ADVOCATES CARIBBEAN
BIENNIAL CONFERENCE 2018 - GRENADA
“A TIME TO STAND”
Advocates Caribbean

Advocates Caribbean hosted its Sixth Regional Conference from Friday 9th November to Sunday 11th November 2018 at the beautiful Grenadian by Rex Resorts, Point Salines, St. George’s, Grenada, West Indies. The theme of the Conference was “A Time to Stand”.

Advocates Caribbean is a regional grouping of Advocates International. Launched in the year 2007 on the Island of Tobago, Advocates Caribbean comprises judges and other judicial officers, attorneys-at-law, and professional persons from various fields. Since its launch, Advocates Caribbean has gathered for conferences in Jamaica in 2010, Barbados in 2012, St. Vincent and the Grenadines in 2014, and Guyana in 2016. These conferences are held in keeping with the mission of Advocates International, an international body, which encourages and enables Advocates to meet locally, organize nationally, cooperate regionally and link globally to promote justice, the rule of law, religious freedom, reconciliation and integrity.

We take pleasure in creating our first edition of Advocates Caribbean Law Journal, comprising the presentations from our informative conference. We trust that you and other regional members will attend in the future. In addition to the excellent information which will be available at future Conferences, we hope that you will enjoy the warm fellowship.

For further information, please feel free to visit Advocates International website at http://www.advocatesinternational.org or email Advocates Caribbean at advocatescaribbean@gmail.com or fax 1-868-623-9052 or call 1-868-627-1030.

Yours faithfully,

Advocates Caribbean
Advocates International is the Largest, Oldest, Most Efficient, Legal Aid Organization You’ve Never Heard of Before. Why is that? Because getting things done is more important to us than getting the credit, and most of the time that means doing things effectively, not publicly. When confronted with issues across the globe where most organizations would send an American Lawyer to file a lawsuit, and publicly enter the trenches of a long litigation battle, we use one of our 30,000 Local Advocates to ask whoever is in charge of the situation “How may we serve you?” Sometimes a public battle in court or before a legislative body is unavoidable but our “How can we serve you” principle often means trading public notoriety for tremendous results.

Advocates North America & Caribbean consists of three distinct Christian lawyer fellowships that hold conferences separately yet cooperate regionally. Each address national legal issues. These three ministries are Advocates Caribbean (AC), the Christian Legal Society (CLS) in the United States, and the Christian Legal Fellowship (CLF) in Canada.
Contents
Advocates Caribbean ........................................................................................................................................1
A Comparative Analysis of Equal Opportunity Laws in the Commonwealth Caribbean ...........................................5
Same Sex Marriage; Equal Opportunities Legislation; Abortion; and Parent Rights v. Children Rights ..................10
JASON JONES & The Attorney General of Trinidad and Tobago........................................................................13
Freedom of Religious Speech and Expression ........................................................................................................24
The Right to Life ................................................................................................................................................29
Constitutional Rights and Freedoms VS Parental Rights......................................................................................34
What is Equal Opportunity Legislation?

Equal opportunity law aims to promote everyone’s right to equal opportunities, typically in relation education, training employment and; eliminate, as far as possible, discrimination and sexual harassment; and provide redress for people whose rights have been breached.

Where is equal opportunity legislation found?

In the Commonwealth Caribbean, only three states have enacted express equality statutes:

1. Guyana-Prevention of Discrimination Act
2. St. Lucia -Equality of Opportunity and Treatment in Employment Act
3. Trinidad and Tobago -Equal Opportunity Act
What about Grenada?

Grenada does not have express equal opportunity laws. Rules against discrimination are provided in the Employment Act.

**St. Lucia – (A narrow definition)**

The act is limited to discrimination in employment. Discrimination on the grounds of race, sex, religion, marital status, ethnicity is prohibited (Section 3) In 2016, St. Lucia rejected broader anti-discrimination laws.

**Guyana – (A little broader)**

No discrimination in conditions and facilities for employment and provision of goods and services. Exceptions allowed to preserve decency and privacy, eg. sex specific toilet and changing facilities. (Section 6) Proposals to include “sexual orientation” as a ground of discrimination.

---

In January, the Director had indicated that SASOD engaged in consultations with stakeholders on the proposed legislative amendment, which would provide legal protection from discrimination in relation to the right to work for lesbians, gays, bisexuals and transgenders (LGBT) people in Guyana. At the time, the Bill was not ready and needed “technical” enhancements vis-à-vis; areas such as its fashioning and wording.

The organisation is lobbying for an amendment to the 1997 Act to protect vulnerable persons within the LGBT community; the inclusion of “sexual orientation” will legally protect persons identified as lesbians, gays and bi-sexuals, while “gender identity” will offer protection to transgender persons.

This amendment has been called for since the Bill prohibits discrimination in the workplace based only on “race, sex, religion, colour, ethnic origin, indigenous population, national extraction, social origin, economic status, political opinion, disability, family responsibilities, pregnancy, marital status or age...”

While the crafting of the Bill may be completed or almost completed, it must still be presented and debated in Parliament before it is assented to.
Guyana - Rental of Church Facilities?

Section 15: It shall be unlawful for a person who provides goods or services or makes facilities available to discriminate against a person by refusing to provide that person with those goods or services or to make those facilities available.

Gay Danish couples win right to marry in church

Homosexual couples in Denmark have won the right to get married in any church they choose, even though nearly one third of the country's priests have said they will refuse to carry out the ceremonies.
Kansas law would force churches to host same-sex ‘weddings,’ receptions

HUTCHINSON, KANSAS, April 24, 2012, (LifeSiteNews.com) – A proposed ordinance in one of the nation’s most conservative states would force churches to rent their property out for same-sex “weddings” and receptions. It would also force any public venue to allow people to use showers, restrooms, and locker-rooms based on their “gender identity,” rather than their “sex at birth.”

The city council of Hutchinson, Kansas, is considering enacting a new statute adding sexual orientation and sexual identity to the city’s non-discrimination policy in all public accommodations. The measure would specifically include churches that rent their property to the public.

“If a church has a parish hall that they rent out to the general public, they could not discriminate against a gay couple who want to rent the building for a party,” such as a same-sex ceremony or reception, according to a city FAQ about the ordinance. If the church only rents the building to their parishioners, they can continue to do so.”

Trinidad and Tobago – (Far reaching)


What are the roles and limits of the Commission?

Trinidad and Tobago - Limits

Religious messages in places of public worship are not offensive. However, messages communicated to the public or acts done in the sight of the public are not exempt. Generally, any behaviour that is intentional and aimed at inciting gender, racial or religious hatred is prohibited.
The Equal Opportunity Commission

Members are appointed by the president on the advice of the Prime Minister in consultation with the Leader of the Opposition. Exercises a quasi-judicial function and interprets and applies the Equal Opportunity Act through the Equal Opportunity Tribunal.

In 2018 The EOC recommended that the definition of cohabitational relationship under the domestic violence act be expanded to include same-sex relationships. The EOC joined the case and adopted the submissions of Jason Jones in his Constitutional Lawsuit striking down sections of the Sexual Offences act in Trinidad and Tobago.

“We stand ready to work alongside policy makers at every level to appropriately address this issue of equality of persons of different status. We applaud the Attorney General for the support he has always given to the work of the commission and look forward to collaborating with him on the legislative amendments needed to address this issue. We look forward to working with all stakeholders in pursuing the next steps to afford the LGBTI community equal opportunities in Trinidad and Tobago.” -Equal Opportunities Commission Trinidad and Tobago

The Wider Caribbean

What are other Islands doing?

Anguilla, Barbados, Jamaica, St. Vincent and the Grenadines, Antigua and Barbuda, St. Kitts Nevis and Dominica do not have anti-discriminatory or equal opportunity laws. Grenada attempted to pass a Rights and Freedoms bill, which called for gender equality, in 2016 but this failed at parliamentary vote.

In Barbados there have been calls for laws on discrimination based on sexual orientation and gender identity to be put on the law books of Barbados so that if one person is discriminated against whether it is in the work place; whether it is in a formal setting they will have redress.

Equal Opportunity/Antidiscrimination Laws have many positive consequences for all members of society but also have far reaching implications for people of faith and the irreligious expression. Equality at the expense of the rights of others is censure. It is essential that we pay attention to the developments in the law to ensure that they reflect the values of our societies.
Grenada’s position on Same Sex Marriage; Equal Opportunities Legislation; Abortion; and Parent Rights v. Children Rights

Marriage:
Marriage is defined as a union between a male and a female. That union must be formally done and must be consummated for it to be a marriage. A number of Acts prohibit the union other than male and female union. A man – to – man relationship would constitute a criminal offence according to the laws of Grenada.

Same sex marriage
Under the Grenada Criminal Code, Section 431 male – on – male homosexuality is an illegal offence. It is also deemed an “unnatural crime” committed by way of sexual intercourse per anum, i.e., anal penetration. Such offence is punishable by imprisonment for ten years.

Buggery Laws
Section 431 of the Criminal Code of Grenada Cap1 (1987), makes buggery unlawful. The act is deemed to be an unnatural crime.

An analysis of Marriage, Same Sex Union and Buggery suggest that:

1.Marriage is a union between male and female.
2.The Criminal Code of Grenada seems to criminalize or prohibit the consummation of unions between people of the same sex that is, male and male and female and female relationships.
3.The law in its current state is not completely clear and if construed as written then female with female relationships may be excluded. The laws does not specify the ‘penetrating’ object, although by reliance on the Common Law, the penetrating object is the penis. The offence therefore is committable by male person with/to male person and/or male person with/to female. The offence cannot, however, be committed by two female persons.
Legal protections
There are no explicit clause on equality or protection of privacy in the Grenada Constitution of 1973. It may not be an infringement of the human rights since there are no explicit clause on privacy in the Grenada Constitution. It may therefore be possible to gather evidence on relations between male and male and female and female even in the privacy of the home without contravening the law.

Equal Opportunities legislation
It is unlawful to discriminate against any employee on the grounds of race, colour, national extraction, social origin, religion, political opinion, sex, marital status, family responsibilities, age or disability, in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment relationship.

Grenada Employment ActNo.14 of 1999

Prohibition of forced labour
Section 27 of the Act stipulates that here shall be equal pay for equal work. “Every employer shall pay male and female employees equal remuneration for work of equal value.” An analysis of Equal Opportunities in Grenada seems to suggest that it would be unlawful to discriminate against a person based on their sex or marital status. It seems to suggest that if someone is in a same-sex union, the employer cannot refuse to hire them based on their sexual orientation. Again Section 27 of the Act would seem to suggest that a male and female person have to be paid equal wages for equal work done. What is abortion? It is the deliberate termination of a human pregnancy, most often performed during the first 28 weeks. In Grenada, abortion is governed by sections 234, 247 and 250 of the Criminal Code. Section 234 states “who ever intentionally and unlawfully causes abortion or miscarriage shall be liable to imprisonment for ten years.” An analysis of Abortion in Grenada suggest that: For a person to be found guilty of a criminal act of Abortion there must be an intentional and unlawful act caused by the person.
Under the Code, the performance of an abortion is generally illegal, whether performed by the woman herself or another person it is seen as a homicidal act. Nonetheless, the Code authorizes the performance of abortions for therapeutic purposes, providing that any act which is done, in good faith and without negligence, for the purpose of medical or surgical treatment of a pregnant woman is justifiable, although it causes or is intended to cause abortion or miscarriage, or premature delivery, or the death of the child. However, the Code does not define the exact scope of medical or surgical treatment.

**Parental Rights vs. children’s rights**

“**parent**” includes—

(a) a natural or an adoptive parent who has the parental responsibility of the child;

(b) a person, who has stood in loco parent is to a child for a period for not less than one year and who has a continuing relationship with the child; or

(c) a legal guardian of the child who has custody or guardianship rights of the child.

“**natural father**” includes a man who has been adjudged to be the biological father of a child;

“**natural mother**” means, a woman who gave birth to a child;

“**natural parent**” means, a natural mother or a natural father.

“**child**” means, a person who is under the age of 18 years.

**Section 25 (2) of the Child (Protection and Adoption) Act 20551 (2010),** states that “neglect of a child” means the failure of a parent of the child to provide the child with adequate care and guidance or other acts or omission by the parent with respect to a child that are inappropriate for the child or likely to be harmful to the child.
History of the Buggery Law

Buggery laws have their roots in the English Common Law. However, Christian philosophy impacted the Law from as early as the 13th Century until the early 19th century. This philosophy held that “there is a divine reason for the existence of fundamental laws, and that such laws are superior to human-made legislation, thus reflecting universal and unchangeable principles by which everyone should live.”

History of the Buggery Law During the period of Colonization, many laws were transplanted to the colonies for ensuring order and exercising English rule within colonies; but they were not necessarily new laws, as their import and origins actually came from the English Common Law, beginning in the year 1210.

The Colonial Laws Validity Act, 1865 was an affirmation by the Crown that indicated to Colonies that Colonial Laws were to be seen and treated as valid laws, which they were to follow.

History of the Buggery Law

In his paper titled ‘A Law above the Law: Christian Roots of the English Common Law’, Augustus Zimmerman confirms that:

“The English common law has an incredibly rich Christian heritage. England’s most celebrated jurists – including the likes of Blackstone, Coke and Fortescue – often drew heavily from their Christian faith when expounding and developing what are now well established principles and doctrines of the common law.”

History of the Buggery Law

Eventually, the UK enacted its Offences Against the Persons Act, 1861, which continued with the common law history by placing into statute what would have been in the early case laws. Initially, England’s Offences Against the Persons Act kept the law of buggery as a capital offence, but the same year of its enactment, the legislation was amended and the maximum penalty was changed from death to a life sentence.

Offences Against the Person Act, 1925

64 years later, Trinidad & Tobago enacted the Offences Against the Person Act, 1925 (no doubt a UK transplant).

What does the OAP Act, 1925 say? In relevant part: 60. Whosoever shall be convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable to be imprisoned for five years.
Offences Against the Person Act, 1925 62. Any male person who, in public or private, commits or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanor and liable to be imprisoned for two years.

Sexual Offences Act (SOA), 1986 In 1986 (61 years after), the OAP Act, 1925 was repealed and the Sexual Offences Act, 1986 was enacted.

Section 13 of the SOA, 1986 states: (1) A person who commits the offence of buggery is liable on conviction to imprisonment for twenty-five years.

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

**SOA, 1986 Section 16 of the SOA, 1986 states:**

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

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

(a) a husband and his wife; (b) a male person and a female person each of whom is sixteen years of age or more, both of whom consent to the commission of the act; or SOA, 1986

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

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

**Sections 6 and 13 of the 1976 Constitution of Trinidad and Tobago Constitutional Guardians:**

Section 6 of the Constitution is a Savings Clause, which was placed in the 1976 [Schedule to the] Constitution for the purpose of retaining certain laws for the continued governing of the country after Independence and becoming a Republic.

Sections 6 and 13 of the 1976 Constitution of Trinidad and Tobago Section 13 of the 1976 Constitution is a mechanism which allows Parliament to make laws, even though those laws may be inconsistent with the rights enshrined in sections 4 and 5 of the Constitution (which are usually referred to as our ‘fundamental human rights and freedoms’), but in order to do so, Section 13 of the Constitution also requires the Parliament to obtain a 3/5 majority in order to pass such laws.

There is an ‘exception’ to all of this in that if the law passed by Parliament is determined to be in contravention of sections 4 and 5 of the Constitution, using the exception within the section 13 mechanism, a law can still be
struck down if it is shown “not to be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual.”

Section 6 of The [1976] Constitution of Trinidad and Tobago

6. (1) Nothing in sections 4 and 5 shall invalidate—(a) an existing law; (b) an enactment that repeals and re-enacts an existing law without alteration; or (c) an enactment that alters an existing law but does not derogate from any fundamental right guaranteed by this Chapter in a manner in which or to an extent to which the existing law did not previously derogate from that right.

Section 6 of The [1976] Constitution of Trinidad and Tobago Cont’d (2) . . . (3) In this section “alters” in relation to an existing law, includes repealing that law and re-enacting it with modifications or making different provisions in place of it or modifying it; “existing law” means a law that had effect as part of the law of Trinidad and Tobago immediately before the commencement of this Constitution, and includes any enactment referred to in subsection (1); “right” includes freedom.

Section 13 of The [1976] Constitution of Trinidad and Tobago 13. (1) An Act to which this section applies may expressly declare that it shall have effect even though inconsistent with sections 4 and 5 and, if any such Act does so declare, it shall have effect accordingly unless the Act is shown not to be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual. (2) An Act to which this section applies is one the Bill for which has been passed by both Houses of Parliament and at the final vote thereon in each House has been supported by the votes of not less than three-fifths of all the members of that House.

Submissions of Jason Jones

He stated that sections 13 and 16 make a crime of any consensual sex between male adults of the same sex and that neither section 6 nor section 13 of the Constitution protects sections 13 and 16 of the SOA, 1986 from challenge on human rights grounds.

The buggery law is residue from Colonial Law – implying it’s archaic and should be struck down; As was done in other courts around the world: they have “struck-down and declared [similar laws] unlawful,” and some countries like England and Wales have done so via legislation; Further, he argued that other States have even declared their buggery laws to be in contravention of International Treaty law.

Submissions of Jason Jones Cont’d Essentially, the Claimant argued that section 6 of the Constitution does not save sections 13 and 16 of the SOA, 1986 and that in fact the SOA, 1986 is new legislation, not pre-constitution/saved legislation.
They argued further that the increased penalty from the original buggery laws, which were then found in the OAP Act, 1925, are so severe that it is unconstitutional in its effect on the Claimant.

In fact, they stated that this increase in penalty, from 5 to 25 years, causes the legislation to fall outside of section 6(1)(c) of the Constitution, which allows for saved/existing laws to be altered, with some conditions; and if it is ultra vires these conditions, then they argued that it is new law.

Submissions of Jason Jones Cont’d To make the claim personal to him, the Claimant stated that the legislation directly affects his right to:

(1) private life;
(2) family life; and
(3) equality before the law.

which included arguments about claimed:
(a) ‘treatment that is arbitrary or unreasonable’;
(b) ‘unlawful differential treatment on the ground of sexual orientation’; and
(c) ‘differential treatment on the ground of sex/gender’.

With regard to section 13 of the Constitution, the Claimant submitted that the ‘exception’ indicated above in section 13 of the Constitution is triggered; he said that sections 13 and 16 of the SOA, 1986 “are not reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual,” and as such, they are unconstitutional. To prove this, the Claimant challenged the aim of the legislation, stating that the aim of legislation which negatively affects/infringes the Claimant’s human rights in the manner outlined, cannot then be reasonably justifiable.

Submissions of the Trinidad & Tobago Council of Evangelical Churches (TTCEC)

By way of introduction, it was stated that “buggery was and was frowned upon as a crime at common law, the established principles and documents of which had their foundation in Christian philosophy.” Further, it was stated that the function of the criminal law relative to sexual relations is, inter alia, “to protect the citizen from what is offensive and injurious.”

Definitions of buggery as injurious from reliable legal sources were provided, including brief mention of sources which cite the high HIV prevalence among men who have sex with men (MSM).

Submissions of TTCEC Cont’d The TTCEC stated that the buggery laws of the 1925 Offences Against the Persons Act is saved law pursuant to section 6(1)(c) of the Constitution, it was posited that: Section 6(1)(c) “protects from invalidation an enactment that alters an existing law, but does not derogate from any Advocates Caribbean Biennial Conference Law Journal 2018 -Grenada
constitutional
guaranteed
fundamental
rights in a manner in which or to an extent to which the existing law did not previously
derogate from that right;”

Essentially we argued that section 6 (1)(c) saves SOA, 1986, because the relevant sections were existing law that were simply altered and in so altering, it did not take away from the previously enshrined and protected human rights in a way or to an extent that the pre-constitution law didn’t already take away from it. In other words, Parliament is allowed to alter an existing law, as long as it doesn’t take away more or different rights than the old law took away (i.e., alter, but leave the same rights and freedoms intact).

Submissions of TTCEC Cont’d We then challenged directly the claims made by the Claimant that his ‘right to private life’ and ‘right to equality before the law’ has been infringed: It was stated that the law is a law against copulation or penetration per anum and prohibits that action between males and any other person, male or female alike [which we also stated is essentially the same law that existed in the 1925 Act]. It was stated that the law does not discriminate among classes of persons and applies equally across the board, whether one is male or female.

We then challenged cases the claimant used to support his views by showing how those cases were distinguishable…many did not have similar facts or circumstances and were not even in relation to buggery laws, and therefore were not decided upon by considering the issue(s) that were before the Trinidad and Tobago Court. With regard to the right to ‘equality before the law’, it was stated that if it is accepted that the Claimant is “predisposed by nature” to be homosexual, that the Claimant can expect to be treated equally as any other person so predisposed and even those who may indulge in the behaviour for the purposes of sexual excitement.

The Act does not prescribe different punitive treatment between one class of individuals and another and the court was urged to reject the claim made by the Claimant that there is arbitrary or unreasonable or different treatment of homosexuals “as a class of criminals;” as all men [and women] convicted pursuant to section 13 of the SOA, 1986 would equally be deemed ‘criminals’.

With regard to section 16 of the SOA 1986, it was our submission that the Claimant is specifically excluded from the ambit of that section, if one were to read the language and more importantly, the definition carefully.

We stated, that the definition of ‘serious indecency’ in section 16, excluded the Claimant from its ambit, because it excluded unnatural sexual intercourse from its purview.

It was then posited that section 13 of the Constitution has provided that an Act shown “not [to be] reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual” can be struck down notwithstanding that it has expressly declared its inconsistency with section 4 and 5 of the Constitution and that the requisite 3/5 majority was obtained. However, the court was reminded, that there is a presumption of

Advocates Caribbean Biennial Conference Law Journal 2018 -Grenada
constitutionality in such cases as this and that a declaration by Parliament that such an inconsistency exists does not automatically mean that the legislation infringes constitutional rights; thus, the Court must explore whether that is in fact the case.

In conclusion, it was stated that the Claimant failed to show how the law (SOA, 1986) is arbitrary or excessive when applied to him; and that he would be constrained to demonstrate how he has a constitutional right to exhibit his sexual preferences openly.

**Submissions of the Attorney General Senior Counsel for the AG**

Stated that “the resolution of this issue is not based on harmonising a diversity of religious views, nor is it a democratic decision… [nor is it] a moral issue.” He further stated that he believes the issues raised in the claim “are a matter of strict law” and does not depend upon the personal experience of the Claimant; nor is it about faith-based organisation’s “strong opinions regarding the issue of homosexuality.”

He said that even though the preamble to the Constitution has language relative to the “Supremacy of God,” he stated that Trinidad and Tobago is a secular State and the Constitution already recognizes the right to “freedom of conscience and religious belief and observance.” He reminded the court that its “obligation is to define the liberty of all, to mandate our own moral code.” This language is taken from a 1992 US Planned Parenthood case.

He cautioned the Court that it must “put aside any claim by the parties to represent any majoritarian position in the society,” as “the Constitution is there to protect the weak as well as the strong and the majority as well as the minorities.” Stating further that the issue becomes whether the majority can use the Legislature/State to enforce its majoritarian views upon the whole society through the operation of law.

After setting up several legal principles which the Court must consider fundamentally in a case like this, the crux of the AG’s submission dealt with his argument/construction that section 6 of the Constitution saves sections 13 and 16 of SOA 1986 from the onslaught of constitutional attack.

He admonished the Court to look to the definition of “alters” in section 6(3) of the Constitution, whereby the language is plain that any alteration that took place in the transition from the 1925 Act to the SOA 1986, is allowed by the language of section 6 of the Constitution and therefore sections 13 and 16 of the SOA, 1986 are saved.

He stated that Savings Clauses are specific to a country and therefore one cannot look to other jurisdictions to determine how savings clauses are to be construed. As an example, he stated that right here in the region, matters that involved savings clauses, yielded completely different outcomes. Some savings clauses are transitional, while others remain as a significant feature of the Constitution for different purposes.
With regard to the penalties, the AG submitted that the penalties are separate and apart from the substance or ingredients of the law of sections 13 and 16 of the SOA 1986. However, he submitted if the Court determines that the penalties violate the Constitution, the remedy is to substitute the current penalties for those that were previously in the 1925 Act (implying that the remedy is not to determine that the entire Act or specifically that sections 13 and 16 of the SOA are unconstitutional, but rather to substitute an acceptable remedy).

**Is section 13 of the Constitution triggered?**

The Court must:

a. Take into consideration the 2-tier structure of section 13, which first requires Parliament to explicitly state that a law is inconsistent with enshrined rights as stated in section 4 and 5 of the Constitution; and

b. second, obtain the 3/5 majority required to pass the law.

c. In determining whether section 13 has been triggered, a Court must then conclude that there has been a violation of sections 4 and 5 of the Constitution;

d. If the Court is satisfied that section 13 has been triggered, it must also be satisfied that any law which so infringes (sections 4 and 5 of the Constitution), must so infringe only if it is “reasonably justifiable” so to do’;

and
e. The burden of proof that the legislation is not “reasonably justifiable” is on the Claimant.

**Submissions of the Equal Opportunity Commission (EOC)**

In the first instance, the EOC made a submission on the date it was due (i.e., November 30, 2017). On December 12, 2017, however, the EOC, filed an application withdrawing its submission that was filed on November 30th. It then sought leave of Court to refile and on January 29, 2018, it made a two-page submission which essentially stated its mandate (I suppose to indicate why it had an interest) and indicated that it had attempted to have the AG’s office amend the SOA, 1986 to include sexual orientation, but was informed that the barrier to this amendment is that buggery remains criminalised on the law books.

As a result, it stated that the EOC is in a dilemma, in that it cannot carry out its mandate relative to persons who are not heterosexual. It cannot, for example, advise employers that it is wrong to treat homosexuals differently, when according to the law, that person is ‘committing a crime’.

The EOC then stated that in light of the above, it “wholly adopts” the Claimant’s submission filed on October 31, 2017. Submission of the Sanatan Dharma Maha Sabha (SDMS). The SDMS was also required to file its submission by November 30, 2017, however, it did not do so. At first, they sought an extension and same wasn’t granted until close to the date of trial. On January 29, 2018 (the day before trial), the SDMS made its two-page submission.
The SDMS indicated that it respects “the freedom of individuals to conduct their own lives in the manner that suits them and is also aware of the changing tide of public support for homosexuals’ freedom to engage/interact with each other as they please.”

However, they cited as their concern that a judgment in favour of the Claimant “could very well pave the way for same sex marriages eventually.” It registered its objection with homosexual activity in relation to the Hindu religion/scriptures and went on to “support the AG in its submissions before the Court.”

**The Judgment Essentially**

The Court said that the section 6 analysis or protections do not even arise when the Parliament has already acknowledged that the Act is inconsistent with the rights enshrined in sections 4 and 5 of the Constitution (i.e., in the preamble…thereby making a statement regarding its unconstitutionality). Therefore no presumption of constitutionality applies and one must embark upon a section 13 analysis. Section 13 of the Constitution: Already established that the legislation contravenes or is inconsistent with sections 4 and 5 of the Constitution (which is the first step).

Parliament got the 3/5 majority required. So, the issue now becomes whether the legislation is reasonably justifiable. To determine reasonable justifiability, the Court adopted the test in the *Northern Construction* case (after indicating why he thought the tests in several other cases did not fit this scenario).

The Judgment Eventually stated, among other reasons, that because the Claimant’s evidence was uncontested, he believes he met his burden and went on to state that: The real justification of the Act is to ‘make a statement of abhorrence for homosexuality.’ If this were not the case, non-consensual anal sex could be treated with under section 4 of the SOA, 1986.

Finally, the Court declared: “That sections 13 and 16 of the Act [the SOA, 1986] are unconstitutional, illegal, null, void, invalid and are of no effect to the extent that these laws criminalise any acts constituting consensual sexual conduct between adults; The court will hear the parties on whether the offending sections should be struck down in their entirety along with issues of costs.”

Subsequent to the April 12th declaration that sections 13 and 16 of the SOA were unconstitutional, the parties returned to Court on July 9th to treat with part two of the judgment, wherein Justice Rampersad asked “whether the offending sections should be struck down in their entirety . . .”

TTCEC opted not to participate in this aspect of the process as it was believed that to do so would be tantamount to TTCEC agreeing with the judgment that the sections are unconstitutional and required change.
JJ Submission on the Remedy

Essentially, JJ suggested that sections 13 and 16 should be amended in a manner that allows consenting adults (whether male or female) to engage in anal intercourse without it being a criminal offence. The following was JJ’s suggestion in this regard: JJ Suggested Amendments Section 13 of the SOA:

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

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

JJ Suggested Amendments

Section 16 of the SOA:

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

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

The State’s Submission on the Remedy

The State suggested that the sections be struck out in their entirety, stating that to amend the legislation in the manner suggested by JJ would amount to the Court stepping into the role of the legislature.

While the State argued that striking out the legislation may be the only option available to the Court, the State did inform the Court that striking out the legislation in its entirety would likely have broad consequential effects on several other pieces of legislation.

Section 4 of the SOA

At the end of these discussions on July 9th, the Judge believed that he was unable to make an informed decision without the benefit of the information relative to whether non-consensual anal intercourse would be covered under section 4 of the Sexual Offences Act (which deals with rape).

The Court was concerned that to strike down the sections entirely would leave a loophole in the law if non-consensual anal sex was not covered under section 4 of the Sexual Offences Act, 1986.

JJ Submission on Section 4 of the SOA

In his written submission, Jason Jones essentially stated that “section 4 of the Sexual Offences Act on its plain meaning is sufficiently broad to criminalise non-consensual anal sex.” The State’s Submission on Section 4 of the SOA.
In the written submission of the State, it posited that while in the past the then existing provisions of the Act had to do specifically with the rape of a woman and that non-consensual anal sex did not constitute rape, the current provision (i.e., section 4 of the Sexual Offences Act) has since been amended and is now “gender neutral;” implying that the language of section 4 of the SOA now allows for “non-consensual sexual intercourse between men and between women.”

The Court’s Reasoning
On the basis of the submissions by the State and Jason Jones, the Court seemed to believe that its concern about striking down the sections in their entirety could lead to a vacuum in the law, allowing persons who commit non-consensual anal sex to go free. Therefore, in order to prevent that lacuna in the law, the Court believed the issue would be best addressed by amending, rather than completely striking out the provisions.

The court seemed satisfied that section 4 of the SOA would capture any persons who committed the act of anal sex without consent. Thus, the Court stated “that the most non-intrusive manner in which to resolve the matter is to do as suggested by the attorney at law for the claimant.”

The Court’s Suggested Amendments

Section 13 of the SOA:

(1) A person who commits the offence of buggery is liable on conviction to imprisonment for five years.
(2) In this section “buggery” means sexual intercourse without consent per anum by a male person with a male person or by a male person with a female person.

The Court’s Suggested Amendments

Section 16 of the SOA:

(1) A person who commits an act of serious indecency on or towards another is liable on conviction to imprisonment for five years.
(2) Subsection (1) does not apply to an act of serious indecency committed in private between—
(a) a husband and his wife;
(b) a male person and a female persons each of whom is sixteen years of age or more, both of whom consent to the commission of the act; or

What Does This Mean?

This means that not only has the buggery law in Trinidad and Tobago been declared unconstitutional, it has also been ordered by the High Court to be amended so that section 13 of the SOA does not criminalise the act of anal sex between persons (men and women alike) who consent for the act to be done.

Advocates Caribbean Biennial Conference Law Journal 2018 -Grenada
Likewise, based on the suggested amendment of the Court, it would no longer be a criminal offence of serious indecency where persons over the age of 16 engage in acts for their ‘arousal or gratifying sexual desire’, as long as those persons consent.

Should the legislation be amended as ordered by the Court, the buggery law in Trinidad and Tobago would no longer exist. Please keep in mind that at present there has been no actual change to the law; same would have to be done by Parliament. However, with a declaration that the law is unconstitutional and an order that it be amended (by Parliament) in the manner suggested, the law is now ineffective and would likely not be utilised for the purpose of charging anyone for buggery.

If an act of anal sex without consent is committed, persons would likely be charged under section 4 of the SOA and if that Act is committed on a child, persons would be charged under section 18 of the Children’s Act, Chapter 46:01. On October 25th, the State appealed the decision in the Jason Jones matter.
Freedom of Religious Speech and Expression

Legal Foundation

Caribbean Constitutions provide rights to Freedom of conscience and religious belief and observance; and freedom of thought and expression. These are fundamental human rights and are entitled to a generous interpretation. At the international level, the right to religion and religious expression is protected under these treaties:

- United Nations Declaration on Human Rights
- International Covenant on Civil and Political Rights
- European Convention on Human Rights

Freedom of Religious Expression Abroad

Ashers Baking Company, based in Northern Ireland, was taken to court after it declined to bake a cake with a slogan that said "support gay marriage" along with a picture of Bert and Ernie from Sesame Street. The bakery was accused of discriminating on the grounds of sexuality. The bakery countered that it was expressing religious freedom.

In the United States, The Supreme court ruled in favour of A baker who refused to bake a cake for a same sex-couple and objected on religious grounds. The Court decided the case on narrow grounds, holding that this particular baker had been treated poorly. Whether anti discrimination laws supersede religious belief and expression is not yet settled.
UK supreme court backs bakery that refused to make gay marriage cake

Judges find in favour of appeal, ruling there was no discrimination on grounds of sexual orientation
In 2012, Two Christian women claimed that they were discriminated against when their employers barred them from wearing crucifixes at work. The European Court agreed that wearing a cross was a legitimate manifestation of the Christian faith. Wearing a cross is protected by the European Convention on Human Rights, which gives the right to freedom of religion.
Minnesota officials have repeatedly stated that private businesses such as the Larsens' violate the law if they decline to create films promoting same-sex weddings. In 2017, the Larsens tried to challenge the law as unconstitutional but a lower court dismissed their case and mandated that they service same-sex weddings or close this part of their business.
Where Does this leave us?

How can we protect our rights to religious expression and observance? It is the duty of everyone to defend religious freedom and promote it for all people. The constitutional freedom of religion is among the most inalienable and sacred of human rights.
The Right to Life

The Legal Position

The Rights Enshrined in the Constitution of Trinidad and Tobago include the following:-

“4(a) the right of the individual to life, liberty, security of person and enjoyment of property and the right not to be deprived here of except by due process of law”

Laws for the protection of life

Section 56 of the Offences Against the Person Act Chap. 11:08: A woman, being with child, who with intent to procure her miscarriage unlawfully administers to herself any poison or noxious thing etc is liable to imprisonment for four years.

Section 57 of the Offences Against the Person Act Chap. 11:08: It is an offence to supply any noxious thing or instrument knowing that it is intended to be used to procure a miscarriage, punishable by two years imprisonment.
When someone is pregnant, she is not “expecting a child” – she already has one. She is not “going to be a mother” – she already is a mother. The baby is not “on the way,” the baby has already arrived. If we are going to change the way society treats unborn children, we have to change the way we talk about them. -Frank Pavone, 7/7/12
The Underlying Principle:
Respect for human life and the sacredness of life.

Lawful or Unlawful

R v Bourne 1939 1KB687 (McNaughtonJ.) “No person shall be found guilty of an offence under this section unless it is proved that the act which carried the death of the child was done in good faith for the purpose only of preserving the life of the mother”

R v Newton and Sungo, 1958 CrimLR469 (AshworthJ.) opined that preserving the health of the mother as well as her life may justify.

Critiques of Bourne, Newton and Sungo

Royal College of Nursing of the UK vs Department of health and Social Security 1981 1ALL ER545 (DiplockLJ) “No disrespect is intended to that eminent judge if I say that his reputation is founded on his sturdy common sense than on his lucidity of legal exposition, certainly his summing up directed as it was to the highly exceptional facts of the particular case left plane to fwoose ends and ample scope for clarification”

The Cases are fact specific and turn on their individual circumstances

Trinidad and Tobago

PROPOSED- “WOMEN’S CHOICE ON PREGNANCY BILL”

●The “lawful” defence has not been tested in the Courts;
●There is no “local application of R vs Bourne;
●Proposals for decriminalization of abortion in Trinidad and Tobago and making abortion available on demand are being vigorously promoted;
●Similar drafts presented and offered throughout the Caribbean;

Features of Proposed Legislation

Broad grounds justifying the termination of pregnancy, in summary:
“to save the life of the woman” “To preserve physical health’
“to preserve mental health” “rape or incest”
“foetal impairment” “economic and social reasons” Similar provisions have been partially or wholly enacted in Barbados and Guyana.
The National Abortion Rights Action League
Seeks to make abortion freely available arguing that it will greatly reduce the number of unwanted children and likely curb the tragic rise in Child Abuse in the country.
They argue that Legal Abortion would decrease the number of unwanted children, battered children, child abuse and possibly the subsequent delinquency drug addiction and a host of social ills believed to be associated with neglectful parenthood.

Important Questions for Abortion Advocates
1. Is the unborn a human being?
2. Is the killing of the innocent human being wrong?

Challenges
Many women, including teenagers, do procure abortions in Trinidad and Tobago
Lobby groups for decriminalizing of Abortion:
Family Planning association of Trinidad and Tobago (FPATT)
Advocates Caribbean Biennial Conference Law Journal 2018 -Grenada
International Planned Parenthood Federation (IPPF) of the US
Advocates for Safe Parenthood Improving Reproductive Equity (ASPIRE).

Who Are We?
We are Christian followers called to a number of professions for the purpose of bringing the Gospel to all nations.

Attorney General’s Reference No. 3 of 1994 [1997] 3 All E.R. 936: There was of course, an intimate bond between the foetus and the mother, created by the total dependence of the foetus on the protective physical environment furnished by the mother, and the supply by the mother through the physical linkage between them of the nutrients, oxygen and other substances essential to foetal life and development…….But the relationship was one of bond, not of identity. The mother and the foetus were of two distinct organisms living symbiotically, not a single organism with two aspects. The mother’s leg was part of the mother, the foetus was not”

How do We take a stand?
Demonstrate commitment
Pursue knowledge
Speak in defence
Reach with compassion
Proclaim your truth
Constitutional Rights and Freedoms VS Parental Rights

The Right of the Parent

Trinidad and Tobago Constitution Section 4: The Right to Liberty, The Right of a parent or guardian to provide a school of his own choice for the education of his child or ward, Freedom of conscience and religious belief and observance.

*Meyer v Nebraska, 262 U.S. 390; 43 S Ct 625 (1923)*- Parents rights have been recognised as being “essential to the orderly pursuit of happiness by free man.”

*Wisconsin v Yoder* “…the primary role of the parents in the upbringing of their children is now beyond debate as an enduring American tradition.”

Consistent with the findings in:

**Parkham vs JR US Supreme Court 44 US 584**
B. Anorvs Children’s Society of Metropolitan Toronto & AG of Canada 1995 4 LRC 107: Mom Says School District Gave Son Illegal Sex Change Operation Without Her Consent–Minnesota, 2016 District Court Judge Paul Magnuson ruled in May 2017 that the son was not legally emancipated and the mother’s parental rights “remain intact.” However, he ruled against the mother, arguing that the parties involved could not be sued for violating her rights.

“The Shift” (Ministry of Home Affairs v Fisher) The Courts have become engaged in the definition, meaning application, interpretation and/or imposition of limitations on these rights. The Courts are now seized with the authority to determine what is an acceptable exercise of these rights.

Littlefield v Forney Independent School District, 268 F.3d 275 (5th Cir. 2001) “...changed the burden of proof from the government proving that it has a compelling need to intrude into the family, and instead puts the family as bearing the burden of proof to justify that its reason to objecting to a government program is sufficiently warranted.”

Re: Becker, 87 Wn.2d 470, 477, 553 P.2d 1339 (1976) "historically, the natural parent's right to custody of a child ... was considered to be absolute, barring a showing of unfitness ... [g]rowing concern for the welfare of the child has led to a gradual modification in judicial attitude."

“The Issues”
The issues are: Where does the Parental Rights end and the States duty to protect Fundamental Human Rights (as defined, prescribed or applied by the Court) begin? Are the two “rights” representative of competing interests: i.e State vs Parents Where the conflict is incompatible, which takes precedence over the other?

“The Common Law Precepts”
The precepts are based on the presumption that parents act in the best interest of their child, and recognize that parents are in the best position to take care of them and make decisions necessary to ensure their well being. Unless the conduct falls below the threshold of public policy and what is socially acceptable. It is the operation of the tailpiece by the Court that draws the stark contrast:–
The Court acts on behalf of the State as Parens Patriae in a capacity as provider of protection for the children who are pressured to be under the control of parents. Their role is beyond challenge and supersedes the right of any parent.

Advocates Caribbean Biennial Conference Law Journal 2018 -Grenada
“Challenges”

Prayer in Schools

1944-Amended to provide compulsory Bible reading daily followed by the recitation of the Lord’s Prayer

1982-Section 2 of the Canada Charter of Rights and Freedoms was amended such that the recognized recitation of the Lord’s Prayer, as provided by the Act, was deemed a violation of the Charter of Rights and Freedoms.

1988-Zylveryv Sudberg Board of Education (Ontario) Held: The use of the Lord’s Prayer and the Education Regulations infringed Religious Freedom and offended the Charter. The insistence in this exercise stigmatised children and coerced them to religious observances which were offensive. The provision for exemption of children from Christian exercises by those who did not wish to participate was an Act of discrimination against them.

School Standards and Franchise Act of 1998 (England and Wales) All pupils in State schools must take part in daily acts of collective worship except:- Where parents specifically request exclusion, Religious schools, Schools exempted by local authority.

“Religious Instruction” Kendal v Kendal 1997 Massachusetts H/C HELD: The father who spoke to the children of fundamental beliefs was barred from sharing his religious belief, praying or studying the Bible with his children.
Germany-Re: Jewish tradition  Circumcision for the purpose of and part of religious upbringing is a violation of the children’s rights. Although circumcision forms an integral part of the religious observances, the parent had no right to physically violate their charge which is the effect of circumcision.

S & Ors. V Commission Scolaivcedes Chenesand Ors. (2012) Held: The suggestion that exposing a child to a variety of religious faiths in itself infringed Religious Freedom or that of their parents amounted to a rejection of the Multicultural nature of Canadian Society and of the Quebec Government obligation with regard to children and public education.

In the Caribbean:

Trinidad and Tobago Education Act Section 29 A parent has the right to chose the religion in which the child is brought up and may insist on the removal of the child from a particular religious institution.

Re Agar-Ellis (1883) LR 24 CHD 317 S29 of the Education Act of Trinidad gives parents the power to withdraw their children from any religious instructions or observances without forfeiting any other benefits of the school.

“School Curriculm” Fields v PalmadeSchool District (2005) 427 F 3d. 1197 Per Judge Reinhardt stated:- “Parental Rights does not extend beyond the threshold of the school door”. If Parental Rights where to dominate school interest and/or curriculum, public education would become untenable. In a Utah case the parents objection to a modernised teaching of Shakespeare’s Twelfth Night which included Cross Dressing and same gender kissing was held to be without merit.

“The U.N. Commission on the Rights of the Child” In the Statement of its position on the UN Floor: - “The US does not accept the obligations based on the connection of the Rights of the child nor do we accept that it is the best or only framework for implementation of policy for the benefit of children.”

Advocates Caribbean Biennial Conference Law Journal 2018 -Grenada
Article 4:
The State shall respect the rights of parents only to the extent that having regard to the evolving capacity of their child … appropriate direction and guidance is recognized.

Article 13:
The child shall have the right of freedom of expression including the right to receive, and impart information and ideas of all kinds regardless … orally, in writing, print, art, or other media of the child’s choice.

Article 14:
Freedom of thought conscience and religion

Article 15:
Freedom of association and to associate

Article 16:
Without arbitrary or unlawful interference with his or her privacy, fancy, home or correspondence

“How do these Rights of the Child Operate Viza Viz Parents”
Does a parent have any right to:- Guide, teach or restrain a child in any particular manner (ie) religious instruction, socially acceptable behaviours and attitudes. Limit or prescribe a child’s exposure to material which is harmful and/or detrimental to them.

Children’s Rights recognized by the CRC trumps Parental Rights

There is no meter of parental supervision or stewardship over information which the child seeks, (ie) access to pornography, violent movies or inappropriate and harmful information from the internet. Association with persons who a parent may find as bad influence(ie) gangs, cults

Proposed Draft Women’s Choice on PregnancyBill (as prepared by ASPIRE)

Clause 8 (3) provides:-
“In the treatment for the termination of pregnancy of a mentally competent minor, while the authorized midwife, medical practitioner or authorized medical practitioner, as the case may be, may encourage the minor to inform her parents or guardian, he or she is not required either to obtain the consent of her parent or guardian or to notify them.”
Clause 13(2):-

“Every person who counsel or perform a procedure for termination of pregnancy, or who acts under the direction of such a person, and all employees of institutions where procedures are conducted, or who obtain access to such institutions-

Shall deal with all information, documents and matters in respect of any matter dealt with by or under this Act as private and confidential; and

Shall not make use of any such information for the purposes, advantage or benefit of himself or herself or of any other person or organisation.”

Section 17(3)

“Any person who contravenes section 13 shall be liable, on summary conviction, to a fine of up to ----thousand dollars and/or imprisonment for a period not exceeding one year.”

“Sex Education”

_Parker v. Hurley, 2008_ It was unconstitutional to uphold the rights of Religious Freedom and Parental Rights over the upbringing of children. “An exodus from class when issues of homosexuality or same sex marriage are to be discussed could send the message that gays, lesbian, and the children of same sex parents are inferior and therefore have a damaging effect in these children”

Dismissing the concerns expressed by parents he stated:-

“(c) Parents can choose to send their children to private school or home school if they had objections.”
“Sex Education”

*Wolf*, 2008, ruled that it was unconstitutional to uphold the rights of Religious Freedom and parental control over the upbringing of children.

*Unruh, 2008,*

“it is reasonable for public schools to attempt to teach understanding and respect for gays and lesbians”

“Conclusion”

To develop and heighten the awareness of the socio-cultural events and their impact upon the region.