REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. 64 0f 2004

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF TRINIDAD AND TOBAGO ("THE CONSTITUTION") ENACTED AS THE SCHEDULE TO THE CONSTITUTION OF THE REPUBLIC OF TRINIDAD AND TOBAGO ACT, CHAPTER 1:01

BETWEEN

(1) KENNETH SURATT for and on behalf of himself and on behalf of: BHAWANI PERSAD, DAVE HOMER, JOSEPH BELGROVE, PAMELA SOOKDEO, ASHA ALEXANDER, ALBERT BELGROVE, LAKHAN SEEPERSAD, DENNIS SEEBARAN, RAJENDRA RAMNARINE, PARVATEE DAWAJIT, SANDRS JUMAN, KALOUTIE GOPAULSINGH, MICHAEL DURHAM AND DEONARINE RAGOO

(2) DEVON GARRAY

(3) DAVIS THOMAS

(4) DIANNE ARNEAUD

(5) RAKESH PERSAD

(6) ASHTON RAMSUNDAR

Appellants/Applicants

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Respondent

PANEL: S. Sharma C.J.
I. Archie J.A.
A. Mendonca J.A.

APPEARANCES:

Mr. R. Lawrence-Maharaj S.C.; Mr. R. Harnanan; Mr. D. Allahar for the Appellant
Mr. R. Martineau S.C. and Ms. D. Peake for the Respondent

DATE DELIVERED: 26th January 2006

I have read the opinion of Archie, J.A. I agree with it and have nothing to add.

Satnarine Sharma
Chief Justice

I have read the opinion of Archie, J.A. and I also agree and have nothing to add.

Alan Mendonca

Justice of Appeal

JUDGMENT

DELIVERED BY ARCHIE, J.A.

1. The appellants have appealed against the decision of the trial judge to refuse an order compelling the Executive arm of the State to constitute and appoint persons to the Equal Opportunity Commission and Tribunal established under the Equal Opportunity Act No. 69 of 2000 ("the EOA").

2. The trial judge found that the EOA was unconstitutional in several respects and the appellants were not entitled to insist on its enforcement, as the protection of the law envisaged by the Constitution could not include the right to enforce a law that was unconstitutional. In the alternative, he found that the

State (i.e. its Executive arm) is not bound to enforce a law which, *"on very good and substantial grounds"*, it finds to be unconstitutional because any rights conferred by an invalid law were merely *"illusory"*.

3. He also ruled that it was open to the State (in the form of its Executive arm) to raise the unconstitutionality of a law as a defense in a constitutional motion for its enforcement. In so doing, he also rejected the argument that the Executive's failure to implement the EOA frustrated the intention of section 14(6) of the Constitution, which gives Parliament the right to confer on the Supreme Court such powers as it thinks fit in the exercise of its jurisdiction under chapter 1 of the Constitution. He did so on the basis that the conferral of a special jurisdiction on the High Court and Court of Appeal did nothing to ameliorate the deficiencies in the EOA. Accordingly, he dismissed the appellants' motion with costs.

4. After a careful review of the arguments and authorities advanced on both sides, I find that the trial judge was right to reject the motion. For the reasons that are set out in this judgment, I find that the EOA is unconstitutional and unworkable. It violates the doctrine of separation of powers and contains provisions that are inconsistent with the enjoyment of certain fundamental rights and freedoms guaranteed by the Constitution. Since the EOA was not passed with a special majority all of those provisions must be struck down. The mechanism for appointment of the Chairman of the Tribunal is also flawed so that, in any event, the Tribunal cannot be validly constituted.

5. On the question whether and in what circumstances the Executive may decline to implement or enforce an "unconstitutional" law, I would formulate the test differently from the trial judge as can be seen later in this judgment. In the particular circumstances of this case, the Executive ought either to have sought the Court's guidance at a much earlier stage or sought to have Parliament repeal the EOA.

6. Before embarking on a detailed analysis of the issues raised in this case it will be useful to provide a brief historical context.

THE HISTORY OF THE EOA

7. The EOA is described in its long title as:

> *"An Act to prohibit certain kinds of discrimination, to promote equality of opportunity between persons of different status, to establish an Equal Opportunity Commission and an Equal Opportunity Tribunal and for matters connected therewith"*

In its broad and unprecedented sweep, the EOA sought to prohibit discrimination on the grounds of sex, race, ethnicity, origin, religion, marital status and disability. It applied to private persons as well as the State and therefore inevitably created a tension between its objectives and the enjoyment, among other things, of the right to freedom of association and rights to enjoyment of property.

8. The EOA provided for complaints to be addressed first of all to a Commission which would enquire into the matter and, where appropriate, either seek to resolve them by conciliation or by reference to a Tribunal which would

> *"..be a superior court of record and shall have in Tribunal (sic) addition to the jurisdiction and powers conferred on it by this Act all the powers inherent in such a court"*

The Tribunal would have the power to order compensation and/or damages and to impose fines.

9. The EOA was brought into force in two stages by proclamation dated 20th November 2000. A change in government followed shortly thereafter and the new Attorney General formed the view that the EOA was, at least in part, unconstitutional and unworkable. No steps were taken to set up either the

Commission or the Tribunal. The appellants filed this constitutional motion alleging that the failure of the Executive arm of the State to take steps to constitute and appoint members to the Commission and the Tribunal deprived them of the protection of the law afforded by the EOA. They allege variously that they have suffered discrimination on the basis of disability, race, ethnicity, geographical location and religion. The Attorney General contends, among other things, that the EOA is unconstitutional, that an invalid or unconstitutional law affords no protection, and therefore there is no sustainable claim for constitutional relief.

ISSUES FOR DETERMINATION

10. The issues for decision by the Court may be summarized by the posing of three questions:

- Can the Attorney General, in a constitutional motion seeking protection for, or enforcement of, statutory rights raise, as a defence, the unconstitutionality of the Act that the applicant seeks to enforce?
- Is the EOA or any of its provisions unconstitutional either because it erodes the jurisdiction of the Supreme Court or because it or some of its provisions are in conflict with the Constitution?
- Is the Executive arm of the State nevertheless bound to enforce a law that is unconstitutional until such time as it is repealed or amended to bring it into conformity with the Constitution?

CAN THE ATTORNEY GENERAL USE THE UNCONSTITUTINALITY OF THE EOA AS A DEFENCE?

11. The Appellants' argument is based on the following propositions:

- At common law, the courts could not declare an Act of Parliament to be illegal

- That prohibition continues until the present time save in so far as it has been modified by the jurisdiction of the court under sections 5(1) and 14 of the Constitution to declare an Act of Parliament to be unconstitutional
- That jurisdiction may only be invoked by a person who alleges that one of his rights guaranteed under Chapter 1 of the Constitution has been or is being or is likely to be infringed.
- Unless that jurisdiction is invoked the courts have a common law duty to enforce an Act of Parliament once it has not been repealed.
- The proper course for an Executive which considers an Act of Parliament to be unconstitutional is to seek to have it amended or repealed by the Parliament

12. The most obvious and startling conclusion that flows from the appellant's line of reasoning is that even in the face of an obviously unconstitutional Law the Court's hands would be tied and it would be bound to turn a blind eye and enforce a Law which it recognized to be flawed. Counsel could point to no clear authority for that proposition apart from the common law doctrine of supremacy of Parliament and the *"common law presumption of constitutionality of an Act of Parliament"*. On that line of reasoning, since that presumption operates in favour of the State, only the appellant could rebut it.

13. Happily, a closer analysis of the constitutional position resolves the issue satisfactorily. One cannot slip carelessly between the use of the expression "the State" on the one hand and reference to its various embodiments in "the Executive", "the Judiciary", and "the Legislature" on the other hand without an appreciation of the doctrine of the separation of powers. While it is true, as the appellant argues, that acts of the Executive, Courts and the Parliament are all acts of "the State", the State is a trinity that exists with a structural tension reflected in the respective roles of its three arms which are separate and distinct.

14. The distinction is not to be blurred as a matter of convenience. In much the same way as none of the other arms of the state may infringe upon the law making (and repealing) powers of the Parliament, the Constitution has reserved to the Courts the power to pronounce upon the constitutionality of those laws. In doing so the Courts are not exercising a legislative function at all. They are merely declaring that state of affairs which already exists. In other words, a law does not become unconstitutional when and because the Courts say so. It is unconstitutional because and to the extent that it is inconsistent with the Constitution.

15. That is the essential and all-important difference between the notions of "Parliamentary supremacy" and "Constitutional supremacy". It is a crucial distinction because if an Act is void 'ab initio', then it can create no enforceable rights pending its repeal. Before a court can make a finding whether an applicant's rights have been infringed, an essential part of its enquiry must be whether the rights claimed exist. It is more than a right to enquire; it is a duty. The court cannot escape a consideration of the statute upon which the alleged rights are based and the correctness of its decision cannot hinge on whether the applicant (as he is unlikely to do) draws attention to any illegality. The court cannot be precluded from that enquiry by the invocation of the doctrine of the separation of powers.

16. The question whether the Executive arm of the state may raise the unconstitutionality of a Law as a defence to an application under section 14 of the Constitution has never been directly addressed in any of the authorities cited or by this court. It is clear that the ability of the court to consider questions about the interpretation of the Constitution or the constitutionality of other laws is not confined to situations where there has been an application under section 14[1]. Since every such application presumes the constitutionality

[1] See e.g. **Chaitan & Peters v The Attorney General** Civ. App. Nos. 21 & 22 of 2001; **D.P.P v Mollison** P.C. App. No.88 0f 2001

of the law that it seeks to enforce, to deprive the state of that defence would relegate every application to an enquiry whether the law invoked has been complied with. That would deprive the court of one of its critical functions which is to be the guardian of the Constitution in preference to being the guardian of subordinate laws, however flawed they may be.

17. It simply does not follow as a matter of logic that because section 14 does not afford the State a remedy, it cannot raise the constitutionality of the law invoked as a defence. There is no such restriction and the Court is entitled to receive and consider submissions to that effect.

18. Before passing on from this point, I would like to emphasize that it can hardly be conducive to good governance and proper public administration for the Executive to do nothing about a statute which it views as unconstitutional. Efforts should be made to have it amended or repealed.

19. During the course of submissions the court raised with counsel the question of what recourse would be available to an executive that could not attract the necessary special majority to repeal an Act that was passed with a special majority but was nevertheless repugnant to section 13 of the Constitution[2]. While it is not necessary for us to make any definitive ruling on that issue in this case, it illustrates the danger in shutting out the Executive from recourse to the courts without a good reason for doing so. Administrations do change. The fact that, in this country, the composition of the cabinet and the parliamentary majority overlaps to an extent that threatens to blur the distinction must not lead us to forget their different conceptual and constitutional roles. The duty of the Executive in circumstances where

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[2] Section 13 provides that an Act that is inconsistent with sections 4 and 5 shall have effect if passed with a special majority and if it declares itself to be inconsistent unless it is shown not to be reasonably justifiable in a society that has proper respect for the rights and freedoms of the individual.

officials form the view that a statute is unconstitutional is addressed later in this judgment.

IS THE EOA OR ANY OF ITS PROVISIONS UNCONSTITUTIONAL?

20. The Respondent alleged that the EOA was unconstitutional in at least six respects:

- Section 41 establishes the Tribunal as a Superior Court of Record with powers similar to the Supreme Court but its members do not enjoy the same degree of security of tenure. It is a breach of the doctrine of separation of powers, derogates from the powers of the Supreme Court and erodes the independence of the judiciary.
- Section 42 gives the Judicial and Legal Service Commission power to appoint the chairman of the Tribunal. The JLSC is a creature of the Constitution, which circumscribes its powers. Any attempt to expand those powers is, in effect an amendment of the Constitution. Any such amendment must be made by special majority in conformance with section 13, which was not done in respect of the EOA.
- Section 7, which is vague and lacking in certainty, restricts rights to freedom of thought and expression that are entrenched under section 4(i) of the Constitution. In any event, this section is not reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual[3].
- By specifically, excluding sexual preference or orientation from the definition of 'sex', persons who allege discrimination on these grounds are denied the equality of treatment under the law that is guaranteed by sections 4(b) and 4(d) of the Constitution.
- Sections 17 and 18, which prohibit discrimination in the provision of goods, services or benefits by private persons (as opposed to the state),

[3] See section 13 (1) of the Constitution.

infringe upon the entrenched right of enjoyment of property and/or the right not to be deprived of property without due process.

- The combined effect of Section 41(4) and Section 48 is to give the Tribunal an unlimited jurisdiction to impose fines. The EOA creates no offences. That is a breach of the doctrine of separation of powers as, in deciding in which matters it could impose fines and then setting the limits of those fines, the Tribunal would be exercising a function reserved for the Legislature.

21. For the reasons that I will now set out, it is clear that all but one of those contentions have merit. The combined effect is a piece of legislation that may have begun with laudable objectives, but was so disastrously drafted that it is impossible to rescue it by selective excision of its offending parts.

SECTION 41

22. The EOA provides that the Tribunal shall consist of a Chairman, whose status and terms and conditions of employment are equivalent to those of a High Court Judge (except for pension entitlement), and two lay assessors, to be appointed at the discretion of the President, for a term specified by the President. The assessors' appointments may be terminated by the President on the recommendation of the Chairman for a number of specified reasons[4]. Section 43 provides that the assessors are to be paid such salaries and allowances as may be recommended by the Salaries Review Commission and approved by the Minister of Finance from time to time. They are also subject to such other conditions of service as may be prescribed by the President. Section 43(5) prohibits alteration of the terms and conditions of service of any member of the Tribunal to his disadvantage during his tenure of office.

[4] Section 42(7) – these include bankruptcy, misbehavior in office, acquisition of other office of emolument, conflict of interest and incapacity.

23. The terms and conditions of service of the lay assessors are clearly inferior to those of the chairman and High Court Judges. Of particular concern is the fact that their continuation in office is subject, to some degree, to the control of the chairman and their salaries are subject to the veto of a member of the Executive.

24. Counsel for the appellants has suggested that this ought not to be of concern because, in any event, section 44(7) provides that:

> ***"The decision of the Tribunal in any proceedings shall be made by the Chairman and delivered by him"***

That raises a new set of questions, the foremost being ***"What then is the function of the lay assessors?"*** The EOA does not specify other than to say in section 42(4) that they shall assist the Chairman in arriving at a decision. They are clearly more than mere advisors as the Tribunal cannot be properly constituted without at least one lay assessor[5].

25. The EOA must therefore contemplate that they are an integral part of the decision making process, since they are to be specifically selected for their experience in law (an unusual requirement for a lay-assessor), religion, race relation (sic), gender affairs, employment issues, education, culture, economics social welfare or human rights[6]. If the Chairman is then free to override a majority of the Tribunal, without whom he would have no jurisdiction, then whatever it is that the EOA contemplates, it bears little resemblance to a Superior Court of Record as that term is generally understood.

26. The effect of the above-mentioned provisions of the EOA is to vest jurisdiction in a Tribunal whose members individually and as a whole, do not enjoy the degree of independence and constitutional protection afforded to the

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[5] vide section 44(1) ***"The jurisdiction of the Tribunal and powers of the Tribunal may be exercised by the Chairman and at least one lay-assessor."***
[6] Section 42(3)

High Court. Even where provisions exist for the protection of its members, they are not constitutionally entrenched. They can be altered by a simple majority vote of the Parliament, and, in the case of the assessors, by the fiat of the President (albeit not for sitting members).

27. The EOA binds the State[7]. The High Court already exercises jurisdiction under section 14 of the Constitution in relation to persons who allege discrimination on the basis of race, religion, origin, or sex on the part of the State or Public Authorities. Any attempt to vest an equivalent or concurrent jurisdiction in a Tribunal whose members' method of appointment and security of tenure does not conform to the requirements of the Constitution for judges of the High Court is unconstitutional[8]. This approach to constitutional interpretation is critical for the preservation of the independence of the judiciary, without which constitutional protection would be illusory. It exists for the protection of the public and not for the judiciary per se. Any other approach would permit a progressive denudation of the jurisdiction of the Supreme Court without recourse to constitutional amendment and the safeguards built in to that procedure.

28. Counsel for the appellant sought to distinguish the case of **Hinds v The Queen** on the basis that, unlike the case in Hinds, where all matters falling under the new Act had to be transferred to the Gun Court, the EOA does not compel an aggrieved person to utilize its provisions but merely, in the case of the State, provides an additional or alternative remedy. There was, on that view, no derogation from the powers and jurisdiction of the High Court. What then is to be made of section 44(9), which needs to be set out in its entirety to appreciate its broad and dangerous sweep.

> *"(9) Where in any written law there is conferred on the Tribunal jurisdiction which was previously exercised by another court,*

[7] Section 57
[8] See **Hinds v The Queen** (P.C.) [1976] 2 WLR 366

Tribunal, authority or person (hereinafter called "the former Tribunal"), then, subject to any Rules made under this section –

> *(a)* *the procedure which governed the exercise of the jurisdiction by the former Tribunal shall continue, mutatis mutandis, to govern such exercise by the Tribunal;*
>
> ***(b)*** *the decisions of the Tribunal in relation to such exercise are enforceable in the same way as those of the former Tribunal;*
>
> ***(c)*** *the effect of things done in or for the purpose of that jurisdiction by the former Tribunal is preserved."*

29. I begin with the premise that section 44(9) was included for a specific purpose. The "written law" can only refer to the EOA or to some law yet to be passed since no other law currently purports to vest jurisdiction of any sort in the Tribunal. The words "previously exercised" and "former Tribunal" imply a transfer of jurisdiction. It is either that Parliament has purported to transfer the jurisdiction currently exercised by the High Court to the Tribunal by the EOA (in which case **Hinds** applies) or it has set the stage to do in two steps, that which cannot be done in one. The latter course is also not open. In fact, a literal reading of section 44(9) suggests that Parliament can in future, by a simple majority, confer any jurisdiction currently exercised by any court or tribunal (including the Supreme Court) to the Tribunal. The opening of the stable door is a sufficient affront to the Constitution. We do not have to wait until the horse has bolted.

30. The appellants' case is not assisted by the argument that any lack of independence or constitutional protection in the Tribunal is cured by the fact that there is a right of appeal to the Court of Appeal, which makes the Tribunal subject to judicial supervision. The case of **Guyana Electricity**

Corporation v Liburd[9] is not on point because the Guyanese Constitution contains the following provision, which has no analog in our Constitution: *"Parliament may confer on any court any part of the jurisdiction and any powers conferred on the High Court by this Constitution or any other law."*[10] That case, like the cases of **Adan v Newham London Borough Council**[11] and **R v Secretary of State, ex parte Alconbury Developments Ltd**[12] is concerned with whether the statutory tribunals under consideration could provide a fair and impartial hearing under the Guyanese Constitution or Article 6(1) of the European Convention[13]. That is a different question from whether the conferral of a jurisdiction already exercised by the High Court on another tribunal was an erosion of the constitutional protection already afforded.

31. Of course, where an entirely new jurisdiction is being conferred, it becomes a material consideration. Our closest analog to Article 6(1) is section 5(2)(e) of the Constitution, which affords all persons *"the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations"*. There are examples of Tribunals within this jurisdiction whose members do not enjoy the same degree of protection as High Court Judges but whose decisions may be appealed to the Court of Appeal. For example, the members of the Tax Appeal Board are appointed in a similar manner to the Tribunal. The Tax Appeal Board is a well-respected court with recognized specialist expertise.

32. In my judgment, the structure set up by the EOA is not incapable of providing a fair hearing in accordance with section 5(2)(e) of the Constitution. However, it does derogate from the jurisdiction of the High Court both generally

[9] Court of Appeal of Guyana (unreported – October 11, 2002)
[10] Article 123(3)
[11] [2002] 1 All ER 170
[12] [2001] 2 All ER 929; [2001] UKHL 23
[13] Article 6(1) says that *"In the determination of his civil rights and obligations…everyone is entitled to a fair and public hearing…by an independent and impartial tribunal established by law"*

because of the unlimited potential scope of its jurisdiction and specifically in relation to the jurisdiction currently enjoyed in respect of disputes between individuals and the State.

33. I now go on to consider whether the new restrictions imposed by the EOA on private persons derogate from existing fundamental rights. If so, then it would have been necessary to pass the EOA with a special majority.

SECTION 7

34. Section 7 prohibits the public performance of any act that is reasonably likely to offend, insult, humiliate or intimidate another person or a group of persons and is done with the intention of inciting hatred and because of the gender, race, ethnicity, origin or religion of the person/s affected[14]. It recognizes that, in the context of a multiracial, multireligious, and culturally diverse society, the maintenance of social and political harmony depends upon the exercise of tolerance and restraint by all sectors of the community. Equally important to the maintenance of democracy is the guarantee of freedom of thought and expression. It is inevitable in any democratic society that the exercise of the latter will from time to time cause offence. That is the price we pay for freedom.

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[14] Section 7 reads as follows:

" 7.(1) a person shall not otherwise than in private, do any act which –

(a) is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of persons;

(b) *is done because of the gender, race, ethnicity, origin or religion of the other person or some or all of the persons in the group; and*

(c) *which is done with the intention of inciting gender, racial or religious hatred.*

(2) For the purposes of subsection (1), an act is taken not to be done in private if it –

(a) cause words, sounds, images or writing to be communicated to the public;

(b) is done in a public place;

(c) is done in the sight and hearing of persons who are in a public place.

(3)This section does not apply to acts committed in a place of public worship.

(4) In this section-

"public place" includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place."

35. The common law and statutes relating to sedition and libel have, in the past, addressed the sensitive balancing act that must be maintained at all times. However, merely to be offensive has never been sanctionable in law. In the political arena, modern authority has leaned on the side of permitting great latitude in critical comment. Some of the major religions in our society have, as part of their basic tenets, the belief that other religions worship false gods and that those who have access to truth have a duty to seek and win converts. To some, that is offensive. Negative stereotyping of groups within the society, though reprehensible, is all too common. It is difficult to say when the thin and subjective line between being offensive and deliberately inciting hatred has been crossed.

36. Parliament undoubtedly has the power to pass laws that proscribe acts calculated to cause conflict and fragmentation in the society[15]. At the time of commencement of the current Constitution, the Sedition Act prohibited, inter alia, the doing of any act with an intention *" to engender or promote feelings of ill-will towards, hostility to or contempt for any class of inhabitants of Trinidad and Tobago distinguished by race, colour, religion, profession, calling or employment;"*[16] Thus there was already as apart of the existing law a provision that proscribed in similar terms, the behavior described in section 7 (with the exception of references to gender).

37. Section 6(1) of the Constitution provides that *"nothing in sections 4 and 5 shall invalidate any enactment that alters an existing law but does not derogate from any fundamental right guaranteed by Chapter 1 in a manner in which or to an extent to which the existing law did not previously derogate from that right."* In that context 'alters' in relation to an existing law

[15] see e.g. the Sedition Act Chap. 11:04
[16] section 3(1)(d) and section 4

"includes repealing that law and re-enacting it with modifications or making different provisions in place of it or modifying it."[17]

38. By the language of the section the definition of *'alters'* is not restricted to a situation where there has been a complete or partial repeal of an existing statute. The expressions *'re-enacting with modifications'*, *'making different provisions in place of'* and *'modifying'* must be taken to have distinct meanings. *'Alters'* in regard to any statute may therefore include the enactment of any provision which addresses the same subject matter in different language (whether more expansive or restrictive). For the purposes of sections 4 and 5 of the Constitution, no freedom to exercise any right or engage in any type of behavior can be said to *"have existed"* if at the time of coming into force of the Constitution, the behavior was already prohibited by law.

39. Section 7 of the EOA undoubtedly alters the existing law. The question is whether it does so in a manner so as to derogate from the right to freedom of thought and expression to an extent to which the Sedition Act did not previously derogate. The answer is 'yes' but only in so far as it prohibits acts reasonably likely and intended to incite hatred on the basis of gender. Section 7 is not thereby invalidated. It merely has to be construed as if the references to gender were absent.[18]

SEX VS GENDER

40. The EOA is an unusual and contradictory statute since it appears to regard *'sex'* and *'gender'* as having an identical meaning that is different from 'sexual orientation' or 'sexual preference'. That is the only explanation for the

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[17] section 6(3) of the Constitution

[18] see e.g. DPP v Mollison (No. 2) P.C. appeal No. 88 of 2001 – Although that case was concerned with the modification of an existing law, the approach is consistent with section section 2 of the Constitution which states that any other law that is inconsistent with the Constitution is void *to the extent of its inconsistency.*

fact that by the definition of *'sex'* in section 3 it specifically excludes from its protection persons who claim discrimination on the basis of sexual preference or orientation, while at the same time purporting, in section 7, to proscribe certain acts motivated on the basis of *'gender'*. The current usage of those expressions, as may be revealed from an examination of any reputable dictionary, is that while the word *'sex'* is generally understood to refer to the biological division of species between male and female in respect of reproductive roles, the concept of 'gender' is broader and is more of a social, cultural and even psychological construct. In other words, 'gender', although it is nowhere defined in the EOA, can include 'sexual orientation'.

41. This may not be a fact that is palatable to most persons in Trinidad and Tobago where homosexual acts are generally disapproved and are still subject to criminal sanction, but orientation or preference is not the same as behaviour. I say this with the greatest of deference to the learned trial judge who undertook a very detailed and sensitive analysis of this point. It is not a crime to have a homosexual or lesbian orientation. In fact there is no evidence, at least in this case, that one can choose an orientation although there are those who argue that the sex towards which one's romantic or sexual desires are focused is more a matter of 'choice' or 'preference'.

42. It is not for this court to resolve that debate, but it is axiomatic that all legislation has to be construed and applied so as to remain in conformity with the Constitution and in particular the guaranteed rights to equality of treatment and equality before the law under section 4 of the Constitution. To the extent that the EOA is inconsistent with the Constitution it is void. In respect of the exercise of statutory powers, the authorities are clear that, in the absence of some compelling justification, it is unreasonable for a decision-maker to reach a decision that contravenes or might contravene fundamental rights[19].

[19] see e.g. R v Lord Saville of Newdigate, ex. parte A & ors. [2000] 1 WLR 1855; UNIPET v A.G. H.C.A. 3022 of 2003 (unreported)

Similarly, any law that is on its face discriminatory has to be justified on the basis of some reasonable distinction between those who are differently treated, otherwise it offends against section 5 of the Constitution. Sexual 'preference' or 'orientation' cannot, by itself, afford such a distinction. In any event, how does one determine such a thing unless it is self-confessed? It is a subjective distinction based on prejudice and stereotyping with no countervailing factors to justify it.

43. The effect of specifically excluding a particular category of persons, on the ground of sexual orientation, from the protection afforded by the EOA to others, is to deny them a fundamental right on a basis analogous to one of the grounds enumerated under section 4 of the Constitution (i.e. 'sex')[20]. It is a denial of the protection of the law and of equality of treatment under the law. The flaw in the appellant's argument lies in the conflation of orientation with actions. It is revealed in the reasons of the trial judge in the following passage.

> *"Legislative intent and policy in Trinidad and Tobago, unlike in Canada and in the U.K., is to continue to treat homosexuality as a very serious criminal offence and it would be contrary to public policy to vest rights in individuals which stem from their condonation and practice of what the legislature has deemed to be serious criminal offences…"*

It is a fallacy to assert that any real or claimed rights may stem from one's sexual orientation. No one can seek special protection on the basis of his orientation. The fundamental rights are aptly so called because they arise from our inherent dignity and value as human beings.

44. In treating with the arguments in this way, it should not be assumed that I am accepting without question the proposition that it is justifiable for anyone, and more particularly for the State, to discriminate against anyone in relation to employment, education or the provision of goods and services *purely on the basis that they have committed a criminal act*, to wit, a homosexual act! It

[20] see Vriend v Alberta (1998) 3 L.R.C. 483

would be double punishment to deny a person access to the things enjoyed by other members of the community in addition to the severe criminal sanctions that his behaviour would attract. The EOA is invidious because in respect of criminal behaviour, it is generally accepted that once one pays one's debt to society, it is over. A conviction for a homosexual act would presumably be established proof of one's orientation and leave the unfortunate convict vulnerable to ongoing discrimination. Even prisoners have constitutional rights of which they are not to be unjustifiably denuded.

45. While it is understandable that a conviction or even an orientation may be a relevant consideration for certain types of employment, the general nature of the discrimination that the EOA permits is unjustified and unconstitutional.

SECTIONS 17 AND 18

46. These sections prohibit persons from discriminating against others in respect of the provision of goods, facilities, services and accommodation. They impose restrictions that did not previously exist on the rights of persons to enter into contracts or to deal with their private property as they see fit. To that extent, they are inconsistent with section 4 of the Constitution. Section 4(a) of the Constitution recognizes two distinct rights, namely *'the right to enjoyment of property'* and *'the right not to be deprived thereof without due process'*[21]. The Appellant submitted that the EOA correctly struck the balance between the requirements of the general interest of the community in eradicating discrimination and the protection of the fundamental rights of individuals[22]. Even if one accepts for the purpose of analysis that it is so, that does not change the fact that these sections clearly impinge on the first of the two rights and would therefore have required a special majority. The question whether the balance has been properly struck is really a question for Parliament, subject to the overriding consideration of reasonable justification

[21] Jaroo v The Attorney General (2002) 59 WIR 519 @ 528 [para. 19]
[22] see Alleyne –Forte v Attorney General (1997) 52 WIR 480 @ 484h – 485d

under section 13 of the Constitution. It is not necessary to answer that question as the first hurdle of the required special majority has not been crossed.

47. The appellants relied on the case of **Alleyne-Forte v A.G**. The issue in that case was whether the deprivation of property authorised by the Traffic Law was effectively without due process. That relates to the second fundamental right. The appellants' arguments focused primarily on the fact that under sections 17 and 18 there was no absolute deprivation of property. There was merely a partial restriction and in those circumstances, the fact that the owner of the property might have the opportunity to come before the Tribunal and argue his case afforded him due process. It is an argument that has some force and, in my view, is not entirely answered by the Respondent's assertion that the fact that no compensation is payable to the property owner negates due process. However, in view of the fact that the EOA has not been passed with the required majority, that decision is best left for a more detailed consideration if the need arises in an appropriate case.

SECTION 42 – THE JUDICIAL AND LEGAL SERVICE COMMISSION

48. The decision on this issue is really determinative of this appeal because if the JLSC does not have the power to appoint the chairman, then the Tribunal cannot be constituted and the ultimate relief that the appellants seek is unavailable. The respondent's argument is simple and, in my view, compelling.

49. The JLSC is a creature of the Constitution and its powers are therein circumscribed. It has two distinct roles. Under section 104 of the Constitution, it advises the President on the appointment of judges of the Supreme Court. Under section 111, it has the power to appoint certain public officers. The

chairman of the Tribunal is neither a judge of the Supreme Court[23] nor a public officer[24].

50. Section 42 of the EOA therefore has no bearing on section 111 of the Constitution since section 42 purports to deal with the JLSC's advisory role and, in any event is not concerned with the appointment of public officers. Section 104 of the Constitution, which does deal with the JLSC's advisory role is an entrenched provision and therefore can only be amended by a special majority.

51. Counsel for the appellants was reduced to arguing that Parliament could confer any additional jurisdiction on the JLSC that it wished without amending the Constitution. That proposition places the JLSC as a sort of freestanding institution whose powers may be altered by an ordinary act of Parliament without amending the Constitution. Taken to its logical conclusion, it also means that the JLSC could be stripped of some of its powers without amendment to the Constitution or that the same powers could simply be given to another body whose members were not isolated from political control in the same way as the JLSC.

52. In establishing the JLSC and the other Service Commissions, the framers of the Constitution must be taken to have struck a careful balance between the need to permit the legitimate exercise of power by the executive and the need to insulate certain public offices from direct political interference. The Service Commissions could easily have been established by ordinary statutes, but they were deliberately brought under the umbrella of constitutional protection. That is not to be lightly brushed aside. Any amendment to the powers of the JLSC

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[23] He is only said to have equal status (see section 41(2)) and his terms and conditions of engagement are different.

[24] See sections 3(1) and 3(4) of the Constitution.

is an amendment to the Constitution. There can be no silent or indirect amendment to the Constitution[25].

53. The vesting of power in the JLSC to advise the President on the appointment of a chairman, in the absence of a declared intention to amend the Constitution and of the requisite special majority, was therefore unconstitutional and ineffective.

SECTIONS 41(4) and 48

54. Section 41(4)(c) gives the Tribunal jurisdiction *"to make such declarations, orders and awards of compensation as it thinks fit".* While there is no definition of the term "order", it includes, at least by implication, the imposition of fines and penalties. Section 48 speaks of *"an order for a fine"*[26] and provides a mechanism for the recovery, by the Registrar, of 'fines', which are to be paid into the Consolidated Fund. The Tribunal is a statutory creation and has no inherent common law jurisdiction. The power to define offences and to fix penalties is inherently a legislative power. Parliament may delegate the power to impose penalties but it may not surrender or abdicate that power. In the case of the EOA there are no guidelines in respect of the type of matters or behaviour that would attract fines and no policy guidance or limits on the fines to be imposed. That is a clear breach of the doctrine of separation of powers[27].

55. Counsel for the Appellants did not seek to defend the grant of this power under the EOA with the vigour shown in respect of the other issues raised on the appeal. Instead, he suggested that the EOA could still be workable if the power to impose fines were to be struck down and the EOA read and applied as if it had been excised. If that had been the only defect in the EOA, I would

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[25] See section 54 of the Constitution
[26] section 48(2)
[27] see Astaphan & Co. v Comptroller of Customs (1996) 54 WIR 153

be inclined to agree, but as is apparent from the rest of this judgment, the cumulative effect of the deficiencies identified is to render the EOA unworkable.

CAN THE EOA BE SALVAGED?

56. The combined effect of the failure to pass the EOA by a special majority, the failed attempt to vest advisory power in the JLSC and the unconstitutional infringement on the jurisdiction of the Supreme Court is that:

- The Tribunal cannot be properly constituted because there is no effective mechanism for appointment of the Chairman;
- No additional protection can be afforded to an applicant by the EOA for breaches by the State;
- One of the major objectives of the EOA, which is to prohibit discrimination in the provision of goods, services and accommodation by private persons is unattainable.

If all the offending provisions are excised from the EOA what remains is a shell that has been gutted of any meaning or effectiveness. The whole Act must be struck down.

CAN THE EXECUTIVE REFUSE TO IMPLEMENT AN UNCONSTITUTIONAL STATUTE?

57. It is no surprise that there is a dearth of U.K. authorities on this point as the constitutional jurisprudence has developed there in the absence of a Constitution like ours. There is a body of writing and case law in the United States of America where this issue has been confronted and I have derived some guidance from it, more particularly form some of the material referred to by the learned trial judge. The issue may be simply posed: The Executive is sworn to uphold the Constitution. It also has a duty to apply and obey other

laws. What is the duty when another written law is inconsistent with the Constitution?

58. The easy response is that since the Constitution is the supreme law, then the duty to uphold the Constitution trumps the duty to obey any other law, which is necessarily subordinate. However, it is not for the Executive to say whether or not a law is unconstitutional. The Constitution has reserved unto the Courts the power to be the final arbiters of its meaning[28]. The Constitution mandates that Parliament should enact laws, the Executive should faithfully execute them and the Judiciary resolves disputes about their constitutionality. In the U.S.A. the Courts and the Executive have traditionally accepted that there is a duty on the Executive to presume the validity of laws and to give effect to them. However, that presumption is not absolute. The Executive has in the past, and with the tacit acceptance of the Courts[29] asserted a right to ignore statutes that are 'clearly' or 'patently' unconstitutional.

59. In practice, however, what has occurred is that once a law was in existence, the Executive would enforce it until it was declared unconstitutional by the Courts. If there was a challenge to its constitutionality, the executive might decline to defend it, although its defence would ordinarily be a part of the Executive's duty to uphold the law. In my view that is the only general approach that can prevent descent into uncertainty and chaos.

60. There always remains, however, the possibility of a genuine mistake or a perverse enactment whose enforcement might have the potential to cause more social or administrative anarchy than if it was ignored. If, in addition, the unconstitutionality of such a statute was 'patent' then the Executive may be justified in declining to enforce it, but only for the limited period necessary

[28] U.S. v Woodley 726F 2nd. 1328

[29] see e.g. the opinion of Scalia J. (joined by justices O'Conner, Kennedy and Souter) in Freytag v Commissioners of Inland Revenue 501 U.S. 868 in which he asserts that one of the options open to the President to resist an encroachment by the legislature on his executive power is simply to disregard an unconstitutional statute.

for the situation to be rectified and only after a decision taken at the level of Cabinet with the advice of the Government's legal officers. If there is doubt about the constitutionality of a statute, then guidance may be sought from the Courts or an amendment or repeal may be pursued in Parliament but in the meantime the statute must be obeyed and enforced.

61. In this instance the EOA was patently unconstitutional and unworkable and there is evidence that appropriate advice was sought and careful consideration given to the course of action taken. The only criticism that can be made is in respect of the length of time that passed with no attempt to amend or repeal the statute.

DISPOSITION

62. In light of the finding that the EOA is unconstitutional and therefore void, it follows that the appellants were not deprived of the protection of the law. I would therefore dismiss the appeal. The filing of this constitutional motion was occasioned, in part by the delay on the part of the Executive in rectifying a state of affairs, which it recognized to be 'unconstitutional'. This matter has raised and resolved some questions of general importance. In the circumstances, I would make no order as to costs.

Ivor Archie
Justice of Appeal