority for law and the people of Belize are the agents of that authority. Pastor Crawford informed that Christians account for 71% of Belizeans according to the latest national Census.

[79] Bishop Dorrick Wright of the Diocese of Belize City of the Roman Catholic Church stated that the Constitution is a charter of ordered liberty and presupposed a common good; which must be contrasted with the greatest good which targets the

majority. The common good presupposes an objective moral order where one can distinguish what is good from what is bad or evil. This is the significance of the reference to the Supremacy of God and to the endowment of inalienable rights by the Creator. The Lord Bishop conceded that law and morality operate in different spheres and not all immoral conduct should be penalised; however, the law is required to preserve a moral climate for members of the society to prosper and avoid vice. A distinction was drawn between homosexual acts and persons who are homosexuals. The act is always immoral but the person is created in the image of God and entitled to dignity inherent in his spiritual nature.

[80] Paragraph 43 of Bishop D. Wright's affidavit reads:

> "Because man possesses inherent dignity, the Church calls upon individuals to reject sin, which does not befit that dignity, but rather degrades. Like others burdened with morally harmful desires, individuals attracted to members of the same sex are called to live chastely and virtuously in imitation of Christ, and are called to "unite to the sacrifice of the Lord's Cross the difficulties they may encounter from their condition." (CCC No. 2358).

In paragraph 66, he suggested that an alien world view is being foisted on the people of Belize.

[81] There can be no doubt that the Reverend gentlemen deposed to views that they sincerely and conscientiously hold, and that are representative of the majority of the Christian community and perhaps of the population of Belize. However, from the perspective of legal principle, the Court cannot act upon prevailing majority views or what is popularly accepted as moral. The evidence may be supportive but this does not satisfy the justification of public morality. There must be demonstrated that some harm will be caused should the proscribed conduct be rendered unregulated. No evidence has been presented as to the real likelihood of such harm. The duty of the Court is to apply the provisions of the Constitution.

[82] In **Patrick Reyes v R**, Lord Bingham cited with approval the following statement by Chaskalson, P of the South African Constitutional Court in **State of Makwanyana [1995] (3) SA 391** (at paragraph 88):

> "Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold the provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication ... The very reason for establishing [the Constitution], and for vesting the power of judicata review of all legislation in the Courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society."

Indeed, in **Nadan v McCoskar v The State**, Winter, J referred to a strong lobby from responsible members of the community holding the view that decriminalization of homosexual conduct would be damaging to the society. His Lordship emphasized that Constitutional invalidity held sway over popular opinion.

[83] The same principle was stated by Justice Kennedy in **Lawrence v Texas** (2003) 539 US 558 at page 571.

[84] The Claimant submitted that paragraph (a) of the Preamble to the Constitution with the reference to the Supremacy of God does not import any specific religious perspective, but rather, it acknowledges the historical origins of the fundamental rights in natural law and that rights are derived from sources beyond the state and its laws. I accept this interpretation as it promotes the very diversity that exists in the society and is reflected in the Constitution.

[85] By way of comparison, the Canada Charter of Rights and Freedoms makes reference to the Supremacy of God in its Preamble. As expressed by Conteh, CJ in the **Maria Roches** case, Justice Muldoon in **G. O'Sullivan v M.N.R. (No. 2), [1991] 2**

C.T.C. 117 affirmed that Canada is a secular state notwithstanding the reference to God. His Lordship had this to say:

> "The preamble to the Charter provides an important element in defining Canada, but recognition of the Supremacy of God, emplaced in the Supreme law of Canada, goes no further than this: it prevents the Canadian state from becoming officially atheistic. It does not make Canada a theocracy because of the enormous variety of beliefs of how God (apparently the very same deity for Jews, Christians and Muslims) wants people to behave generally and to worship in particular. The preamble's recognition of the supremacy of God, then, does not prevent Canada from being a secular state."

[86] For the reasons I have espoused, I find that section 53 violates the fundamental right of the Claimant to privacy.

THE RIGHT TO FREEDOM OF EXPRESSION

[87] The protection of freedom of expression is provided for in section 3(b) and section 12(1) of the Constitution. Section 12(1) and (2) reads:

> "12(1) Except with his own consent, a person shall not be hindered in the enjoyment of his 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 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 reasonable provision –

(a) that is required in the interests of defence, public safety, public order, public morality or public health;

(b) ...

(c) ...

The Claimant contended in his submissions that section 53, insofar as it criminalizes consensual private sexual activities between consenting adults, is a breach of the individual's freedom to express his or her preference or orientation.

[88] There can be no demur that freedom of expression is one of the pillars of a democratic society. (see: **Benjamin el al v Minister of Information and Broadcasting et al (2001) 58 WIR 171** at paragraph 38; **R v Zundel [1992] 10 CRR (2nd) 193** at p. 209 (Supreme Court of Canada); and **Handyside v UK (1976) 1 ECHR** at p. 754. It has been held in **Erwin Troy Ltd. v Quebec (Attorney General) [1989] 1 SCR 927** by the Supreme Court of Canada that conduct can amount to expression if it attempts to convey meaning. The Supreme Court prescribed a two-stage inquiry to determine whether the freedom of expression of an individual has been infringed. The steps are:

(a) Does the activity fall within the scope of protected expression?

(b) If yes, was it the purpose or effect of the Government's action to restrict freedom of expression?

[89] The right to freedom of expression was dealt with in the written submissions of the Claimant but was not developed in oral argument by learned Senior Counsel save to say that it is consistent with and complementary to the diversity and difference of opinion contemplated in the Constitution.

THE RIGHT TO EQUALITY

[90] The Claimant alleges that there has been a breach of his right to equality as set out in sections 3, 6(1) and 16 of the Constitution. Section 3 guarantees certain rights as set out in paragraphs (a), (b), (c) and (d) to the individual without discrimination

regardless of "his race, place of origin, political opinions, colour, creed or sex". The reference to non-discrimination does not confer any rights. In this regard, I accept the contention in the written submissions of the Claimant that section 3 does not create an autonomous right to non-discrimination. As Lord Hoffman put it in **Matadeen v Pointu [1991] 1 AC 98** (at paragraph 15) (PC), "discrimination as to a matter falling within the ambit of one of the specified rights and freedoms will violate section 3, even though the substantive right has not itself been infringed".

[91] By contrast, section 16 of the Constitution confers protection against discriminatory laws (subsection (1)) and discriminatory treatment by a person or authority (subsection (2)). Subsection (3) defines "discriminatory" as follows:

> "(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."

[92] As previously iterated, inasmuch as section 53 is framed in gender neutral language, the evidence demonstrates that it is discriminatory in its effect. The Claimant has shown that he has been rendered a criminal by virtue of his homosexuality.

[93] In **Toonen v Australia Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992**, the UN Human Rights Committee ("UNHRC") ruled that various forms of sexual conduct including consensual sexual acts between men in private under Tasmanian law were incompatible with the International Covenant on Civil and Political Rights ("ICCPR"). The UNHRC held that the word "sex" in Articles 2 and 26 of the ICCPR were to be interpreted as including "sexual orientation". This interpretation has been adopted by other UN Agencies and bodies.,

[94] Belize has acceded to the ICCPR in 1996 two years subsequent to **Toonen**. As such, it can be argued that in doing so, it tacitly embraced the interpretation rendered by the UNHCR. It has been further urged by the 1st, 2nd and 3rd Interested Parties that by virtue of section 65 of the Interpretation Act, Chapter 1 given that more than one interpretation is reasonably possible "a construction which is consistent with the international obligations of the Government of Belize is to be preferred to construction which is not". I accept these contentions to the effect that the word 'sex' in section 16(3) of the Constitution is to be interpreted to extend to "sexual orientation".

[95] Section 6(1) of the Constitution provides

> "All persons are equal before the law and are entitled without discrimination to the equal protection of the law."

The remaining subsections deal with procedural fairness. However, the Claimant has invited the Court to not restrict section 6(1) to procedural matters. The onus is therefore on the Claimant to show that he has been discriminated against. On the evidence he has demonstrated that he has been discriminated against on the basis of his sexual orientation. No evidence has been led to show that such discrimination is justifiable. The same position applies in relation to section 16(1) and (3) applying the interpretation of sex to embrace 'sexual orientation' as enunciated by the UNHRC in **Toonen**.

[96] I have no difficulty holding that the Claimant has been discriminated against on the basis of his sexual orientation by virtue of section 16(1) and (3) and there is an ongoing violation of his right under section 6(1) to equality before the law and the equal protection of the law without discrimination.

DECLARATION

[97] It is hereby declared that section 53 of the Belize Criminal Code, Chapter 101 contravenes sections 3, 6, 12 and 16 of the Belize Constitution to the extent that it applies to carnal intercourse against the order of nature between persons.

MODIFICATION OF SECTION 53

[98] By virtue of section 21 of the Constitution, section 53 is an existing law that was in force immediately before the Constitution was promulgated. As such, it remained in force for a period of five years without being amenable to being held to be inconsistent or in contravention of any of the provisions of Part II. Five years having elapsed, the restriction has expired. Section 134(1) provides for such laws to continue in force subject to such "modifications as may be necessary to bring them into conformity with this Constitution".

[99] The Supreme Court is empowered to revise the language of an existing law to bring it into conformity with the Constitution (see: **San Jose Farmers' Cooperative Society Ltd v Attorney General (1991) 43 WIR 63**; **DPP v Mollison (2003) 64 WIR 140**) Such power extends to the revision of the language of the existing law to bring it into conformity with the Constitution. Such revision can address matters of substance. In the present case, the challenge was restricted to consensual sexual acts between adults in private and did not extend to non-consensual sexual acts, sexual acts with children and sexual acts with animals. I am prepared to adopt the solution suggested in the written submission of the Claimant to read down section 53 to exclude consensual private sexual acts between adults. It is therefore ordered that the following sentence be added to section 53 of the Criminal Code, Chapter 101:

> "This section shall not apply to consensual sexual acts between adults in private."

COSTS

[100] The hearing of this case lasted four days and the material provided to the Court was voluminous. The Claimant is entitled to his costs fit for two Senior Counsel. Such costs shall be assessed by the Registrar unless agreed. The costs shall be paid by the Defendant.

Dated this 10th day of August, 2016

KENNETH A. BENJAMIN
Chief Justice