IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF GUYANA

CCJ Appeal No. GYCV2017/015
GY Civil Appeal No. 83 of 2013

BETWEEN

QUINCY MC EWAN	**FIRST APPELLANT**
SEON CLARKE	**SECOND APPELLANT**
JOSEPH FRASER	**THIRD APPELLANT**
SEYON PERSAUD	**FOURTH APPELLANT**
SOCIETY AGAINST SEXUAL ORIENTATION DISCRIMINATION (SASOD)	**FIFTH APPELLANT**

AND

THE ATTORNEY GENERAL OF GUYANA	**RESPONDENT**

Before the Honourables: **The Hon. Mr. Justice A. Saunders, PCCJ**
The Hon. Mr. Justice J. Wit, JCCJ
The Hon. Mr. Justice W. Anderson, JCCJ
The Hon. Mme Justice M. Rajnauth-Lee, JCCJ
The Hon. Mr. Justice D. Barrow, JCCJ

Appearances
Mr. Douglas Mendes, SC, Mr. C. A. Nigel Hughes, Ms. Mishka V. Puran, Ms. Savannah Barnswell, Mr. Westmin R. A. James and Mr. Isat Buchanan for the Appellants

Mr. Kamal Ramkarran, Mr. Selwyn Pieters and Mrs. Joycelin Kim Kyte-Thomas for the Respondent

JUDGMENT
of
The Honourable Justice Saunders, President and Justices Wit and Barrow

Delivered by The Honourable Mr. Justice Saunders, President

and
JUDGMENT
of the Honourable Mr. Justice Anderson

and
JUDGMENT
of the Honourable Mme Justice Rajnauth-Lee

and
JUDGMENT
of the Honourable Mr. Justice Barrow

Delivered on the 13th day of November 2018

JUDGMENT OF THE HON. MR. JUSTICE SAUNDERS, PRESIDENT

Introduction

[1] Difference is as natural as breathing. Infinite varieties exist of everything under the sun. Civilised society has a duty to accommodate suitably differences among human beings. Only in this manner can we give due respect to everyone's humanity. No one should have his or her dignity trampled upon, or human rights denied, merely on account of a difference, especially one that poses no threat to public safety or public order. It is these simple verities on which this case is premised.

[2] The 1st – 4th named appellants are, or are perceived to be, different. They are transgendered persons. Their sense of personal identity and gender does not correspond with their birth sex. As a result, their appearance, mannerisms and other outward characteristics are not consistent with society's expectations of gender-normative behaviour. That is their reality. It is a reality that is different from the one experienced by most persons. Unfortunately, it is a reality that, for whatever reason, confuses many and frightens, even disgusts, some in Caribbean societies often leading to derision of, and sometimes violence against those who are different. It is for courts to afford the protection of the law to those who experience the brunt of such behaviour.

[3] In secular, democratic Guyana, the 1st - 4th named appellants were arrested, detained, charged, convicted and punished essentially for cross-dressing in public. For the reasons we set out below, we believe that the actions taken against them were unconstitutional. We also believe that the law used to justify the treatment they suffered is itself in violation of the Constitution.

Background Facts

[4] On Friday 6th February 2009 at around 8.30 in the evening, the first two named appellants, Quincy McEwan and Seon Clarke, were awaiting transportation at the corner of North Road and King Street in Georgetown. McEwan was dressed in a pink shirt and a pair of tights along with a black hair piece. Seon Clarke, wearing slippers, had on a jersey and a skirt. A party of police officers passed by in a vehicle. McEwan and Clarke were promptly arrested. They were transported to the Brickdam Police Station. There, they were photographed and instructed to undress. They were then placed in the lockup.

[5] A few hours later, around 3.30am, the third named appellant, Joseph Fraser, was at the K and VC Snackette in the area of the Stabroek Market. Fraser was having a meal with friends. Seyon Persaud, the fourth named appellant, was in the group. Anthony Bess was also there. Fraser and Persaud were each dressed in a skirt. Each wore a red and black wig.

[6] Persons nearby began to taunt and heckle the members of the group. An altercation ensued. Bottles were hurled at the group. Bess was struck with a stool. Fraser was injured. Fraser and Persaud were both forced to flee for their safety. In the vicinity of Parliament Building, a police vehicle approached them. They were placed in the vehicle. They too were taken to the Brickdam Police Station. At the station, they encountered some of the persons who had earlier attacked them. These persons had reported to the police that *they* were the victims in the earlier melee and that they had been beaten and robbed by Fraser and Persaud.

[7] While in custody, Fraser made several requests of the police. He demanded that the police take a statement from him of what had transpired at the Snackette. He sought legal counsel. He requested medical attention. He asked for a telephone call. None of his requests was granted. Instead, he and Persaud were lined up in an identification parade and then put in a cell.

[8] They met McEwan and Clarke in the cell. All four spent the weekend there. Neither at the time of arrest nor at any other time during the weekend did they receive any explanation as to why they had been arrested and detained.

[9] On the Monday morning, 9th February 2009, they were all taken to the Georgetown Magistrate's Court. At the court they learned, for the first time, that they had been charged with the offences of loitering and wearing female attire in a public place for "an improper purpose". Fraser was also charged with damaging a mini-bus and with larceny of a cell phone belonging to the mini-bus driver.

[10] The 1st - 4th named appellants pleaded guilty to the charge of wearing female attire for an improper purpose. It was more convenient and less expensive to do so than to retain counsel to dispute the charges. McEwan, Clarke and Persaud were fined $7,500. Fraser was fined $19,500. Upon imposing the sentence, the presiding Magistrate made some

extraordinary comments. The Magistrate told the 1st - 4th named appellants that they must go to church and give their lives to Jesus Christ. The Magistrate advised them that they were confused about their sexuality; that they were men, not women.

[11] The loitering charges against the four appellants were subsequently dropped. The other charges against Fraser (damage to the mini-bus and larceny of the cell phone) were also dismissed. But Fraser was placed on a 2-year bond to be of good behaviour.

[12] Sometime after the proceedings before the Magistrate had ended, the 1st - 4th named appellants held discussions with the Society Against Sexual Orientation Discrimination (SASOD). SASOD is a local human rights organisation. Its objectives include the cause against eradication of homophobia in Guyana and throughout the Caribbean. It undertakes efforts geared towards constitutional reform of discriminatory laws against the LGBTI community and changing societal attitudes towards the LGBTI community to end discrimination.

The Constitutional Proceedings

The Trial Court

[13] The appellants began proceedings in the High Court against the State. They were represented by the same counsel. They alleged a series of constitutional rights violations. These included:

(i) The refusal of the police to inform the 1st - 4th named appellants, as soon as reasonably practicable, of the reasons for their arrest and detention. This, it was said, was contrary to their constitutional rights laid out in Article 139 (3) and Article 144 (2) (b).

(ii) The refusal of the police to allow them to retain and instruct legal counsel of their choice upon arrest and before being taken to court. Article 139 (3) of the Constitution was cited in support of this claim.

(iii) The validity of section 153(1)(xlvii) of the Summary Jurisdiction (Offences) Act and the remarks of the Magistrate. Section 153 contains the offence for which the 1st - 4th named appellants had pleaded guilty. The material part of section 153 makes it a crime for a man to dress in female attire, or for a woman to dress in male attire, in a public place, for an improper purpose.

The appellants claimed that this law is bad because it is vague, uncertain, irrational and discriminatory. The vagueness and uncertainty, they said, relate to the words "improper purpose", "female attire" and "male attire". They claimed that the law breaches Articles 1, 40, 149 and 149D of the Constitution. They also said that the sentencing remarks of the Magistrate reinforced the discriminatory treatment.

[14] The judge sitting in the Constitutional Court found that the police were under a constitutional duty to inform the 1st - 4th named appellants of the reason for their arrest. Accordingly, the judge issued a declaration to this effect. The judge, however, held that the Constitution did not impose upon the police an obligation to enable an arrested person to retain and instruct a lawyer. Reference was made to the cases of *Robinson v R*[1] and *Abdool Salim Yasseem and Thomas v The State (No. 2)*.[2] The judge found no evidence to show that the police had acted to prevent any of the appellants from retaining and instructing counsel.

[15] The judge denied the various points of challenge to section 153. First of all, the judge decided that the section was precluded from human rights challenge. This was because, according to the judge, the Constitution's "savings clause" immunises laws enacted during the colonial era against constitutional challenge. The judge's view was that section 153 could only be invalidated by the legislative process.

[16] The judge disagreed that section 153(1)(xlvii) was too vague and uncertain to be enforceable. The judge considered that it was the "improper purpose" that grounded the criminalisation of cross-dressing in public. Concerns about any supposed vagueness in what constituted "male attire" or "female attire" were therefore of no consequence. According to the judge: "[I]t is not criminally offensive for a person to wear the attire of the opposite sex as a matter of preference or to give expression or to reflect his or her sexual orientation".

[17] The judge did not agree that section 153(1)(xlvii) breached the 1st - 4th named appellants' right to freedom from discrimination. There was no sex discrimination,

[1] (1985) 32 WIR 330 (P.C).
[2] (1994) 56 WIR 274.

according to the judge, because firstly, the section is "directed against the conduct of both male and female persons". Secondly, the section only addresses "attire". In the judge's interpretation of the law, it was not an offence for a male person to wear a female head wig or earrings or female shoes in a public place, even for an improper purpose. The judge also disagreed with the argument that the rights of the 1st - 4th named appellants to equality before the law under Article 149D of the Constitution had been violated.

[18] The judge addressed the issue of the religious admonitions of the Magistrate and the possibility that those remarks signified breaches by the State of the 1st - 4th named appellants' rights to equality and to freedom of conscience (Articles 145 and 149). The judge held that, at worst, the Magistrate's statements amounted to "proselytising", but they did not constitute a hindrance to freedom of thought and of religion.

[19] The judge held that SASOD had no standing. There was no room for SASOD to represent anyone when the affected persons themselves had instituted proceedings on their own behalf. SASOD was struck from the proceedings.

[20] The judge awarded each appellant the sum of $40,000 for breach of the right to be informed as reasonably practicable of the reason(s) for being arrested. The judge also awarded the State $5000 in costs, to be payable by SASOD. The appellants appealed to the Court of Appeal.

The Court of Appeal

[21] In the Court of Appeal, counsel for the State raised several preliminary issues. Counsel claimed that the appellants were abusing the process of the court. The case was academic and hypothetical because, in pleading guilty before the Magistrate, the 1st - 4th named appellants had accepted the validity of section 153. The complaints they made in the constitutional court, whether about section 153 or their treatment when they were arrested, should have been dealt with at the Magistrate's court. These constitutional proceedings were really a collateral challenge to the convictions recorded against the 1st – 4th named appellants. They were seeking a second bite at the cherry and this should not be permitted.

[22] The Court of Appeal did not accept these preliminary submissions. The court, commendably, took a common-sense view of the matter. Raising the constitutional issues before the Magistrate was an option, but, as the Court of Appeal pointed out, the four appellants were distinctly disadvantaged since they did not have the benefit of legal representation. Further, the fact that they each pleaded guilty did not operate as a bar to the constitutional challenge they subsequently raised. The court proceeded to hear the appeal on its merits.

[23] The judgment of the Court of Appeal was a unanimous one. On the savings clause point, the court entertained but dismissed an interesting submission made by the appellants. The appellants had submitted that since section 153 had been amended several times since independence in 1966, the section had thereby lost its status as an "existing" law. The savings clause no longer privileged it and rendered it immune from scrutiny. The court did not buy this argument. The court observed that the post-independence amendments had merely created harsher penalties. In the court's view, the substance, the mischief, targeted by the law, had remained unaltered. As such, the court decided that section 153 was still protected from constitutional challenge by the savings clause.

[24] The Court of Appeal expressed its "complete agreement" with the trial judge's view that section 153 carried no taint of gender discrimination. On the vagueness point, while acknowledging that the expression "improper purpose" is broad in meaning, the court pointed out that the use of broad terms in statutory provisions is pervasive. In this case, according to the Court of Appeal, the meaning of "improper purpose", as used in section 153, is "to be gleaned from the context or more directly, the factual circumstance, including the place and time at which the 'improper purpose' as used in section 153 is alleged." In support of this conclusion, the court referred to statements in *R v Crown Court at Wood Green ex parte DPP*.[3] It was stated there that the legal meaning of statutes which are vaguely drawn is to be determined by courts on a case by case basis. The court noted that given the changing times, it is impossible for the draftsman to have captured the degree of certainty which a criminalising enactment ought to bear. The use of the phrase "improper purpose" was intended to capture a range of different situations.

[3] [1993] 1 WLR 723.

[25] The Court of Appeal answered the appellants' concern that the vagueness of cross-dressing in public for an "improper purpose" makes it impossible for a citizen to know how to regulate his/her conduct. The court's view was that it requires "a measure of internal rationalization so that the citizen is able to determine for himself the consequences which a given action may entail". The Court of Appeal proceeded to suggest examples of conduct that would fail to meet a "proper purpose" standard. One such example given was where a man puts on a dress, a wig and high heeled shoes, pretending to be a woman in distress, and then enters a taxi in order to rob the driver.

[26] The Court of Appeal dismissed the arguments of the appellants that the statements made by the Magistrate infringed their constitutional rights. The court pointed out that the Magistrate made her comments *after* imposing sentence and therefore what was said could not have influenced the proceedings.

[27] Finally, the Court of Appeal reversed the judge's orders made in favour of the 1st - 4th named appellants. These orders, it will be recalled, were in relation to the successfully claimed right to be informed as reasonably practicable of the reason(s) for being arrested. The Court of Appeal noted, correctly in our view, that there were substantial areas of conflict in the affidavit evidence of the 1st - 4th named appellants and of the police. Based on this conflicting evidence, the court found that it was inappropriate for the judge to have made a finding of a breach of Article 139 (3) of the Constitution, especially in the absence of any cross-examination of the makers of the respective affidavits. The appellants appealed to this Court. The Attorney General cross-appealed the refusal of the Court of Appeal to dismiss the proceedings as a collateral challenge to the convictions recorded against the 1st - 4th named appellants.

The issues for determination

[28] The issues before us for determination are no different from those faced by the courts below. The most substantive may conveniently be categorised as follows:

(i) Whether section 153(1)(xlvii) violates the 1st - 4th named appellants' right to equality and non-discrimination guaranteed to them under Article 149 of the Constitution;

(ii) Whether section 153(1)(xlvii) violates the 1st - 4th named appellants' right to freedom of expression guaranteed to them under Article 146 of the Constitution;

(iii) Whether section 153(1)(xlvii) offends the rule of law given its vagueness with the use of the terms "improper purpose", "male attire" and "female attire;

(iv) Whether SASOD is a necessary and proper party to the proceedings;

(v) Whether the remarks of the Magistrate were appropriate and, if they were not, what consequence, if any, should follow.

Before examining these issues, it is necessary to spend some time first, in placing section 153(1)(xlvii) in its historical context, and secondly, in determining whether the court is barred from testing that section for unconstitutionality. Although both courts below pronounced on the latter, neither paid much attention to the historical context of the section.

The historical context surrounding section 153

[29] Why was section 153(1)(xlvii) enacted? What interests did it serve at the time of its enactment? What interests does it currently serve? These kinds of questions are relevant because of the nature of the challenge made to the constitutionality of the section. To answer them we must turn to historians and social scientists. These academics have an enormous contribution to make to the interpretative process lawyers and judges must undertake. But their efforts are often insufficiently appreciated. We are therefore grateful to counsel for the appellants for the extensive and rigorous research that was conducted and for the rich, ample material provided to assist the Court.

[30] The prohibition against cross-dressing for an improper purpose was enacted in Guyana in 1893, towards the end of the 19th century. The law was part of a suite of laws enacted against vagrancy. These laws were passed in the post-emancipation period, both in the Caribbean and in the United States, to cope with the paradigm shift in the mode of production from slavery to free labour. The laws were designed to regulate and exercise control of both the ex-slave population and, in places like Guyana, the newly imported

indentured labourers.[4] The objective was to curtail mobility, to keep close to the plantations those whose labour was essential for continued exploitation. Legal coercion became indispensable to maintaining a ready source of cheap labour in the emerging free labour system.[5] The laws, which also regulated gender and religion, were rigorously enforced by magistrates and police.[6]

[31] Legal historian and Dean of the University of Virginia Law School, Professor Risa Goluboff, in her recent book,[7] has noted that:

> "The vagrancy law was often the go-to response against anyone who threatened, as many described it during vagrancy laws' heyday, to move "out of place" socially, culturally, politically, racially, sexually, economically, or spatially. Over time, states and localities deployed and retooled vagrancy laws for use against almost any—real or perceived, old or new—threat to public order and safety.
>
> The officer on the beat in the 1950s and 1960s saw such threats everywhere, in the "queer," the "Commie," the "uppity" black man, the "scruffy" young white one. It was his job to see these threats, to determine who was "legitimate" and who not. He was trained to see difference as dangerous, to see the unusual as criminal. That was what not only his superiors but also the upstanding taxpayers wanted, expected him to do. When he walked the streets questioning and arresting the scum, the flamboyant, the detritus, and the apostate, he brought vagrancy laws with him, and he did his job."[8]

[32] These views have been accepted and supported by distinguished jurists. Writing about vagrancy statutes and other laws enabling arrest on suspicion, United States Supreme Court Justice William Douglas noted:

> "I think we can say with confidence that in this particular area of law the traditional safeguards available to accused persons tend to mean practically nothing. These vagrants usually have no lawyer to speak for them."

He added that:

> "The persons arrested on "suspicion" are not the sons of bankers, industrialists, lawyers, or other professional people. They, like the people accused of vagrancy, come from other strata of society, or from minority groups who are

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[4] Diana Paton, *The Cultural Politics of Obeah: Religion, Colonialism and Modernity in the Caribbean World* (Cambridge: Cambridge University Press 2015) 123.
[5] Diana Paton, *No Bond But the Law: Punishment, Race, and Gender in Jamaican State Formation, 1780-1870* (Duke University Press, Durham 2004) 54.
[6] Diana Paton, *"Small Charges: Law and the Regulation of Conduct in the Post-Slavery Caribbean"*, The Elsa Goveia Memorial Lecture (Published by the Department of History and Archaeology, The UWI Mona, April 2014).
[7] Risa Goluboff, *Vagrant Nation: Police Power, Constitutional Change, and the Making of the 1960s* (Oxford University Press, 2016).
[8] ibid, pp. 2-3.

not sufficiently vocal to protect themselves, and who do not have the prestige to prevent an easy laying-on of hands by the police."[9]

[33] Unsurprisingly, vagrancy laws ultimately were struck down by the Supreme Court of the United States. They were violative of the rule of law. In *Papachristou et al v. City of Jacksonville*,[10] for example, it was held that the Jacksonville vagrancy law was unconstitutionally vague because it did not give a person of ordinary intelligence fair notice that his or her contemplated conduct was forbidden by the statute.

[34] Section 153(1) is typical of the vagrancy laws of the post emancipation era. The question for determination in this case is whether section 153(1)(xlvii), cross-dressing in public for "an improper purpose", should remain on Guyana's statute books; at least, in the form in which it currently stands.

The Savings Law Clause

[35] The second preliminary issue we must look at is extremely important. It has overarching significance, not just for this case, but for all cases where a pre-independence law is alleged to be contrary to the fundamental rights laid out in the Constitution. It concerns the question whether section 153(1)(xlvii) is "an existing law", and, if it is, whether it is therefore immune from judicial scrutiny. This is a fundamental plank upon which the State defends the challenge to the constitutionality of the law. The argument is that, however section 153(1)(xlvii) might infringe the 1st - 4th named appellants' human rights, the section is nonetheless part of a protected law; a law preserved and protected by a "savings law clause".

[36] The "savings law clause" is to be found in the Constitutions of all Commonwealth Caribbean States. The Constitution of the State of Belize has the rare distinction of having placed a time horizon on its operation. In Belize, the clause sensibly had effect only for the first five years after the country attained independence. In other States, there is no such explicit time bar. Still, it is useful to bear in mind that, as suggested in *Watson v. R*,[11] the general savings clause was included in independence constitutions for a

[9] Willian O. Douglas, *"Vagrancy and Arrest on Suspicion."* The Yale Law Journal Vol. 70, No. 1 (1960), 1, 10.
[10] 405 U.S. 156 (1972). See also *Thornhill v Alabama*, 310 U.S. 88; *Shuttlesworth v Birmingham* 382 U.S. 87, 382 U.S. 90.
[11] (2004) 64 WIR 241 [46] per Lord Hope

limited purpose – that of securing an orderly transition from colonial rule to independence. After more than 50 years of independence it is quite a stretch to say that Guyana (or indeed any other independent Commonwealth Caribbean state) is still in that transition phase.

[37] Guyana's savings clause is to be found in Article 152 of the Constitution. That Article states, among other things, that nothing contained in or done under the authority of any pre-independence written law shall be held to be inconsistent with or in contravention of any provision of Articles 138 to 149 (inclusive) of the Constitution. Articles 138 to 149 encompass a variety of human rights provisions. The broad effect of the savings clause, read literally by many, is that these human rights, so carefully laid out in the Constitution, must give way to the dictates of a pre-Independence law until and unless the legislature amends the pre-independence law.

[38] Until this Court's recent decision in *Nervais*,[12] it has been the conventional wisdom that the savings clause completely immunised pre-independence laws from being held to be in contravention of the human rights laid out in the Constitution. The courts below adopted the conventional wisdom. They held that the cross-dressing law was an existing law and was therefore "saved" from constitutional challenge; that Article 152 of the Constitution barred the court from declaring section 153(1)(xlvii) to be inconsistent with anyone's fundamental rights.

[39] By shielding pre-Independence laws (referred to as "existing laws", because they were laws in existence at the time of Independence) from judicial scrutiny, savings clauses pose severe challenges both for courts and for constitutionalism. The hallowed concept of constitutional supremacy is severely undermined by the notion that a court should be precluded from finding a pre-independence law, indeed *any* law, to be inconsistent with a fundamental human right. Simply put, the savings clause is at odds with the court's constitutionally given power of judicial review.

[40] On 27th June 2018, a day before the hearing of the present appeal, this Court delivered its judgment in the appeals of *Nervais v The Queen* and *Severin v The Queen*.[13] In those

[12] *Nervais v The Queen and Severin v The Queen* [2018] CCJ 19 (AJ).
[13] ibid

consolidated cases, the Court addressed the Barbados savings law clause. At [59] of the judgment we noted that:

> "With these general savings clauses, colonial laws … are caught in a time warp continuing to exist in their primeval form, immune to the evolving understandings and effects of applicable fundamental rights. This cannot be the meaning to be ascribed to that provision as it would forever frustrate the basic underlying principles that the Constitution is the supreme law and that the judiciary is independent."

[41] We reiterate those statements here. Law and society are dynamic, not static. A Constitution must be read as a whole. Courts should be astute to avoid hindrances that would deter them from interpreting the Constitution in a manner faithful to its essence and its underlying spirit. If one part of the Constitution appears to run up against an individual fundamental right, then, in interpreting the Constitution as a whole, courts should place a premium on affording the citizen his/her enjoyment of the fundamental right, unless there is some overriding public interest. That was this Court's approach in *Joseph & Boyce*[14] when we held that, in order to assure a condemned man the right to the protection of the law, a constitutional ouster clause did not prevent the courts from inquiring into the decisions of the local Mercy Committee.

[42] There are at least four broad and interlocking approaches courts can take to ameliorate the harsh consequences of the application of the savings law clause. Firstly, even if one were to apply the clause fully and literally, because of its potentially devastating consequences for the enjoyment of human rights, *the savings clause must be construed narrowly, that is to say, restrictively*.

[43] Secondly, assuming again a full and literal application of the clause, the clause only saves laws that infringe the individual human rights stipulated in the clause itself. It does not preclude the court from holding a pre-independence law to be invalid if in fact the law runs counter to some constitutional provision that falls outside the specified individual human rights, i.e. in Guyana, Articles 138 to 149 (inclusive). Nor is the savings clause in play if core constitutional principles are violated by the existing law. In other words, *only challenges to the stipulated human rights provisions are barred*.

[14] [2006] CCJ 3 (AJ), 69 WIR 104.

[44] Thirdly, application of the clause may result in placing the State on a collision course with its treaty responsibilities and it is a well-known principle that *courts should, as far as possible, avoid an interpretation of domestic law that places a State in breach of its international obligations.*

[45] The fourth approach is the most contentious. But it has support from very distinguished jurists. It is that *courts should first apply the modification clause to the relevant pre-Independence law before attempting to apply the savings law clause*. We consider each of these approaches in turn.

Restrictive interpretation and application

[46] A restrictive interpretation and/or application of the savings clause is always warranted. There is a simple reason for this. It is the duty of the court to adopt a generous interpretation of the provisions related to fundamental rights.[15] As far as possible, full effect should be given to the guarantees promised to the citizen in those rights. Several judges have affirmed this essential principle that savings law clauses must be given a narrow construction.[16]

[47] A classic example of a restrictive interpretation can be seen in the consolidated Eastern Caribbean cases of *Hughes v R* and *Spence v R*[17]. The question at issue was whether the death penalty was saved by a savings clause. A majority of the Court of Appeal held that although the clause, in the Saint Lucia and St Vincent and the Grenadines Constitutions respectively, may have immunised challenges to the law prescribing the death penalty, it did not save from attack challenges to the *mandatory* death penalty. This restrictive approach was affirmed by the Privy Council in *Spence v R*[18] where a fine distinction was made between that which was required and that which was authorised.

[48] Guyana's cross-dressing law did not remain in its pristine form after it was enacted in 1893. It was repeatedly amended after the country's independence in 1966. Acts Nos. 1 of 1989, 8 of 1997 and 10 of 1998 all amended it by imposing harsher penalties on

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[15] See *Minister of Home Affairs v Fisher* [1980] AC 319, per Lord Wilberforce.
[16] See, for example, *Attorney General v. Whiteman* (1991) 39 WIR 397, 412 (PC TT); *Watson v. R* (2004) 64 WIR 241 [42], [46]; *R v. Hughes* (2002) 60 WIR 156, [2002] 2 AC 259 [35]; *Attorney General v. Coard* (2005) 68 WIR 289 at [68]-[69]; *Nervais v R* [2018] CCJ 19 (AJ) [39].
[17] [2002] 2 LRC 531.
[18] [2001] UKPC 35, 59 WIR 216.

convicted persons. When the courts below had to consider whether this law was an "existing law", it was open to them to regard these amendments as having altered the law so that it was no longer to be regarded as an existing law i.e. a law that was in existence at the time of independence. This approach would have been consistent with a narrow application of the savings clause. The courts below neglected to take that approach. They opted instead for a somewhat liberal application. They held that the repeated amendments to the penalties laid out in the law did not cause the law to lose its status as an existing law because the essence of the law remained un-altered.

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

Only challenges to the listed human rights provisions are barred

[50] The savings clause ostensibly applies to laws which are alleged to be inconsistent with or in contravention of Articles 138 to 149 (inclusive) of the Constitution. The following Articles of the Constitution are plainly outside the range of the clause, namely: Article 1 (characterisation of the State as an indivisible, secular, democratic State) and Article 40 (the right to a happy, creative and productive life). The framers of the Constitution never saw it fit to protect pre-independence law from invalidity because of inconsistency with either of these two Articles.

[51] Additionally, the savings clause does not immunise pre-independence laws against challenge if the pre-independence law is inconsistent with the separation of powers. An early demonstration of this principle can be seen in the Jamaican case of *DPP v Mollison (No. 2) (2003).*[19] Section 29(1) of the Juveniles Act 1951 authorised the imposition of a sentence of detention during the pleasure of the Governor-General of Jamaica. This was a pre-independence law. Ordinarily, Mollison, a juvenile to whom the law was

[19] [2003] UKPC 6, 64 WIR 140.

applied, could not have had the court invalidate section 29(1) on the ground that this law contravened his human rights. It was nevertheless open to Mollison to argue that the law should be invalidated because it infringed the core constitutional principle that judicial functions (such as sentencing) had to be exercised by the judiciary and not by the executive. This argument prevailed. The wording of the law, and hence, the sentence, had to be modified to read detention during the court's and not the Governor-General's pleasure. In light of the modern approach to other core constitutional principles such as judicial independence[20] and the rule of law,[21] one can safely say that the savings clause will also not protect a pre-independence law if the latter is in clear violation of these principles as well. So, in this case, if the appellants can make good on their claim that section 153(1)(xlvii) is contrary to the rule of law, then the savings clause is of no assistance to the State and the Court would be entitled to strike down or modify the section.

[52] Mr Mendes, SC, on behalf of the appellants, makes the powerful argument that the variety of rights added to the Constitution in 2003, and listed as Article 149A to 149J, are also outside the range of the savings clause. The submission is that these newly inserted rights are numerically distinct, since 149A is not the same as 149; they are qualitatively distinct, in that Article 149A to 149J embraces a variety of topics, some of which have nothing to do with the nature or type of protection covered by Article 149; and, finally, they are temporally distinct, given that these new rights were added in 2003, long after the ones contained in Articles 138 to 149.

[53] The new rights covered by Article 149A – 149J actually emerged from a thorough and democratic reform process. One mandate of this process was to take into account "the full protection of the fundamental rights and freedoms of all Guyanese".[22] The reform commission was tasked, among other things, with considering the extent to which "equal opportunities legislation… can contribute to the cause of justice, equity and progress in Guyana."[23] The new rights accordingly speak to various dimensions of equality,

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[20] See *Suratt and others v Attorney General of Trinidad and Tobago (No 2)*, [2008] UKPC 38, 73 WIR 437.
[21] See *Maya Leaders Alliance v. Attorney General of Belize*, [2015] CCJ 15 (AJ); Per Saunders J, *Lucas and Carillo v The Chief Education Officer et al*, [2015] CCJ 6 (AJ).
[22] Hari N Ramkarran, "*Seeking a Democratic Path: Constitutional Reform in Guyana*" (2004) 32:3 Georgia Journal of Int'l and Comp Law, 585, 597.
[23] The Herdmanston Accord, Clause 4(iii) (January 17, 1998).

participatory democracy, equitable treatment, Indigenous Peoples, education and the environment. These new provisions substantially extended the justiciable fundamental rights in the Constitution through the addition of Article 149A – 149J. It would be strange for proudly independent, republican Guyana to promote these new rights by inserting provisions in the Constitution that could be trumped by ordinary legislation enacted by a colonial legislature. To deny full judicial protection in respect of these new rights would render useless a substantial part of the entire constitutional reform process that sought to create a more democratic and inclusive society. We accept this submission put forward by Mr Mendes. It is a submission that is also consistent with restrictive interpretation and application of the savings clause.

International law implications

[54] International law bodies have strongly repudiated savings law clauses because of their inconsistency with international human rights obligations. In cases originating from Barbados and Trinidad and Tobago, for example, the Inter-American Court of Human Rights repeatedly held that application of the savings law clauses produces consequences that violate the American Convention on Human Rights by denying the right to seek judicial protection against violations of guaranteed human rights.[24]

[55] Article 39(2) of the Guyana Constitution expressly mandates the courts to "pay due regard to international law, international conventions, covenants and charters bearing on human rights" when interpreting any of the fundamental rights provisions of the Constitution. In *Thomas v AG*,[25] one of the first cases to examine Article 39(2), George J (as she then was) held [at [12]] that the provision placed courts under a duty 'to incorporate international human rights law into the domestic law of Guyana when interpreting the rights provisions of the Constitution.' George J expressly distinguished the situation in Guyana from other Caricom States in which international law is said merely to have persuasive application. In Guyana, therefore, there is an even greater onus on courts, pending legislative reform, to interpret the savings clause as narrowly as

[24] *Case of Hilaire, Constantine and Benjamin et al. v Trinidad and Tobago*, IACHR Series C no 9, IHRL 1477, Judgment dated 21st June 2002, para. 152(c), and *Case of Caesar v Trinidad and Tobago*. Merits, Reparations and Costs. Judgment of March 11, 2005. Series C No. 123, paras. 115- 117; *Case of Boyce et al. v. Barbados*, Judgment of November 20, 2007 (Preliminary Objection, Merits, Reparations and Costs), paras. 75 – 80.
[25] (Unreported) June 17, 2011, High Court, Guyana, by George J.

possible so as to place the law in compliance with the country's international law obligations.

Modification of pre-independence law first before applying the savings clause

[56] Section 7(1) of the Constitution Act provides:

> "Subject to the provisions of this Act, the existing laws shall continue in force on and after the appointed day as if they had been made in pursuance of the Constitution but shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Act."

[57] The question which arises is how does section 7(1) relate to the savings clause. Section 7(1) is not a part of the Constitution, but it is contained in the Act that brings the Constitution into force. Specifically, does section 7(1) permit the modification of the cross-dressing law (and other existing laws) so that Article 152 (the savings clause) is in play only if the existing law is incapable of modification? Or, is the court precluded from resorting to section 7(1) in which case the conventional wisdom regarding the savings clause continues to hold sway? It is these questions which engaged an expanded nine-member panel of the Privy Council in the Barbados case of *Boyce & Joseph v R.*[26]

[58] By a narrow margin of 5 – 4, the conventional wisdom carried the day. The majority held that the savings clause was a complete ouster of any jurisdiction to review existing laws to test their constitutionality. The minority, on the other hand, took the view that the effect of the savings clause, read together with the modification clause (i.e. the section akin to section 7(1) of the Guyana Constitution Act), was to permit the court to identify an inconsistency between an existing law and the fundamental rights in the Constitution and to modify the inconsistency out of existence. The savings clause would only be needed where it proved utterly impossible to modify the existing law to make it conform with the Constitution. Among the four dissenters was, Lord Bingham, the President of the court and, arguably, one of the finest judges the United Kingdom has ever produced.

[26] [2005] 1 AC 400, [2004] UKPC 32.

[59] This Court's judgment in *Nervais*[27] came down firmly on the side of the dissentients. At [64] we stated unequivocally, in relation to the Barbados Constitution, that:

> Where any person alleges that an existing law has contravened or is contravening or is likely to contravene any of the provisions of sections 12 to 23 in relation to him, the Court must read section 4(1) of the Independence Order together with section 26(1) of the Constitution.

Further, at [68] of the judgment, we concluded that:

> Where there is a conflict between an existing law and the Constitution, the Constitution must prevail, and the courts must apply the existing laws as mandated by the Independence Order with such modifications as may be necessary to bring them into conformity with the Constitution.

In other words, we held that the modification clause and the savings clause must be read together so that pre-Independence law is brought into conformity with the Constitution.

[60] For all the above reasons, and in particular, the fact that the post-Independence amendments made to the cross-dressing law deprived that law from being regarded as an existing law (See [49] above), the Court therefore accepts the submission that it should not be deterred by the savings law clause from testing section 153(1)(xlvii) for its compatibility with the Constitution. And, if we find that the section is inconsistent with the fundamental rights laid out in the Constitution, we are entitled to treat accordingly with it.

Equality and non-discrimination

[61] The Co-operative Republic of Guyana is an indivisible, secular, democratic and sovereign nation.[28] Its most precious civic values are laid out in the country's Constitution. The Constitution's Preamble indicates the determination of the Guyanese people to "forge a system of governance that promotes concerted effort and broad-based participation in national decision-making in order to develop a viable economy and a harmonious community based on democratic values, social justice, fundamental human rights, and the rule of law". The Constitution proclaims that the people of Guyana celebrate their "cultural and racial diversity and strengthen [their] unity by eliminating

[27] [2018] CCJ 19 (AJ).
[28] Section 2, *"The Preamble of the Constitution"*, Act No. 6 of 2001, Constitution (Amendment) No. 4 of 2001.

any and every form of discrimination…"[29] In adjudicating complaints of human rights infringements, this Court must be guided by these statements of fundamental principle.

[62] Article 149(1) of the Constitution protects the people of Guyana from discrimination. No law can be enacted that is discriminatory of itself or in its effect.[30] No one is to be treated in a discriminatory manner by any person acting in the performance of the functions of any public office or any public authority.[31] The word "discriminatory" is specifically defined. It means

> "…affording different treatment to different persons attributable wholly or mainly to their or their parents' or guardians' respective descriptions by race, place of origin, political opinion, colour, creed, age, disability, marital status, sex, gender, language, birth, social class pregnancy, religion, conscience, belief or culture whereby persons of one such description are subjected to disabilities or restrictions to which other persons of the same or another such description are not made subject or are accorded privileges or advantages which are not afforded to other persons of the same or another such description."[32]

Article 149D (1) provides that "The State shall not deny to any person equality before the law or equal protection and benefit of the law". Of course, as is the case with other fundamental rights, the right not to be discriminated against is not enjoyed at large. The Constitution itself lays down exceptions and qualifications which may impact on the enjoyment of the right: Article 149 (3)-(7). Parliament may, for example, properly enact legislation limiting or impinging fundamental rights if such legislation is reasonably required in the interests of, *inter alia*, public order, public morality,[33] or for the purpose of protecting the rights and freedoms of other persons, including the right to practice and observe any religion,[34] or that imposes restrictions upon public officers.[35] Any such limitation should be demonstrably justified in a democratic society.[36] In other words, the infringing law must pursue some pressing objective and be rationally connected to that objective. The infringing law should impair only such of the right as is necessary to be

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[29] ibid
[30] Article 149(1)(a)
[31] Article 149(1)(b)
[32] Article 149(2)
[33] See Article 143(2)
[34] See Article 145(5)
[35] See Article 146(2)(c)
[36] See de Freitas v Permanent Secretary (1998) 53 WIR 131.

impaired. And there must be proportionality of effects between the deleterious and salutary effects of the infringing law in question.[37]

[63] The appellants submitted that the cross-dressing law infringes their fundamental rights because it is rooted in gender stereotypes of how women and men should dress. They say that the section treats transgendered and gender non-conforming persons unfavourably by criminalising their gender expression and gender identity in violation of Article 149D of the Constitution. That Article focuses squarely on inequality before the law and is distinct from, albeit complementary to, Article 149(1) which prohibits discrimination on specified grounds.

[64] At the heart of the right to equality and non-discrimination lies a recognition that a fundamental goal of any constitutional democracy is to develop a society in which all citizens are respected and regarded as equal. Article 149 gives effect to this goal. The Article signifies a commitment to recognising each person's dignity and equal worth as a human being despite individual differences.

[65] The Inter-American Court of Human Rights has repeatedly made the link between equality and dignity. In its Advisory Opinion on *Proposed Amendment to the Political Constitution of Costa Rica related to Naturalization*, the Court said at paragraph 55:

> "The notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified."[38]

[66] The constitutional promise of equality prohibits the State from prescribing legislative distinctions or other measures that treat a group of persons as second-class citizens or in any way that otherwise offends their dignity as human beings. To safeguard equality rights, courts must adopt a substantive approach. Ensuring substantive equality might require equal treatment for those equally circumstanced, different treatment for those who are differently situated, and special treatment for those who merit special

[37] See R v Oakes 1986 CanLII 46 (SCC); [1986] 1 SCR 103.
[38] Advisory Opinion OC-4/84, January 19, 1984, Series A No. 4.

treatment.[39] Paying regard to mere formal equality could lead to grave injustice and defeat the spirit of the equality provisions.[40] Critical to the adoption of a substantive approach is the need to examine the impact or effect of a challenged measure. The judge at first instance was in error when he took the view that there was no discrimination here because, among other things, section 153(1)(xlvii) is "directed against the conduct of both male and female persons".

[67] A substantive approach was applied in the Belizean case of *Roches v Wade*.[41] The case concerned a school's policy of dismissing teachers who had children out of wedlock. When challenged as to the discriminatory nature of the policy, the school argued that the policy applied equally to both male and female teachers. The argument was rightly dismissed by Conteh, CJ who noted at paragraph [51]:

> "The so-called policy of the respondent inevitably therefore impacts more on female unmarried teachers who even without letting on, become progressively and visibly pregnant. This automatically subjects them to the respondent's policy of dismissal. Their male unmarried counterparts on the other hand with their built-in biological incapacity to conceive and therefore get pregnant can, cavalierly ignore with impunity (some would say promiscuity) the respondents' injunction of living according to Jesus' teaching on marriage and sex, without the slightest prospect of sanction…"

[68] At its core, the principle of equality and non-discrimination is premised on the inherent dignity of all human beings and their entitlement to personal autonomy. There is a marked link between gender equality, self-determination and the limits placed on self-determination by gender stereotypes. The CEDAW[42] Committee has noted that:

> "Inherent to the principle of equality between men and women, or gender equality, is the concept that all human beings, regardless of sex, are free to develop their personal abilities, pursue their professional careers and make choices without the limitations set by stereotypes, rigid gender roles and prejudices…"[43]

[69] Jamadar J (as he then was) has pointed out that "a court is entitled to consider granting constitutional relief, where the claim is that a person has been discriminated against by

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[39] See, for example, Constitutional Court of Colombia Case C-862/08.
[40] *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 [165].
[41] Action No. 132 of 2004 (Belize).
[42] Convention on the Elimination of All forms of Discrimination Against Women.
[43] General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women at [22].

reason of a condition which is inherent and integral to his/her identity and personhood. Such discrimination undermines the dignity of persons, severely fractures peace and erodes freedom."[44] The Canadian Supreme Court Justice, Iacobucci J, states that human dignity relates to a person's self-respect and self-worth. It is harmed "by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits."[45] It is also harmed

> "… when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within…society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?"[46]

[70] A society which promotes respect for human rights is one which supports human development and the realisation of the full potential of every individual. The hostility and discrimination that members of the LGBTI community face in Caribbean societies are well-documented.[47] They are disproportionately at risk for discrimination in many aspects of their daily lives, including employment, public accommodation, and access to State services.

[71] The 1st - 4th named appellants here, by choosing to dress in clothing and accessories traditionally associated with women, are in effect expressing their identification with the female gender. And the expression of a person's gender identity forms a fundamental part of their right to dignity. Recognition of this gender identity must be given constitutional protection.

[72] Although it is true that cross dressing is practiced by persons of several types of sexual orientation, both on its face and in its application, section 153(1)(xlvii) has a disproportionately adverse impact on transgendered persons, particularly those who identify with the female gender. It infringes on their personal autonomy which includes

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[44] *Sanatan Dharma Maha Sabha of Trinidad and Tobago Inc and Others v The Attorney General of Trinidad and Tobago* HCA No S2065/2004.
[45] *Law v. Canada* [1999] 1 SCR 497 at [53].
[46] ibid
[47] See for example: "*I have to leave to be me*." Discriminatory Laws against LGBT People in the Eastern Caribbean, https://www.hrw.org/report/2018/03/21/i-have-leave-be-me/discriminatory-laws-against-lgbt-people-eastern-caribbean; accessed 2 September, 2018.

both the negative right to not be subjected to unjustifiable interference by others and the positive right to make decisions about one's life. The formulation and operation of section 153(1)(xlvii) also reinforce stereotyping. The section conduces to the stigmatisation of those who do not conform to traditional gendered clothing. But most of all, the fact that it criminalizes aspects of their way of life, thus enabling the State to unleash its full might against them, cannot, in all the circumstances, be reasonably justified. It is therefore, in our view, that section 153(1)(xlvii) violates Articles 149(1) and 149D of the Constitution**.**

Freedom of expression

[73] The appellants also claimed that section 153(1)(xlvii) infringes freedom of expression as guaranteed under Article 146. The courts below denied the appellants' claim. Those courts reasoned that section 153(1)(xlvii) does not criminalise cross-dressing as such; that it only criminalises dressing in the clothing of the opposite sex *for an improper purpose* and that there was nothing wrong with such a law.

[74] Article 146 of the Constitution gives every Guyanese the right to hold and communicate ideas and opinions without interference. Like other rights, this one may be qualified by laws that make provision for that which is reasonably required in the interests of, inter alia, defence, public safety, public order, public morality or public health. We note in passing that, in this case, no submissions were made to suggest that this case is concerned with any of these exceptions.

[75] Because it underpins and reinforces many of the other fundamental rights, freedom of expression is rightly regarded as the cornerstone of any democracy. A regime that unduly constrains free speech produces harm, not just to the individual whose expression is denied, but to society as a whole. On the one hand, the human spirit is stultified. On the other, social progress is retarded. The fates of brilliant persons like Galileo, and Darwin, and countless others, sung and unsung, betray a familiar pattern in the history of humankind. Today's heresy may easily become tomorrow's gratefully embraced orthodoxy.

[76] It is essential to human progress that contrary ideas and opinions peacefully contend. Tolerance, an appreciation of difference, must be cultivated, not only for the sake of

those who convey a meaning, but also for the sake of those to whom it is conveyed.[48] A person's choice of attire is inextricably bound up with the expression of his or her gender identity, autonomy and individual liberty. How individuals choose to dress and present themselves is integral to their right to freedom of expression. This choice, in our view, is an expressive statement protected under the right to freedom of expression.

[77] These conclusions are not novel. The Indian Supreme Court in *National Legal Services Authority v Union of India and Ors*[49] reached a similar determination when it held that expression of one's identity through words, dress, action or behaviour is included in the right to freedom of expression under the comparable Article of the Indian Constitution.[50] Other courts have also arrived at similar conclusions.[51]

[78] Like other rights, however, freedom of expression is subject to the reasonable limitations imposed by the Constitution. These limitations must be established by law and be demonstrably justified in a free and democratic society. Throughout these proceedings, the State has sought to validate section 153(1)(xlvii) by suggesting that there was nothing wrong with cross-dressing as such but that it was the "improper purpose" that rendered cross-dressing in public objectionable. At paragraphs [80] to [85] we address more specifically this nebulous concept of an "improper purpose". But for the moment, it is instructive to note that it was the mere appearance of McEwan and Clarke, as they stood awaiting transportation at the corner of North Road and King Street, dressed in "female clothing", that resulted in them being arrested, detained, charged, prosecuted and convicted. No "improper purpose" was or could have been attributed to them.

[79] No one should have to live under the constant threat that, at any moment, for an unconventional form of expression that poses no risk to society, s/he may suffer such treatment. But that is the threat that exists in section 153(1)(xlvii). It is a threat particularly aimed at persons of the LGBTI community. The section is easily utilised as a convenient tool to justify the harassment of such persons. Such harassment encourages

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[48] *Irwin Toy Ltd v Quebec (AG)* [1989] 1 SCR 927.
[49] [2014] 4 LRC 629; Writ Petition (Civil) No. 400 of 2012.
[50] Article 19.
[51] See also *Irwin Toy Ltd v Quebec (AG)* [1989] 1 SCR 927; *City of Columbus v. Rogers* 41 Ohio St. 2d 161 (Ohio 1975); *Muhamad Juzaili Bin Mohd Khamis and Others v State Government of Negeri Sembilan and Others* [2015] MLJU 65; *City of Chicago v. Wilson et al.* 75 Ill.2d 525, 389 N.E.2d 522, 27 Ill. Dec. 458; *National Coalition for Gay and Lesbian Equality and Anr. v. Minister of Justice and Ors* [1998] ZACC 15; *Navtej Singh Johar & Ors. v Union of Indian and Ors.* Writ Petition (Criminal) No. 121 of 2018.

the humiliation, hate crimes, and other forms of violence persons of the LGBTI community experience. This is at complete variance with the aspirations and values laid out in the Guyana Constitution and referred to at [62] above

Vagueness of section 153 (1) (xlvii)

[80] A penal statute must meet certain minimum objectives if it is to pass muster as a valid law. It must provide fair notice to citizens of the prohibited conduct.[52] It must not be vaguely worded. It must define the criminal offence with sufficient clarity that ordinary people can understand what conduct is prohibited.[53] It should not be stated in ways that allow law enforcement officials to use subjective moral or value judgments as the basis for its enforcement. A law should not encourage arbitrary and discriminatory enforcement.[54]

[81] Section 153 (l) (xlvii) fails these tests. No details or examples of conduct that would fall under the umbrella of "improper purpose" are discernible, whether in the specific law itself or elsewhere. The cross-dressing person has no clue, and receives no guidance, as to whether contemplated conduct is forbidden by the statute. The section facilitates discriminatory application.

[82] It was suggested to us by the Solicitor General that any potential vagueness could be removed if, when a person is charged, details are given of the improper purpose that prompted the laying of the charge. This is not an effective solution to the problem. It seeks to cure the vagueness *after* the individual has been arrested for the offence. On the contrary, individuals require advance notice of any proscribed conduct so as to regulate their behaviour so as to avoid getting into trouble.

[83] If, as the courts below insisted, the cross-dressing was by itself not really an issue, but the "improper purpose" was in fact the essence of the offence, then two things readily suggest themselves. Firstly, by criminalising only a purpose, and a vague, undefined and extremely broad one at that, the offence represents an unprecedented extension of criminal liability. Secondly, the alleged improper purpose must necessarily itself relate to the taking of some step to commit a known offence. In the latter case the law is entirely

[52] See *Ontario v. Canadian Pacific Ltd.* [1995] 2 S.C.R. 1031.
[53] *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).
[54] ibid

otiose as, without it, the individual may still be prosecuted for committing or attempting to commit that other known offence.

[84] Layered on top of this is the premise, inherent in the law, that there is attire that is wholly and exclusively male or female. This is not borne out by everyday practice. Indeed, many clothing establishments advertise and sell unisex clothing. Section 153(1)(xlvii) is therefore predicated on the faulty notion that outward attire is necessarily exclusively male or female. The fact that no one can say with certainty what an 'improper purpose' is or what male or female attire looks like, leaves transgendered persons in particular in great uncertainty as to what is and is not allowed. And to aggravate that injustice, it gives law enforcement officials almost unlimited discretion in their application of the law.

[85] The rule of law requires that legislation which is hopelessly vague must be struck down as unconstitutional.[55] For all these reasons we hold that section 153(1)(xlvii) is unconstitutionally vague and, as it stands, fulfils no legitimate purpose.

Locus Standi of SASOD

[86] Counsel for the State conceded that while SASOD has a right under the Constitution to act in a representative capacity to advocate on behalf of its members, SASOD had nevertheless not put forward any submissions materially different from the 1st - 4th named appellants. Indeed, SASOD and the other appellants were represented by the same counsel. It was further stated that since the persons whose rights were allegedly infringed had themselves filed suit, there was no basis for SASOD also to be a party to the proceedings and that having SASOD as a party would unnecessarily add to the costs because, if costs were awarded against the State, SASOD would be an additional party to whom costs would have to be paid. The Court of Appeal accepted these submissions as justification for striking out SASOD as a party to the proceedings.

[87] The Court of Appeal did not, in our view, sufficiently appreciate that the appellants were not only challenging the constitutionality of the treatment suffered by the 1st - 4th named appellants. The appellants, and SASOD in particular, were also challenging, in the abstract, the constitutionality of a legal provision; a provision which, if it remained on

[55] *Sabapathee v. State* [1999] 4 LRC 403 at 412, per Lord Hope.

the statute books, could easily be applied in the future to any member of the general public including members of SASOD. Had the courts below paid greater attention to that factor they would have come to a different conclusion since there can be little doubt that SASOD has a real and genuine interest in the legislation under challenge.

[88] In constitutional proceedings, courts should adopt a liberal approach in affording standing to individuals and entities. It is in the public's interest to ensure that the Constitution is properly interpreted and applied, and the rule of law vindicated. Jamadar JA stated in *Dumas v The Attorney General*,[56]

> "…the issue of standing in relation to the vindication of the rule of law, where there is alleged constitutional default, assumes great significance given the constitutional ethic of civic republicanism – that emphasizes the responsibility, even duty, of citizens to participate in creating and sustaining a vibrant democracy and in particular in upholding the rule of law."[57]

Given SASOD's objectives[58] there is no good reason why the courts below should have struck it from the proceedings.

[89] The award of costs is an entirely separate issue. Costs are always in the discretion of the court. One must expect that courts would make sensible and rational costs awards. There is equally no good reason why (in the event the State unsuccessfully defended these proceedings) any court would award separate costs to be paid both to SASOD and to the other appellants when they were all represented by the same counsel.

The remarks of the Magistrate

[90] The remarks made by the Magistrate, after sentencing the 1st - 4th named appellants, while the Magistrate was still sitting, were inappropriate. The courts below should not have excused those remarks. Judicial officers may not use the bench to proselytise, whether before, during or after the conclusion of court proceedings. Secularism is one of the cornerstones upon which the Republic of Guyana rests. But these remarks went beyond proselytising. They revealed stereotypical thinking about transgendered persons. It is not possible to know whether the 1st - 4th named appellants would have been dealt with differently by a Magistrate with impartial views about persons of the LGBTI

[56] Civil Appeal No. P 218 of 2014.
[57] ibid, [46].
[58] See [12] above.

community. On the charge being read, a more informed Magistrate may have, for example, rejected the Guilty pleas and stated a case for the Constitutional court; or, recorded a conviction but discharged the 1st - 4th named appellants; or taken some other step short of the punishment which was actually recorded against the 1st - 4th named appellants.

[91] Section 144 of the Constitution promises all persons charged with a criminal offence a fair hearing by an impartial tribunal. By reason of the remarks made by the Magistrate, the 1st - 4th named appellants would have been justified in believing that in their case this promise was not manifested.

Remedies

[92] In *Maya Leaders Alliance v. Attorney General of Belize*,[59] this Court stated that, "the power … granted to the courts to provide redress for constitutional infractions confers a broad discretion to fashion effective remedies to secure the enforcement of constitutional rights." For all the reasons that have been given above, it is our view that section 153(1)(xlvii) is entirely inconsistent with the Constitution of the Co-operative Republic of Guyana and that, further, the section ought not to be regarded as "an existing law". It is therefore susceptible to being struck down in lieu of being modified. In all the circumstances, the provision should be rendered void.

[93] In these proceedings, the 1st - 4th named appellants elected not to challenge the validity of the convictions and sentences that had been recorded against them in the Magistrate's Court proceedings. Instead, the appellants were concerned here only with prospective remedies. This may have been a prudent course adopted by Counsel for the appellants to avoid any objection that their constitutional challenge was a collateral attack on their convictions. Nevertheless, the declaration of the invalidity of section 153(1)(xlvii) operates retrospectively. It is for the appellants and their Counsel to determine what course of action, if any, they may wish to take in light of the judgment and Orders of the Court in these proceedings which are outlined at [147] below.

[59] [2015] CCJ 15 (AJ).

JUDGMENT OF THE HON. MR. JUSTICE ANDERSON, JCCJ

[94] The Appellants pleaded guilty to and were convicted of the offence of violating section 153(1)(xlvii) of the Summary Jurisdiction (Offences) Act of the Laws of Guyana. That section prohibits every person who, "being a man, in any public way or public place, for any improper purpose, appears in a female attire; or being a woman, in any public way or public place, for any improper purpose, appears in a male attire." The convictions were recorded in the Magistrates Court.

[95] The Appellants did not appeal their convictions. They did, however, commence constitutional proceedings in the High Court claiming, primarily, that section 153(1)(xlvii) was unconstitutional because it was vague, uncertain, irrational and discriminatory and thus breached Articles 1, 40, 149 and 149D of the Constitution. These Articles declare Guyana to be an indivisible, secular, democratic sovereign state[60]; guarantee fundamental rights and freedoms of the individual[61]; protect the individual from discrimination on the grounds of race, place of origin, political opinions, colour or creed[62]; and guarantee equality before the law and equal protection and benefit of the law.[63] The constitutional challenges were denied by the High Court and unanimously by the Court of Appeal. The Appellants now renew these constitutional challenges in their appeal to this Court.

[96] In my opinion the appeals must be allowed because in purporting to criminalize the act of cross-dressing for an improper purpose section 153(1)(xlvii) is an unconstitutional extension of criminal liability in two respects. First, the purported offence is impermissibly vague: it fails to provide fair notice to an ordinary person of reasonable intelligence of the conduct necessary to conform with the provision. The flipside of this is that the section confers unacceptably broad discretion on state officials to arrest and charge at will. The vagueness of the purported offence is fully discussed in the judgments by Saunders PCCJ and Rajnauth-Lee JCCJ. Second, section 153(1)(xlvii) is unconstitutional in that it seemingly purports to criminalize intentions or states of mind which, in my view, is not a competence constitutionally within the realm of the criminal

[60] Constitution of Guyana, Article 1.
[61] Constitution of Guyana, Article 40.
[62] Constitution of Guyana, Article 140.
[63] Constitution of Guyana, Article 149D.

law. It is in relation to this aspect of the case that I wish to make the following few comments.

[97] In purporting to criminalize cross-dressing for an improper purpose, section 153(1)(xlvii) appears to come exceedingly close to attempting to criminalize intentions or states of mind. It is clearly the case that the act of 'crossing dressing' is not itself unlawful *per se*. It is not an offence for males to dress in female attire and vice versa in a public place. The offence is committed only where this is done for an "improper purpose" (whatever that may mean). This suggests that what is being punished is not primarily the conduct of cross-dressing but rather the mental state of harbouring an improper purpose whilst being cross-dressed. This differs from typical crimes where the action proscribed is the interference by one person with the bodily integrity or the property of another. In the case of murder, for example, the *actus reus* of causing deadly harm to another is coupled with the *mens rea* of intending to cause that harm or being reckless whether it was caused.

[98] The situation in the case at bar is very different. Cross-dressing is an entirely innocuous act in that it does not invade the physical or propriety interest of another. For that matter it does not involve self-infliction of harm to one's own body or damage to one's own property; areas in which some have argued that the society might have an interest to protect. Nor does the act involve deception of any kind. It is difficult to disagree with the argument by the Appellants that section 153(1)(xlvii) would be no different in impact if it criminalized the wearing of a blue shirt or walking fast in public for an improper purpose. The conduct is not itself objectionable in any way; it is the purpose for which the unobjectionable conduct is engaged in that leads to criminality. The essence of the crime therefore appears to consist virtually entirely of the state of mind of the person engaged in otherwise perfectly innocent conduct.

[99] This was emphasized by the acting Chief Justice in the High Court when he stated, "[I]t is not criminally offensive for a person to wear the attire of the opposite sex as a matter of preference or to give expression or to reflect his or her sexual orientation." This view, which was unanimously accepted by the Court of Appeal, must be correct, unless the giving of expression to preference or sexual orientation is itself to be considered an

"improper purpose", in which case there would be an attempt to criminalize thoughts, desires and intentions.

[100] Why should a state not punish persons for their thoughts, desires and unexecuted intentions? The traditional reasons advanced have been that mere thoughts, desires and intentions are not punishable because they are harmless, innocent and unprovable, but these suggestions are not universally accepted.[64]

[101] According to the harm principle advocated by John Stuart Mill, the only purpose for which state power can be rightfully exercised over a member of a civilized community against his will is to prevent harm to others[65] and thoughts, desires and intentions are often considered to be harmless. However, this is not necessarily so. There would be little point in forming an intention if intentions did not generally increase the likelihood of taking the intended action. Intentions typically become manifest in actions. Merely desiring that an enemy be killed or believing that there is something to be said for killing an enemy is one thing, it is another thing entirely to intend to kill the enemy. The intention makes the death of the enemy more likely.

[102] Neither is it true to say that thoughts are necessarily innocent in the sense of not being culpable or wrong. For the reason advanced in the preceding paragraph, not only can thoughts and intentions be dangerous, but for that reason they can be culpably wrongful. A person who forms an intention to kill, on one view[66], culpably creates in himself a psychological condition the purpose and possible effect of which is to cause the death of another. The formation of an intention to kill sets the individual on a path that makes someone's death more likely and is therefore wrong.

[103] Nor is a dangerous and wrongful intention impossible of proof. Blackstone did suggest that "no temporal tribunal can search the heart or fathom the intentions of the mind"[67] but this view does not comport with the modern law of evidence. An intention can be satisfactorily proven by several means such as confession, a statement to an accomplice,

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[64] Gabriel S. Mendlow, *"Why Is it Wrong to Punish Thoughts?",* Yale L.J. 127, no. 8 (2018): 2342-86.
[65] John Stuart Mill, on Liberty 9 (Elizabeth Rapaport ed., Hackett Publishing Co. 1978) (1859).
[66] Gabriel S. Mendlow, *"Why Is it Wrong to Punish Thoughts?"*, Yale L.J. 127, no. 8 (2018): 2342-86.
[67] 4 William Blackstone, Commentaries at 21.

or by an entry in private diary. Modern science may well be on the way to being capable of proving intention by other probative means.[68] It is therefore entirely possible that the law can rationally conclude that a person possesses a specific intention even if the person takes no steps to execute that intention.

[104] But even those who argue that thoughts, desires and intentions cannot logically be excluded from criminal responsibility on the basis that they are harmless, innocent and unprovable still suggest that criminalization and punishment is not permissible. Mendlow argues that punishment for mere mental states is intrinsically unjust because such punishment would be a form of mind control.[69] He contends that persons have a right of mental integrity, a right to be free from the direct and forcible manipulation of their minds. This right undergirds important principles governing the relationship between the minds of individuals and the state. The ban on criminalizing thought is merely one of those principles.

[105] This seemingly persuasive view accepts the unexamined premise that individuals have complete freedom of choice over their thoughts and therefore over the coalescence of their thoughts into desires and intentions; hence the assertion that the individual "culpably creates in herself a psychological condition" to act on illicit or criminal thoughts.[70] Modern science and philosophy would probably dispute this premise.[71] Thoughts are involuntary. An individual generally has no more control over the next thought he thinks than he does over the next word that comes from the lips of a companion with whom he is conversing. The thought, and subsequent intention to do one thing or another, appears in consciousness but does not originate there.

[106] The mere existence of criminal thoughts, desires and intentions in the internal mental world of the individual *does* constitute an increased risk to persons and/or property in the external material world but cannot properly be the subject of criminalization because such criminalization does not accord the individual the possibility of a *locus poenitentiae*; an opportunity to change his mind. Nor, more importantly, does it recognize the increasing culpability of the individual in identifying with/acting on the transition from thoughts to desires, desires to intentions, and intentions to actions in the

[68] Sam Harris, *Free Will* (2012, ISBN 978-1451683400).
[69] Gabriel S. Mendlow, *"Why Is it Wrong to Punish Thoughts?",* Yale L.J. 127, no. 8 (2018), at 2369.
[70] Ibid., at p. 2351.
[71] See e.g., Sam Harris, *Free Will* (2012, ISBN 978-1451683400).

external world shared with other human beings. It is at the point that the individual takes a wrongful act in the shared world to consummate the "improper purpose" or "criminal intention" or undertakes an activity sufficiently proximate to that act that it can properly be said that an offence has been committed and is therefore of concern to the criminal law.

[107] This can be illustrated in an example given by acting Chancellor Singh in the Court of Appeal in the present case. In responding to the criticism that the broad expression of cross-dressing for an "improper purpose" did not provide the citizen with the internal rationalization with which to determine the consequence which a given action may entail the learned Chancellor disagreed, stating that:

> "… a plea of a lack of certainty and accessibility would hardly avail a man who puts on a dress, a wig and high heeled shoes and while wearing lipstick, pretends to be a woman in distress and enters a taxi intending to rob the driver, whom he does rob and on being caught and prosecuted, pleads that section 153(1)(xlvii) under which he was charged was not sufficiently clear to him, enable him to regulate his conduct."[72]

[108] Respectfully, surely in the scenario described the correct approach of the criminal law is to punish the cross-dresser for the crime of robbery and not for merely having the "improper purpose" of committing the robbery? Similarly, a charge of attempted robbery could have been preferred had the cross-dresser undertaken an action sufficiently proximate to the robbery even if he was ultimately unsuccessful in carrying out his intention. On the other hand, if an individual cross-dressed and possessed the intention as hypothesized by the Chancellor but repents of this intention and abandoned the enterprise whilst standing on the road awaiting the approach of the taxi it would seem inappropriate and indeed impermissible to punish the mere existence of a wrongful intention abandoned before undertaking an act sufficiently proximate to constitute an attempt to commit the offence. Arguably, under section 153(1)(xlvii) as interpreted in the Court of Appeal, the offence is committed as soon as the cross-dresser appears on the road with the improper purpose.

[109] I consider that our jurisprudence properly accepts that intentions by themselves are not constitutionally the proper subject of the criminal law. Accordingly, to the extent it

[72] Judgment of the Court of Appeal at p. 63.

purports to punish purpose and/or intentions, I would hold that in addition to being unacceptably vague, section 153(1)(xlvii) is also an unconstitutional extension of the criminal law into the realm of punishing mental states.

JUDGMENT OF THE HON. MME JUSTICE RAJNAUTH-LEE, JCCJ

Introduction

[110] I have had the benefit of reading the judgment of the majority delivered by the President of the Court. I agree with the majority that the impugned law is unconstitutional and ought to be struck down. My judgment relates only to the appellants' challenge that section 153(1)(xlvii) of the Summary Jurisdiction (Offences) Act[73] is so vague as to render the law a violation of their right to the protection of the law guaranteed to them by Articles 40 and 144 of the Constitution of Guyana.

[111] The prohibition which forms the subject of this appeal is found in section 153(l)(xlvii) of the Summary Jurisdiction (Offences) Act which makes it an offence for any person

> "(xlvii) being a man, in any public way or public place, for any improper purpose, appears in female attire; or being a woman, in any public way or public place, for any improper purpose, appears in male attire."

The offence created by this section is included amongst a long list of other offences under section 153 (1) under the title "Minor Offences, Chiefly in Towns" within Title 12 – Police Offences, within Part V entitled "Offences against Religion, Morality, and Public Convenience." Other offences listed within this section include assembling "in any public way or public place, or in any open space of ground in the immediate neighbourhood thereof, for any idle, lewd, vicious, or disorderly purpose..."[74] and behaving irreverently or indecently "near to any church, chapel, or other building appropriated for religious worship during divine service, or behaves irreverently or indecently in or near to any public burial-ground during the burial of a body".[75]

[112] It is useful to note that section 153 (1) also creates the offence of loitering with which all four appellants were additionally charged. Loitering is deemed as an offence under

[73] Cap. 8:02 of the Laws of Guyana.
[74] Section 153 (1) (xlv).
[75] Section 153 (1) (xlviii).

section 153(1)(xlvi) where any person "loiters, carouses, or the like, in or about any shop, and does not quietly leave or move away when thereunto required by any police or rural constable or by the owner of the shop or his agent or servant." All four appellants were charged with the offences of loitering and wearing female attire. McEwan was additionally charged with causing damage to a minibus and larceny of a phone belonging to the minibus driver, those charges arising out of a scuffle which apparently transpired before McEwan's arrest. The appellants pleaded guilty to the charge of wearing female attire and all the other charges were subsequently dismissed.

The Historical Context

[113] The Summary Jurisdiction (Offences) Act appears to have been the result of a consolidation exercise as indicated in the description of the Act which explains that the legislation is "An Act to consolidate and amend the Laws relating to Procedure with respect to Offences punishable on Summary Conviction". There does not appear to have been any significant amendments to the challenged provision since its enactment, save for adjustments to the stipulated penalty. These collective offences under section 153 are essentially offences of vagrancy. Counsel for the appellants in both written and oral submissions referred us to several helpful authorities which extensively detail the social and historical circumstances surrounding the enactment of the challenged section and statute in the post-emancipation era. These authorities generally highlight the point that vagrancy and related laws sought to legislate new forms of labour coercion to maintain the viability of the plantation enterprise after emancipation. Professor Rose-Marie Belle Antoine has observed:

> "After the collapse of the slave system (mainly due to the fact that slavery and sugar plantations were no longer profitable), slavery was abolished by the Emancipation Acts of 1833. Yet the law and legal systems continued to reflect the unequal structure of the ex-slave, colonial society. In fact, they were used deliberately to reinforce this structure. Laws such as the Tenancy Acts and Vagrancy Acts, imported from England, served a clandestine function in the West Indies. They helped to force "idle", jobless ex-slaves, devoid of land, money or opportunity, back on the plantations. They were intended to discourage small landholdings and force labour to remain on the oversupplied market. Under the Vagrancy Acts, for example, innocuous activities such as loitering were criminalised".[76]

[76] Rose-Marie Belle Antoine, *Commonwealth Caribbean Law and Legal Systems*, 2nd edition, 2008, p. 21.

[114] It is against this backdrop that these vagrancy provisions were transplanted from the statutes of the Westminster Parliament to the Caribbean region. The English legislation, specifically the various Vagrancy Acts, sought to regulate the activities of vagabonds, beggars and idle persons in England. The English legislation dealing with vagrants was linked with the law regulating poverty and paupers. In *Ledwith v Roberts*[77] Scott L.J. summarised the background to the English vagrancy laws as follows:

> "These laws were framed exclusively in relation to a particular class of the community, and had three purposes. The class consisted of the hordes of unemployed persons, many of them addicted to crime, then wandering over the face of the country; and the purposes were: (a) settlement of the able bodied in their own parish and provision of work for them there; (b) relief of the aged and infirm, that is, those who could not work; (c) punishment of those of the able-bodied who would not work. The early Vagrancy Acts came into being under peculiar conditions utterly different to those of the present time. From the time of the Black Death in the middle of the 14th century, till the middle of the 17th century, and indeed, although in diminishing degree, right down to the reform of the poor law in the first half of the 19th century the roads of England were crowded with masterless men and their families who had lost their former employment through a variety of causes, had no means of livelihood and had taken to a vagrant life."[78]

[115] While vagrancy legislation was transported to several Caribbean territories,[79] Guyana appears to be the only territory in the region to have enacted the specific provision found in section 153(1)(xlvii). It is noteworthy that this exact provision formed part of the law of British Guiana and dates back to 1893.[80] Several other territories outside of the Caribbean, including a number of cities and states in the United States to which we were referred, had similar laws regulating dress. Similar to the challenged section in this appeal, these territories often made gendered clothing laws part of wider vagrancy enactments. In the 1970s, United States courts began to hear challenges to such laws on both freedom of expression and vagueness grounds, some of which are highlighted below. The courts generally took the view that, taking into account contemporary changes in the manner and style of dress, such ordinances were unconstitutionally vague

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[77] [1936] 3 All ER 570; [1937] 1 KB 232, p. 271.
[78] ibid at [593].
[79] Fourth Report from the Select Committee on Coffee and Sugar Planting. Appendix: Order in Council, 7 September 1838 – Vagrancy laws in the West Indian Colonies of British Guiana, Trinidad, St. Lucia and Mauritius.
[80] Sections 44 and 45 of the British Guiana Summary Conviction Offences Ordinance, 1893; Diana Paton and Gemma Romain, *"Gendered Clothing Legislation and Trans Experience in Guyana"*, March 21, 2014, http://www.historyworkshop.org.uk/gendered-clothing-legislation-trans-experience-in-guyana/, accessed 7 November, 2018.

since clothing for both sexes was so similar that it would be difficult for a person of common intelligence to identify any particular item as either male or female clothing. This logic appears to have been employed to strike down these laws in a number of cities in the United States. In the United Kingdom certain sections of the original UK Vagrancy Act 1824 which effectively criminalise "begging" remain in force in England and Wales. However, in 1982 the entire 1824 Act was repealed in Scotland by the Civic Government (Scotland) Act. Section 18 of the Firearms and Offensive Weapons Act 1990 (Ireland) repealed section 4 of the 1824 Act (begging and vagrancy) in Ireland.

Protection of the Law

[116] The common thread underlying the appellants' submissions is that the specific use of the terms "improper purpose", "male attire" and "female attire" in constituting the elements of the offence, section 153(1)(xlvii) of the Act is so vague that it renders the section a violation of their right to the protection of the law guaranteed to them by Articles 40 and 144 of the Constitution. Article 40(1) of the Constitution provides that:

> "Every person in Guyana is entitled to the basic right to a happy, creative and productive life, free from hunger, ignorance and want. That right includes the fundamental rights and freedoms of the individual."

[117] The fundamental rights and freedoms of the individual referred to in section 40 (1) are provided for in section 40 (2) which makes reference to the provisions of Title 1 of Part 2 and encompasses inter alia, the protection of the right to life,[81] personal liberty,[82] from deprivation of property,[83] freedom of conscience,[84] freedom of expression,[85] freedom of assembly, association and demonstration[86] and provisions to secure the protection of the law.[87] Article 144 (1) which provides for the protection of the law states that every person charged with a criminal offence shall be afforded a fair hearing by an independent and impartial court. The appellants argued that the right to protection of the law enshrined in Article 144 is one of the fundamental rights and freedoms alluded to in section 40 (2). It was further argued that the right to protection of the law was not limited to the detailed provisions outlined in Article 144.

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[81] Article 138
[82] Article 139
[83] Article 142
[84] Article 145
[85] Article 146
[86] Article 147
[87] Article 144

[118] This argument is not without merit, since this Court in its jurisprudence has repeatedly emphasised that the right to the protection of the law is a broad and expansive right. In *Attorney General of Barbados v. Joseph and Boyce*,[88] this Court held that a condemned man has a right to the protection of the law. At [60] of the joint judgment of de la Bastide PCCJ and Saunders JCCJ (as he then was), the Court observed:

> "… the right to the protection of the law is so broad and pervasive that it would be well nigh impossible to encapsulate in a section of the constitution all the ways in which it may be invoked or can be infringed…The protection which the right was afforded by the Barbados Constitution would be a very poor thing indeed if it were limited to cases in which there had been a contravention of the provisions of section 18."

[119] Wit JCCJ in a separate judgment considered that the right to protection of the law was far-reaching in its scope and that the multi-layered concept of the rule of law infuses the Constitution with other fundamental safeguards such as rationality, reasonableness, fundamental fairness and the duty to protect against abuse and arbitrary exercise of power. He noted that:

> "…It is clear that this concept of the rule of law is closely linked to, and broadly embraces, concepts like the principles of natural justice, procedural and substantive "due process of law" and its corollary, the protection of the law. It is obvious that the law cannot rule if it cannot protect."[89]

[120] In *Maya Leaders Alliance v. Attorney General of Belize*[90] this Court held that the evolving concept of 'protection of law' encompassed the responsibility of the State to comply with its international obligations. The Court concluded at [47] that the right to the protection of the law:

> "... is a multi-dimensional, broad and pervasive constitutional precept grounded in fundamental notions of justice and the rule of law. The right to protection of the law prohibits acts by the Government which arbitrarily or unfairly deprive individuals of their basic constitutional rights to life, liberty or property. It encompasses the right of every citizen of access to the courts and other judicial bodies established by law to prosecute and demand effective relief to remedy any breaches of their constitutional rights. However, the concept goes beyond such questions of access and includes the right of the citizen to be afforded, "adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power."

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[88] [2006] CCJ 3 (AJ).
[89] ibid, at [20].
[90] [2015] CCJ 15 (AJ).

[121] In the Court's recent landmark decision in *Nervais v The Queen and Severin v The Queen*,[91] this Court found that the mandatory death penalty in Barbados breached the right to protection of the law as it deprived a court of the opportunity to exercise the quintessential judicial function of tailoring the punishment to fit the crime. The Court noted that *Joseph and Boyce* examined the ambit of the right to protection of the law which incorporates those fundamental rules of natural justice embedded in the common law of England. The Court at [45] noted:

> "The right to protection of the law is the same as due process which connotes procedural fairness which invokes the concept of the rule of law. Protection of the law is therefore one of the underlying core elements of the rule of law which is inherent to the Constitution. It affords every person, including convicted killers, adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power." [92]

[122] Courts have taken the view that vague statutes fail to give sufficient notice to the public, lead to arbitrary and discriminatory enforcement and represent an unwarranted delegation to law enforcement. Criminal statutes which are vaguely drawn operate as a threat to the balance of power between the state and the individual. There is an added dimension of statutory certainty which is connected to the notion that governments must operate by rules. This serves to protect the autonomy of the citizens by setting forth, in a manner that is done publicly and in advance, the parameters of any proscribed activity. As noted by legal philosopher Lon L. Fuller articulated in his seminal work "The Morality of Law"[93]:

> "[T]here can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him, or that came into existence only after he had acted, or was unintelligible .... As the sociologist Simmel has observed, there is a kind of reciprocity between government and the citizen with respect to the observance of rules. Government says to the citizen in effect, 'These are the rules we expect you to follow. If you follow them, you have our assurance that they are the rules that will be applied to your conduct."[94]

[123] In, *R v Nova Scotia Pharmaceutical Society*,[95] a leading case of the Supreme Court of Canada, the court examined in detail section 7 of the Canadian Charter of Rights and

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[91] [2018] CCJ 19 (AJ).
[92] ibid, at [45].
[93] Lon L. Fuller, (Lon Luvois), 1902-1978. *"The Morality of Law."* New Haven: Yale University Press, 1964.
[94] ibid, p. 39-40.
[95] [1992] 2 S.C.R. 606.

Freedoms, which was a constitutional provision that protected an individual's autonomy and personal legal rights from actions of the government. The Supreme Court of Canada ultimately determined that laws could be struck down as a violation of section 7 where they were so vague that they violated fundamental justice. Gonthier J., writing for the court, established the "legal debate" test for vagueness[96]:

> "A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. Such a provision is not intelligible, to use the terminology of previous decisions of this Court, and therefore it fails to give sufficient indications that could fuel a legal debate. It offers no grasp to the judiciary."

[124] These statements highlight that the overarching rationale of this test is to balance the need for clarity with the desire to grant the legislature a sufficient margin of manoeuvre to enact general laws and delegate the discretionary authority that is necessary to realise the ends of public policy. Also encapsulated in the above test are two critical factors – fair notice and the control of discretion. These concepts were advanced to us at length in the written and oral arguments of counsel for the appellants in relation to the vagueness of the challenged section.

Fair Notice

[125] The principle of legality is a rule of statutory interpretation: if Parliament intends to interfere with fundamental rights or principles, or to depart from the general system of law, then it must express that intention by clear and unambiguous language.[97] The principle has long historical pedigree in Australia and dates back to 1908.[98] Certainty in legislation is part of the requirement of legality, both to give individuals prospective notice of how to regulate their conduct and to reduce arbitrariness in the application and enforcement of the law. As Gonthier J. pointed out in *R v Nova Scotia Pharmaceutical Society*, vague laws pose the same kind of strain on legality because they fail to "delineate any area of risk" and thus cannot provide fair notice. While it would be unrealistic to expect the ordinary citizen to be informed of the detailed contents of criminal statutes, the proper application of fair notice simply requires that it be possible

[96] ibid, p. 639-640.
[97] Oliver Jones, *Bennion on Statutory Interpretation*, (6th ed) (LexisNexis Butterworths, 2013).
[98] Potter v Minahan (1908) 7 CLR 277, 304.

for citizens to determine their legal duties and regulate their conduct in accordance with the prescribed laws in advance of acting.

[126] In my view, the use of the phrase "improper purpose" in section 153(1)(xlvii) simply does not meet the standards expounded above. The phrase offers no guidance to the citizens as to what constitutes an "improper purpose" so that they could regulate their conduct to ensure compliance with the statute. Additionally, the view of the courts below that there could be no uncertainty in the meanings of "female attire" and "male attire" cannot be easily reconciled with the current landscape. This difficulty was canvassed in a decision of the Ohio Supreme Court in the case of *City of Columbus v. Rogers.*[99] The court in that case heard the appeal of a man who had been convicted under a city ordinance that prohibited individuals from appearing in public in dress "not belonging to his or her sex". Taking account of contemporary changes in the manner and style of dress, the court determined that the ordinance was unconstitutionally vague. Chief Justice O'Neill found, as a factual matter, that dress is a particularly malleable social convention, one that was more sexually indeterminate than ever before. He observed:

> "Once it is recognized that present-day dress may not be capable of being characterized as being intended for male or female wear by a "person of ordinary intelligence," the constitutional defect in the ordinance becomes apparent.
> The defect is that the terms of the ordinance, "dress not belonging to his or her sex," when considered in the light of contemporary dress habits, make it "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." Therefore, Section 2343.04 of the Columbus City Codes violates the due process clause of the Fourteenth Amendment to the United States Constitution."[100]

Control of Discretion

[127] The second factor outlined by Gonthier J in *R v Nova Scotia Pharmaceutical Society* relates to the fact that vague laws give public officials the power to subject individuals to arbitrary exercise of discretion. This is a particularly important issue in this case since the appellants were never informed of any details of the charges being made against them, including the alleged "improper purpose" of which they were being accused, and were denied the opportunity to make phone calls after their arrest and detention despite repeated requests. It is important to recall in this regard that Acting Chief Justice Chang

[99] 324 N.E.2d 563 (Ohio 1975).
[100] ibid, p. 565.

made a factual determination that the constitutional right of the appellants to be each informed of the reason for their arrest as soon as reasonably practicable under Article 139 (3) was denied. So according to this timeline, it would not be a misstatement that, since their arrest, the first and only opportunity that the appellants had to receive any information about their charges was when they appeared before the Magistrate after a weekend of detention.

[128] This connection between statutory vagueness and the arbitrary exercise of power by public officials was highlighted by the United States Supreme Court in the case of *Papachristou et al v. City of Jacksonville*.[101] The eight defendants in this case were arrested under Jacksonville's vagrancy statute. They were engaged in any known criminal activity at the time they were detained. Four of the defendants, an interracial group of friends, were arrested for "prowling by auto" while driving to a nightclub, one defendant was arrested as a "vagabond" while waiting for a ride, two were charged with "loitering" while walking on a sidewalk, one was arrested as a "common thief" after being ordered out of his car in his girlfriend's driveway, and the last was charged with resisting arrest and "loitering" after being identified by a policeman as a generally opprobrious character. Defendants, in consolidated appeals, challenged the constitutionality of the Jacksonville vagrancy ordinance.

[129] In *Papachristou,* the Supreme Court held that the Jacksonville vagrancy ordinance was unconstitutionally vague in that it failed to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute and it encouraged erratic arrests and convictions since it gave too much arbitrary power to the police. The court found that the laws could criminalise a variety of innocent activities, such as "nightwalking" or "habitually living 'without visible means of support.'" The court held that a valid law needed to be clearly written and evenly administered:

> "Those generally implicated by the imprecise terms of the ordinance -- poor people, nonconformists, dissenters, idlers -- may be required to comport themselves according to the lifestyle deemed appropriate by the Jacksonville police and the courts. Where, as here, there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law. It furnishes a convenient tool for "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure."... It results in a regime in which the poor and the unpopular are

[101] 405 U.S. 156 (1972).

> permitted to "stand on a public sidewalk..." only at the whim of any police officer."[102]

[130] The collective reasoning employed in the above cases highlight a key fact: the requirements of certainty and fair notice in a criminal statute are a logical corollary to the protection of the law as it operates in modern democracies. The protection of the law implies that legal commands are uniform and general; that they cover all situations within the class they define and apply to all persons within those situations. This reassures individuals before a court that their conduct is being punished because of previously established rules and not on the basis of rules which are arbitrarily fashioned for their distinct disadvantage. Individuals must be satisfied that any punishment they receive by a court is not solely attributable to the judge's greater social or other power but rather to rules that govern both the individual and the exercise of power and discretion by the judge. The continued existence of a law which is manifestly vague and uncertain as section 153(1)(xlvii), effectively diminishes the right of the appellants to the protection of the law enshrined in the Constitution of Guyana.

Conclusion

[131] Section 153(1)(xlvii) of the Summary Jurisdiction (Offences) Act is unconstitutionally vague on its face as it fails to give an individual fair notice with sufficient particularity as to how his conduct can ensure conformity with the provision. Additionally, it facilitates arbitrary enforcement by public officials. Criminal statutes which are vaguely drawn are inconsistent with the right to protection of the law. Section 153(1)(xlvii) of the Summary Jurisdiction (Offences) Act is therefore inconsistent with the Constitution of Guyana and in accordance with Article 8, which affirms the supremacy of the Constitution of Guyana, it is void to the extent of that inconsistency.

JUDGMENT OF THE HON. MR. JUSTICE BARROW, JCCJ

[132] I agree with the judgment of the Court delivered by President Saunders and would wish to add the following observations.

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[102] ibid, p. 170.

Victorian values

[133] Section 153(1)(xlvii) of the Summary Jurisdiction (Offences) Act dates back to 1894, and in interpreting this criminalization of cross-dressing it is necessary to consider the social and moral values that operated at that time in England and the colonies, including British Guiana, during the reign of Queen Victoria. Those were the values that led to the passing of this type of legislation in the metropolis and in Guyana. The Victorian fervour to suppress homosexuality is well documented[103] and it was against related conduct that the section was directed.

[134] As demonstrated by the notorious Victorian case, next discussed, of *R v Boulton*,[104] because sodomy was performed in private, it was often impossible to prove the commission of the crime, which had only ceased being a capital offence in 1861, when it became punishable by life imprisonment.[105] It was expedient to target associated conduct and section 153(1)(xlvii) served that objective.

Inference of purpose

[135] The section created the offence of cross dressing for an improper purpose. It follows that the dressing had to be connected to the purpose: as counsel on both sides agreed, the offence was directed to cross dressing in furtherance of the purpose. Cross dressing, in itself, was not a crime and was not targeted by the section. In targeting the improper purpose, the stratagem the law employed was to premise that the purpose was to be inferred from the fact of so dressing; that the dressing was done to facilitate and further the purpose. It was a virtual certainty that the ordinary observer would conclude that a man dressed as a woman, in a public place, was intending to attract attention and treatment as a woman; especially sexual attention.

[136] The respectability of this premise is demonstrated by *R v Boulton*[106] in which two men dressed as women were arrested in front of the Strand Theatre in London, and tried on indictment along with others on fourteen counts relating to homosexuality, including "conspiracy to commit, or to incite to the commission of felonious and unnatural

[103] McKenna, Neil (2006). *The Secret Life of Oscar Wilde*. pp. 76-81.
[104] (1871) 12 Cox CC 87.
[105] Section 61 Offences Against the Person Act, 1861 (24 & 25 Vict c 100)
[106] Supra (n84).

crime."[107] The allegations followed two lines; a general conspiracy to debauch the public and separate conspiracies to debauch each other. In his summing up to the jury, which acquitted the men, Cockburn CJ directed that,

> "On the … [charge relating to the public conduct of the defendants], no doubt there had been great indecency and improper conduct; but you must not allow your indignation at these indecent proceedings to warp your judgment in trying the far more serious accusation which is before you, and the question is, whether from this conduct, considered with reference to the other facts in the case, you can draw the conclusion that the defendants, in thus acting, had the intention and design imputed to them. And it is necessary for you to consider whether the inference you might otherwise have drawn is not rebutted by the evidence as to the use of the dresses for theatrical characters and performances. There was undoubtedly a lawful occasion for the purchase of the dresses, and there is evidence that they were originally used for that purpose. Then, on the other hand, there is no evidence of anything like solicitation or actual incitement to any act of the public; on the contrary, the evidence is rather that they kept themselves to their own party. So much as to that part of the case which relates to the public."[108]

[137] The words of the Lord Chief Justice make clear that the cross dressing of the defendants, which was proved to be their common practice, was regarded in law as amounting to "great indecency and impropriety of conduct" and that this conduct of cross dressing was a proper basis for the jury to have drawn the inference that the defendants had the intention to incite persons to commit an unnatural offence. That reality was underscored by the judge's direction that this inference was rebutted by the evidence that the defendants bought the dresses for theatrical performances. It is inescapable that, had there not been the rebutting evidence of this lawful purpose in purchasing the dresses, the jury could properly have convicted the defendants by drawing the inference that the men cross dressed for an improper (and unlawful) purpose, that is, to incite the commission of homosexual conduct.

[138] At a basic level, *Boulton* is authority for the proposition that a court may conclude that the conduct of cross dressing gives rise to a presumption or inference that it is done for the purpose of inciting the commission of an unnatural crime. The proposition is easily applied to section 153(1)(xlvii) of the Summary Jurisdiction (Offences) Act, so that, on a prosecution for this offence, there is no need for the prosecutor to adduce evidence to prove more than the facts that (i) a man was attired (ii) in female clothing, and (iii) in a

[107] ibid p. 88.
[108] ibid p. 94.

public place or way; the improper purpose is inferred from the fact of the attire. It should be recalled that the section 153(1)(xlvii) offence is made out by the court inferring merely an 'improper purpose'; the purpose inferred does not need to rise to 'unlawful'. The summing up of Lord Cockburn CJ in Boulton settles that by cross-dressing a person is already prima facie guilty, as a matter of inference, of "great indecency" and "improper conduct" and of intending to incite the commission of homosexual conduct. There is no need to prove any other or other specific improper purpose.

[139] The inference identified in *Boulton* is confirmed to be orthodox legal theory, at the time, by looking in the Guyana legislation itself, at section 146, which provides:

> "146. In proving a purpose or intent under any of the provisions of the two last preceding sections, it shall not be necessary to show that the person charged was guilty of any particular act or acts tending to show his purpose or intent, and he may be convicted if, from the circumstances of the case and from his known character as proved to the court, it appears to the court that his purpose was unlawful, or that his intent was to commit a robbery, theft, or unlawful act."

[140] It is not to the point that this statutory facilitation of proof of purpose or intent applies to prosecuting persons for possession of articles to be used in connection with the practice of obeah or witchcraft, and not to the offence of cross dressing. Its relevance is that this provision demonstrates the nature of the presumptions or inferences against accused persons that the law makers at the time thought fit to provide, especially against the lower rank of persons. As section 146 stated, it was not necessary to prove the doing of any act by an accused to establish his unlawful purpose or intent; it was sufficient that it *appeared* to the court, from the circumstances of the case and the known character of the accused, that his purpose was unlawful.

Pre-human rights law

[141] Modern conceptions of human rights and constitutionalism that the appellants invoked, including protection from discrimination on the ground of sex and gender under Article 149 (1) of the Constitution, the right to equality and to equal protection and benefit of the law under Article 149D, and the right to freedom of expression under Article 146 of the Constitution were not even glimmers on the Victorian legal horizon. The offences created in the Act were in tune with the 'Poor Laws' of that age in England (and the colonies), intended to keep the dispossessed and depressed under control; they were

directed at 'vagrants' and 'beggars' and 'rogues and vagabonds'. The object of these laws was not to promote fairness, social justice or equality.

[142] The cross-dressing proscription, along with many other provisions in the Act, such as declaring a man be a vagabond and subject to a fine because he does not work and support himself or his wife when capable of so doing,[109] is a law that belonged to a different time. It criminalized the expression of sexual orientation and gender identification at a time when State intrusion of that nature was the norm and human rights were, at best, a developing intellectual concept. This was not the age of liberal democracy; sovereignty did not belong to the people,[110] as Article 1 of the 1980 Guyana Constitution was later to proclaim. Laws of the nature of section 153(1)(xlvii) were directed to keeping the masses in their place. It seemed contrarian, therefore, that the State, whose Constitution proclaims it to be in transition from capitalism to socialism[111] and champions fundamental rights[112] proclaimed long ago in the Universal Declaration of Human Rights of 1948, should have argued for the presumption of constitutionality to benefit a law such as section 153(1)(xlvii).

Caution against judicial legislating

[143] In both his written and oral submissions, counsel for the State urged that the judiciary should be cautious not to succumb to deciding on social policy and effecting legislative reform, as these are the remit of the Executive and the Legislature. There can be no gainsaying the value of this caution or wish for it to be otherwise, and judges are often uneasy when the performance of the judicial function becomes exposed to concerns about intrusion into the purview of the other branches of government. However, what Mr. Ramkarran's caution against 'judicial legislating' fails to comprehend is that challenges to existing legislation, which seek to achieve reform that is properly the business of the legislature, are not challenges created or initiated by the judiciary; they are challenges that the Constitution gives aggrieved persons the right to make and they are challenges that the courts must (not may) hear and determine, once satisfied that they are justiciable.

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[109] Section 143 (a) Summary Jurisdiction (Offences) Act Cap 8:02.
[110] Ministerial government and universal adult suffrage were introduced in Guyana in 1953, http://parliament.gov.gy/about-parliament/about-parliamant-history/
[111] Article 1 of the Constitution of the Co-operative Republic of Guyana, Cap. 1:01.
[112] Articles 40 of the Constitution of the Co-operative Republic of Guyana, Cap. 1:01.

[144] The certain way for the legislature to keep the courts from becoming engaged with legislative reform, as counsel apprehended may be involved in the adjudication of the challenge to section 153 is for the legislature itself to undertake that reform. In this regard, it is appropriate to mention also that it is not every law that the executive must feel obliged to defend against challenge. It is proper for a government to acknowledge that a law is long past its "sell-by date" and serves no social or legal purpose. With respect, the soundness of that approach in this case is not reduced by the effort of the Court of Appeal to ascribe value to the section by giving the example of using it against a man who dresses in female clothing to commit robbery. It is difficult to resist the response that the society is not benefitted from retaining a law under which to charge a robber for cross-dressing, which carries a minimum fine of G$7,500.00 (or US$35.00) when the offence to charge is robbery, which carries a sentence of imprisonment for 14 years.[113]

Saving of existing law

[145] As the law stood when the appellants presented their challenge to section 153(1)(xlvii) in the courts below, the State had a legal basis (if not philosophical or practical justification) for arguing that this section was protected by Article 152 of the Constitution, which saved existing laws from declarations of invalidity for inconsistency with the Constitution. This Court's decision in *Nervais and Severin v R,*[114] delivered just one day before the instant appeal was argued, has now definitively established that the savings law provision in the Constitution of Barbados does not make existing laws immune from declaration of invalidity for inconsistency with the Constitution. This determination is equally applicable to the laws and Constitution of Guyana and, therefore, section 153(1)(xlvii) is no longer to be regarded as saved from being declared inconsistent with the Constitution. To be fair, it must be noted that at the time of argument before this Court counsel for the State had not had time to read the decision in *Nervais* on the effect of the savings clause. It may be that if the decision on the savings clause had come at an earlier point in the life of the instant proceedings, the State may have taken a different course in responding to the challenge to section 153(1)(xlvii).

[113] Section 221 of the Criminal Law Offences Act, Cap. 8:01.
[114] [2018] CCJ 19 (AJ).

[146] For the reasons detailed in the judgment of the Court, delivered by the President, the highly undemocratic section 153(1)(xlvii) is inconsistent with the several Articles of the Constitution stated and must be declared void for that inconsistency.

Disposition and Orders

[147] In light of the foregoing, the Court makes the following declarations and orders:

i. The appeal is allowed and the cross-appeal dismissed;

ii. SASOD has standing to join in these proceedings and the Order striking it out as a party is set aside;

iii. The judgment and other orders of the Court of Appeal are set aside;

iv. Section 153(1) (xlvii) violates the right to equality and non-discrimination guaranteed under section 149 and 149D of the Constitution;

v. Section 153(1) (xlvii) violates the right to freedom of expression guaranteed under section 146 of the Constitution;

vi. Section 153(1) (xlvii) is unconstitutionally vague and offends the rule of law;

vii. Section 153(1) (xlvii) is struck from the Summary Jurisdiction (Offences) Act, Chapter 8:02 of the Laws of Guyana; and

viii. The appellants are entitled to their costs here and in the courts below; the said costs to be a single sum for the Appellants jointly, to be assessed, if not agreed.

/s/ A. Saunders

The Hon Mr Justice A. Saunders

/s/ J. Wit

The Hon Mr Justice J Wit

/s/ W. Anderson

The Hon Mr Justice W Anderson

/s/ M. Rajnauth-Lee

The Mme Justice M Rajnauth-Lee

/s/ D. Barrow

The Hon Mr Justice D. Barrow