

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

**IN THE HIGH COURT OF JUSTICE
(Civil)**

SLUHCV2020/0349

BETWEEN:

CHERYL BERTRAND

Claimant

and

THE ATTORNEY GENERAL

Defendant

**Heard together with
SLUHCV2020/0351**

BETWEEN:

**SHAKIRA FRANCIS
by her next friend, Kara Maria Francois**

Claimant

and

THE ATTORNEY GENERAL OF SAINT LUCIA

Defendant

Before:

The Hon. Mde. Justice Kimberly Cenac-Phulgence

High Court Judge

Appearances:

Mr. Horace Fraser of Counsel for both Claimants
Mrs. Karen Barnard with Mr. Rene Williams, Mr. Kareem Alleyne and Mr.
Seryozha Cenac of Counsel for the Defendant

2020: December 21;
2021: January 11,15; (additional written submissions)
June 30.

JUDGMENT

Introduction

- [1] **CENAC-PHULGENCE J:** This judgment concerns two fixed date claims which were heard together in which the claimants brought identical constitutional motions challenging the constitutionality of article 579 of the **Civil Code of Saint Lucia**¹ (“the Code”). They challenge article 579 on the basis that, by its definition of “single man”, it prevents a child born out of wedlock to a married man from inheriting from his/her father’s Estate and, therefore, breaches such child’s constitutional right to protection of the law and equal treatment before the law. It also breaches their father’s constitutional right to freedom of expression and freedom from discrimination on the basis of sex, which has a direct impact on their ability to inherit from his Estate. They are therefore also denied their right to freedom from deprivation of property. The Attorney General of Saint Lucia opposes the motions on the ground that the rights contained in the Constitution of Saint Lucia² are not absolute and that, as there is a justifiable rationale for the provisions of article 579 of the Code, it is not unconstitutional.

Preliminary Issue

Non-compliance with CPR 23

- [2] The Attorney General of Saint Lucia (“the AG”) in respect of Shakira's claim, raised the point that the provisions of CPR Part 23 for commencing a claim on behalf of a minor had not been satisfied and consequently, her claim could not properly be maintained and should be struck out. It was their contention that Kara had not filed an order showing that she was authorized to act as Shakira’s next friend; alternatively, she had not filed the requisite certificate that she had satisfied the conditions to act as next friend and no service of a copy thereof had been effected on the AG’s Chambers and further, the certificate of truth was not signed on Shakira’s behalf by her next friend.

¹ Cap 4.01 of the Revised Laws of Saint Lucia, 2013.

² Cap. 1.01 of the Revised Laws of Saint Lucia, 2008.

- [3] In response to this, Mr. Horace Fraser (“Mr. Fraser”) in oral submissions suggested that this claim is a not an ordinary claim and is of importance in that it is seeking to protect the interest of a child and looking at the requirements of CPR 23.6, Shakira’s mother would qualify to be appointed as she is the child’s legal tutor. It was his contention that the rule does not take away the court’s discretion to set matters right and allow the matter to move forward since there could be no potential harm to Shakira given the circumstances of the case. Counsel for the AG, Mrs. Karen Barnard (“Mrs. Barnard”) indicated that she was prepared to recognize the importance of the claim and that the Court could set matters right in accordance with CPR 26.9. The Court therefore made an order that Kara Francis be appointed as next friend of Shakira Francis for the purposes of these proceedings.
- [4] I believe it is important to briefly outline the reasons for taking this course of action. Whilst the provisions of CPR 23 require a minor to have a next friend to conduct proceedings on his or her behalf, in particular from as early as issuing a claim and sets out the qualifications and the procedure to be followed by a person who proposes to act as next friend, I am of the view that failure to follow that procedure is not fatal. It does not invalidate the claim such that it cannot be maintained or proceed and must be automatically dismissed.
- [5] The CPR provides that a proposed next friend does not require a court order appointing him or her but must simply file a certificate stating that he or she satisfies the conditions of being able to fairly and competently conduct proceedings on behalf of the minor and of having no interest adverse to that of the minor. Whilst noncompliance with the rules is not to be countenanced, Kara is Shakira’s mother, and she has attached proof of this by way of Shakira’s birth certificate. No allegation has been made that Kara does not meet the conditions of being able to represent Shakira fairly and competently or that she has an adverse interest. Further there is no prejudice to the defendant in allowing the claim to proceed despite the procedural error and there would be obvious prejudice to Shakira if her claim was struck out at this stage of the proceedings.

The Claimants' Cases

- [6] The claimant in SLUHCV2020/0349 is Ms. Cheryl Bertrand ("Cheryl"), born on 1st March 1993 to Mr. Jean Rogers Bertrand ("Mr. Bertrand") and Ms. Catherine Alexander, who were, at the time of her birth, living in a common law union. Her parents also had another child, her brother, Bradley Bertrand, born on 25th September 1985. Their union lasted until her father died, intestate, on 25th April 2003. He died a married man, having been married to Ms. Marie Myrtle Jeremie on 2nd March 1966. After this marriage broke down, her father formed the union with her mother, and she is unaware whether he was ever divorced. Her father died a natural heir to the Estate of the late Pierre Celestin in respect of property situate at Dauphin registered as Block 1449 B Parcels 454 and 455. However, according to article 579 of the Code, because her father died a married man, she is not considered an heir to his Estate and his interest in the property will devolve on his wife, or her heirs, or his siblings. She states that her father was responsible for her maintenance and upkeep from her birth until his death. He took good care of her and she believes it would be his wish that any property or interest in property to which he is entitled would be inherited by her.
- [7] The claimant in SLUHCV2020/0351 is Shakira Francis ("Shakira"), a minor, by her next friend and mother, Ms. Kara Francois ("Kara"). Shakira was born to Kara and Norman Francis ("Mr. Francis") on 17th December 2017. At the time of her birth, Kara and Mr. Francis were living together in a common law union. Mr. Francis died, intestate, on 7th February 2019, a married man, having been married to Mrs. Eleanor Marlene Francis. He died leaving both moveable and immoveable property, which now forms part of his Estate. However, as he died a married man, article 579 of the Code prohibits Shakira from being considered an heir to his Estate. Kara states that Mr. Francis was, before his death, responsible for Shakira's maintenance and upkeep and he died without making plans for her financial wellbeing. Kara believes that because of Mr. Francis' love for their child, it would have been his desire, had he foreseen his death, to make financial provision for her. Having not done so, she believes he would want Shakira to share in his Estate.

[8] The claimants each seek the following relief against the Attorney General of Saint Lucia:

1. A declaration that she is entitled to the right of protection of the law and the right not to be subjected to inequality of treatment based on the circumstances of her birth, in accordance with section 1 of the **Constitution of Saint Lucia**³ (“the Constitution”).
2. A declaration that the perforce of article 579 of the Code is deprivation of her right of succession to property or an interest in property to which her deceased father is entitled contrary to section 6 of the Constitution.
3. A declaration that the law embodied in article 579 of the Code is a breach of her father's constitutional right of freedom of expression, which in turn directly affects her right of succession to property or an interest in property of her father, contrary to section 10 of the Constitution.
4. A declaration that article 579 of the Code discriminates against her father on the ground of his sex, which militates against her ability to inherit property forming part of his Estate, contrary to section 13 of the Constitution.
5. A declaration that article 579 of the Code promotes unequal treatment between children of Saint Lucia by affording favorable treatment to those children born in wedlock which is not afforded to children born out of wedlock if their father is a married man, contrary to the import and intendment of the Constitution and the right to protection of the law, contrary to section 1 of the Constitution.
6. A declaration that article 579 of the Code is contrary to the **United Nations Convention on the Rights of the Child** (“the Convention”) as it promotes inequality between children of Saint Lucia based on the circumstances of their birth.
7. A declaration that the distinctions between “single man” and “married man”, “single woman” and “married woman”, single woman and single man born out of wedlock or in wedlock, and children born out of wedlock are repugnant to the Constitution and are not reasonably required or justifiable in a democratic society.

³ Cap 1.01 of the Laws of Saint Lucia.

8. A declaration that article 579 of the Code is unconstitutional as it seeks to promote unfair and unequal treatment at law between man and woman, married man and married woman, man and woman born in wedlock and children who are born in or out of wedlock.
9. An order striking down article 579 of the Code, in its entirety, as being repugnant to the Constitution.
10. Costs
11. Such further and other orders as the Court deems just.

[9] Both Cheryl, and Kara on behalf of Shakira, state that article 579 of the Code promotes unfair treatment of children who are born out of wedlock to a married man. It punishes the child of a married man who fathers a child outside of his marriage, although the man is not, himself, punished. They contend that there is no discernible distinction between children born in or out of wedlock or born out of wedlock to a married man. The distinction Parliament has made, by enactment of article 579 of the Code, is disproportionate as it seeks to benefit one class of children over another. The distinction is not rationally related to any legitimate public purpose or the promotion of any objective public good. Further, the distinction has been abolished for the purpose of the **National Insurance Corporation Act**⁴ ("NIC Act"), which now treats all children as one with all the same rights; thus, the inconsistent treatment of children in these two pieces of legislation is irrational and difficult to reconcile.

[10] Saint Lucia is also a member state of the United Nations and duly ratified the Convention on 20th November 1989, which entered into force on 2nd September 1990. In accordance with the Convention, Saint Lucia is obligated to undertake to put in place all appropriate legislative, administrative and other measures for the implementation of the rights recognized therein, which are intended to lead to the elimination of laws or systems that promote inequality or discrimination towards children. Accordingly, Saint Lucia was obligated to amend its law relating to

⁴ Cap 16.01 of the Laws of Saint Lucia, 2005.

succession to remove the provision for “irregular succession” or “other succession” in its entirety, as it promotes inequality among children. However, Saint Lucia has failed to adhere to its obligations under the Convention.

- [11] The claimants state that article 579 of the Code discriminates against them, through their father on the ground of his sex, given the wide definition therein of single woman as compared with single man. The effect is that they would be entitled to inherit from their mothers if the circumstances were such that their mothers had been married and they had been born out of wedlock. The wide definition given in relation to single woman is not afforded to a man similarly circumstanced. Single man is given a solitary meaning which disadvantages him.
- [12] Article 579 of the Code also contravenes the Constitution in respect of their father’s freedom of expression and choice to be married and form a union with another woman and have sexual relations while still being married, thereby producing children. Parliament seeks to stifle the expression of that choice by disinheriting children born in such circumstances. Their father’s freedom of expression is protected by the Constitution with which article 579 of the Code seeks to interfere, and which directly deprives her from claiming an interest in her fathers’ Estate.
- [13] They conclude by stating that, whatever the reason for enactment of article 579 of the Code in the year 1956, that that reason no longer represents the view of modern-day society; therefore, it has no proper place in modern-day society. The Courts have given protection to couples living in common law unions regardless of whether married or not, and in 1988 when Parliament amended article 579 of the Code, it dropped use of the phrase “illegitimate child” and replaced it with the phrase “child born out of wedlock”. Parliament, by its enactment of the NIC Act, where “child” includes children whether born in or out of wedlock, adopted, or a child of the family, shows that Parliament has a different view of children born out of wedlock and that modern-day perception has changed. Therefore, all such superficial distinctions should no longer be part of the law.

The Attorney General's Case

- [14] The Attorney General also states that article 579 of the Code only permits a child to inherit from a "single man" who dies intestate and the term "single man" refers to a man who has never been married; however, neither claimant has proven her entitlement to properties forming part of her father's estate and each is therefore put to strict proof that the provisions of article 579 prohibit her from being considered as an heir to her father's Estate.
- [15] The AG denies that the aim of article 579 of the Code is to promote unfair treatment towards persons like the claimants or that the effect of the law is to make a child born out of wedlock pay for his/her father's indiscretion. He denies that article 579 of the Code is disproportionate and explains that while article 186 of the Code recognizes that a child born during a marriage is presumed to be the child of the husband, there is no such certainty with respect to children born outside the marriage. Article 579 therefore has the legitimate aim of protecting the Estate of a deceased man from false claims.
- [16] He provides background to article 579, stating that prior to 1988, the Code did not permit children born out of wedlock to inherit from their parents upon intestacy. Article 579 was amended in 1988 and again in 1991 to permit children born out of wedlock to inherit from their mothers and unmarried fathers respectively, as evidenced by the Hansard of the House of Assembly, dated 12th January 1988, 28th April 1988 and 12th November 1991. At page 50 of the Hansard of 12th November 1991, in respect of unmarried men, the then Attorney General cautioned that being a matter of succession, the man is dead, and cannot identify who his children are and are not. The AG states that these amendments to article 579 were enacted pursuant to Parliament's law-making power by virtue of section 40 of the Constitution.
- [17] The AG is of the view that article 579 does not discriminate between children of a single man or a single woman as the same treatment is afforded to them under the

provision. In any event, any purported discrimination does not fall within the recognized constitutional discriminatory grounds under section 13 of the Constitution, being, "sex, race, place of origin, political opinions, colour or creed".

[18] He denies that the claimants have been discriminated against through their father on the ground of his sex and states that the claimants cannot assert a constitutional infringement on behalf of another, that is to say, discrimination on grounds of sex against their now deceased fathers. The claimants have failed to establish discrimination against themselves on the ground of their sex. Even if there could be found to be discrimination against their fathers on the ground of sex, within the meaning of section 13 of the Constitution, that discrimination would fall within section 13(4)(c) and would be precluded. Further, the meaning given to single man and single woman is not disadvantageous to a man as it aims to prevent false or doubtful claims to his Estate.

[19] The AG states that the claimants have also failed to establish any basis for the alleged breach of the constitutional right to freedom of expression and is, in any event, again seeking to enforce this right in relation to their deceased fathers. The claimants cannot speak to an alleged breach on their father's behalf.

[20] The AG states that section 1 of the Constitution, relied upon by the claimants, does not create any enforceable rights, and in respect of an alleged breach of section 6 of the Constitution, the claimants have not established their entitlement to any property or that such property has been taken from them without compensation contrary to that provision.

[21] Further, the AG avers that no right under the Constitution is absolute, and each right has to be balanced against other competing rights such as, inter alia, the rights to property of children born in lawful wedlock. The claimants have not illustrated that article 579 or any part thereof is not reasonably required or justifiable in a democratic society. More so, the claimants are requesting the Court to amend or repeal article

579 of the Code, however, any such decision, on the basis of the needs of the society, can only be taken by Parliament. Additionally, although the Convention has been ratified by Saint Lucia, it has not been incorporated into the domestic law of Saint Lucia and thus cannot be relied upon by the claimants.

The Claimants' Reply

- [22] Kara on behalf of Shakira states the value and extent of Mr. Francis' Estate is not the subject of these proceedings. The proceedings are concerned with challenging the law that prevents Shakira from being entitled to inherit her father's Estate as an heir.
- [23] Cheryl states similarly that, as a private citizen and taxpayer, she is entitled to bring and maintain these proceedings to challenge a law that she believes is unconstitutional. She does not need to quantify her father's Estate or prove that he is necessarily entitled to succession to the Estate of the late Pierre Celestin, whom she says is her father's great grandfather. As to the assertion of the effect of section 13(4)(c) of the Constitution, she states that it is not premised on any logical or discernable reason.
- [24] Cheryl, and Kara on behalf of Shakira, are adamant that article 579 of the Code prohibits them from making a claim as an heir to the succession of their father's Estate. The assertion that the aim of the amendments to article 579 of the Code was to protect the Estate of a deceased man from false claims is absurd and unfounded because: (i) it flies in the face of the fact that her father accepted and recognized her to be his daughter, which is also reflected on her birth certificate, therefore, her claim to succession to her father's Estate cannot be false; (ii) in any event, the child of a marriage proves paternity by the production of a birth certificate and marriage certificate, and if the law permitted her to inherit her father's Estate, she too could prove her paternity by her birth certificate or by an order of the court, consequent upon DNA results; (iii) further, the High Court is equipped to preside over and dismiss false claims, such that it is overreaching by Parliament to enact

law that discriminates against illegitimate children born to a married man by failing to provide a mechanism by which they can establish claims to allow them to be recognized as natural successors to the Estates of their deceased fathers; (iv) further and in any event, a single man can be the subject of a false paternity claim just as a married man could and, therefore, in this regard Parliament has usurped the function of the court.

- [25] Both disagree with the interpretation placed on the Hansard by the AG and state that the amendment clearly changed the law in relation to illegitimate children born of married women but made no similar provision for illegitimate children born of married men, even though it was acknowledged by one member of Parliament during the debates and agreed by the then Attorney General to be an anomaly. The then Attorney General took the position that same could not be dealt with at the time because the provisions regarding succession are difficult and require a great deal of thought and preparation. The claimants say they have a legitimate expectation that Parliament would further amend article 579 of the Code in light of the 1991 debates and the fact that Saint Lucia is a signatory to the Convention. They state that they are aware that the court does not amend or repeal statute; what they are asking is for this Court to strike down article 579 of the Code as being unconstitutional.

The Submissions

A. Breach of the Right to Protection of the Law and Equality before the Law- Section 1 of the Constitution

Claimants' Submissions

- [26] The claimants submit that the Constitution affords them the right to protection of the law, that is, the right not to be subjected to inequality of treatment based on the circumstances of their birth (status). They rely on section 1(a) of the Constitution which states that every person in Saint Lucia is entitled to the fundamental rights and freedoms, whatever his or her race, place of origin, political opinions, color, creed, or sex, namely, the right to equality before the law and the protection of the law. They submit that the right to protection of the law is constitutional and although

it is not a fundamental right in the Saint Lucia Constitution, it is a right on account of its wide nature, such that it cannot be reduced to a single section. They submit that it is a right that affords a citizen protection by the entire body of laws in Saint Lucia and for this they rely on the case of **Ong Ah Chuan v Public Prosecutor**⁵ wherein Lord Diplock stated:

“In our constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, reference to ‘law’ in such context as ‘in accordance with law’, ‘equally before the law’, ‘protection of the law’ and the like, in their Lordships view, refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the time of commencement of the Constitution...”

[27] They also rely on the CCJ case of **Maya Leaders Alliance v the AG of Belize**⁶ in particular dicta of Sir Dennis Byron:

“At paragraph 40, in delivering the majority judgment in the Court of Appeal, Morrison JA found that the notion of protection of the law spoke to ‘...the availability of processes for the vindication of rights rather than to substantive rights themselves. Appearing as it does in what is in fact the preamble to Part II of the Belize Constitution and the detailed elaboration of the fundamental rights and freedoms which it contains, the phrase ‘protection of law’ in section 3(a) is in my view an assurance to persons in Belize of a continued... right to access to the courts of Belize under a system of law that is fair for declarations of the invalidity of executive or legislative action...”

We respectfully disagree that this narrow interpretation is properly to be given to the wide spectrum of rights entailed in section 3(a). Undue emphasis should not be placed on the location of the provision. It is the case that the detailed provisions of Part II of the Constitution must be construed in light of the provisions of Section 3, but those sections provisions do not thereby curtail the ambit of the section.

...The wording of section 3 is not that of a mere preamble or introduction but rather that of an enacting provision which recognizes that there has existed and declares that there shall continue to exist, the right of the individual to among other things the protection of the law.

⁵ [1981] AC 648.

⁶ [2015] CCJ 15 (AJ).

... The right to the protection of the law is a multi-dimensional, broad and persuasive constitutional precept grounded in fundamental notions of justice and the rule of law. The right to the protection of the law prohibits acts by the Government which arbitrarily or unfairly deprive individuals of their basic constitutional rights to life, liberty and property... 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. The right to protection of the law may, in appropriate cases, require the relevant organ of the state to take positive action in order to secure and ensure that enjoyment of basic constitutional rights. In appropriate cases, the action or failure of the state may result in a breach of the right to protection of the law."

- [28] The claimants conclude therefore that the right to protection of the law is a free-standing right which can attract a declaration that the claimants, being illegitimate children born to married men, are accorded unequal treatment by the laws of intestate succession, in comparison to children born into a marriage and those born to single men. The claimants are prevented from inheriting their fathers' Estates because of their status. The failure of Parliament to amend article 579, despite acknowledging that it is an anomaly and impliedly promising to do so, is a breach of the right to protection of the law.

Denial of Access to the Court

- [29] The claimants submit that denial of access to the court is also a breach of the right to the protection of the law. According to the statement of the then Attorney General in the Hansard, only a married man can identify his children and if he is dead, he can do so by his name being on the child's birth certificate. Despite this, no provision has been made for children born out of wedlock to married men who can prove paternity by their father's name being inserted on their birth certificate. Further, the statement by the then Attorney General suggests that paternity can only be proven by this singular method. No provision has been made in article 579 of the Code for redress before a court or tribunal to prove paternity. Whilst article 196 of the Code provides for proof of the status of legitimacy and for proceedings to do so, no such provision has been made for an illegitimate child born to a deceased married man to prove paternity. Thus, it is a denial of access to a court of law to prove paternity.

Legitimate Expectation

- [30] The claimants say they have a legitimate expectation that article 579 would be amended based on (i) the promise of the then Attorney General to amend article 579 of the Code at a later time with respect to illegitimate children born to married men and (ii) article 4 of the Convention which provides that States shall undertake all legislative, administrative and other measures for the implementation of the rights recognized in the Convention. They rely on the case of the **Attorney General et al v Lennox Boyce and another**,⁷ where the issue before the court was the legal effect of a treaty that was ratified by a State, but which had not been incorporated into municipal law. The court set out the circumstances where the signing of the treaty and the actions of the executive associated with the treaty can give rise to the creation of a legitimate expectation in a person who seeks to claim a right under the said treaty.

AG's Submissions

- [31] The AG submits that the claimants rely on section 1(a) of the Constitution in particular the right to equality before the law and protection of the law. However, he points out that section 16(1), which gives the Court power to grant redress for contraventions of fundamental rights and freedoms guaranteed by the Constitution, provides: *"If any person alleges that any of the provisions of sections 2 to 15 inclusive has been, is being or is likely to be contravened in relation to him or her... then, without prejudice to any other action with respect to the same matter which is lawfully available, that person... may apply to the High Court for redress."*
- [32] He submits that case law establishes that section 1 is not a free-standing right for which redress, by way of a declaration, can be given by the Court. Section 1 of the Constitution is merely declaratory in effect and does not confer any fundamental rights on an individual. It contains an outline of the fundamental rights and freedoms in the nature of a preamble or explanatory note and is not capable of being breached. Section 16 of the Constitution vests in the High Court jurisdiction to

⁷ [2006] CCJ 3.

provide constitutional redress by way of a declaration in respect of contraventions of sections 2 to 15 only. The constitutional right to redress does not apply to section 1. The AG relies upon the cases of **Elesia Crisp v The Attorney General of Saint Lucia**⁸ and **Newbold v Commissioner of Police**.⁹

[33] The AG distinguishes the case of **Ong Ah Chuan v Director of Public Prosecutions**¹⁰ relied on by the claimants and states that the Privy Council was addressing the proposition made by the respondent in that case to the effect that so long as deprivation of life or personal liberty was authorized by a written law passed by the Parliament of Singapore, there could be no breach of the fundamental right under article 9(1) of the Singapore Constitution to life and personal liberty regardless of whether the law was arbitrary or procedurally unfair. The AG submitted that in the Singapore Constitution, Part IV, sections 9-16 confer fundamental liberties. Unlike the Saint Lucia Constitution, section 12 of the Singapore Constitution confers the right of all persons to equality before the law and equal protection of the law and is not merely declaratory in nature. Lord Diplock was addressing the fundamental rights conferred under articles 9(1) and 12(1) which are not in the nature of a preamble.

[34] The AG submits that the case of **Maya Leaders Alliance et al v Attorney General**,¹¹ relied on by the claimants, is also inapplicable to the present case as section 3 of the Belize Constitution differs from section 1 of the Saint Lucia Constitution. The material difference is with the enforcement provisions. Section 20(1) of the Belize Constitution provides for redress and vests in the Supreme Court jurisdiction to make a declaration if any person alleges that sections 3 to 19 inclusive is being or is likely to be contravened in relation to him. Section 3 of the Belize Constitution is similar to section 1 of Saint Lucia Constitution, however the rights under section 3 are enforceable.

⁸ SLUHVC2015/0398, delivered 20th July 2017, unreported.

⁹ [2014] UKPC 12.

¹⁰ [1981] AC 648 .

¹¹ [2015] CCJ 15.

- [35] The AG concludes that the claimants cannot seek redress pursuant to section 16 of the Constitution asserting a right to protection of the law on the basis that it is a free-standing right. Section 1 of the Constitution does not create any rights, therefore constitutional relief does not arise.

Denial of Access to the Court

- [36] The AG notes that the claimants seek to advance a claim not raised in the pleadings – that the right to protection of the law has been breached by virtue of article 579 and article 196 of the **Civil Code**, having not made any provision for illegitimate children to seek redress before a court or tribunal to prove paternity. He submits that that is not the case and provision is made by article 209 of the Code for an illegitimate child to seek to judicially establish her or her paternity or maternity in accordance with the procedure set out in articles 200-203. Therefore, he submits that there is no denial to access to the Court and no breach of the right to protection of the law.

Legitimate Expectation to Amend the Law

- [37] In relation to the claimants' reliance on the statement of the former Attorney General "*to amend article 579 of the Civil Code of Saint Lucia at a later time [with] respect to illegitimate children born to married men*" and the act of the Government in acceding to the Convention, the AG submits that the claimants could not have any legitimate expectation because neither the Attorney General nor the Government of Saint Lucia made any representation to them upon which they relied. Relying on the case of **Elvis Daniel et al v Public Service Commission and Attorney General**,¹² the AG submits that legitimate expectation is a concept developed within the sphere of public law to protect persons from gross unfairness or abuse of power by public authorities. It is based on the proposition that when a public body states that it will do something a person who has reasonably relied on that statement should, in the absence of good reasons, be entitled to enforce the statement through the courts. The statement must be clear, unambiguous and unqualified. The AG submits that

¹² SVGHCVP2016/0007, delivered 29th January 2019, unreported.

the statement relied upon is not clear and unambiguous. Further, it was qualified by the then Attorney General expressing the complexity of the issue and that further consideration would be necessary. No representations were made to the claimants, rather they were made to the House of Assembly and United Nations, respectively. The claimants have also not established on the evidence that they relied on the statement, and this is not evident from the facts of the case.

- [38] The AG submits further that the case of the **Attorney General et al v Lennox Boyce and another**¹³ established that in the case of a conflict between a domestically enforceable provision in an incorporated treaty and a clear statutory provision, the latter must be given precedence by the Court. He submits that article 579 is clear and there is no ambiguity, therefore, there is no need to interpret it in accordance with the Convention and the Court ought not to incorporate treaty obligations into domestic law via the doctrine of legitimate expectation. In **Boyce** it was stated that treaties cannot deprive citizens of existing rights without authorization of the legislature as this would violate the doctrine of separation of powers. He submits that to grant the declaration sought would be to deprive a class of citizens of their existing rights, being the children of the marriage or the wife, to the property of the deceased man. This would itself amount to a breach of the Constitution in respect of these persons. This Court cannot alter the common law by shifting from the applied and accepted doctrine of dualism to monism.

B. Protection from Deprivation of Property-Section 6 of the Constitution

Claimants' Submissions

- [39] The claimants submit that article 579 of the Code is a deprivation of their right of succession to property or interest in property to which their deceased father is entitled contrary to section 6 of the Constitution. They submit that the case of **Maya Leaders Alliance** supports this view where Sir Dennis Byron stated: *"The notion of deprivation of property is often discussed in the context of compulsory acquisition*

¹³ (2006) 69 WIR 104.

of property however there may be arbitrary deprivation of property even whether there is no compulsory acquisition.”

- [40] They submit that the present case deals with the situation where a provision in legislation seeks to deny the children of a deceased married man from succeeding to his Estate in circumstances where the said man has recognized them as his offspring prior to death, which goes against the wishes of their fathers and which is arbitrary and irrational. The claimants say they will suffer quantifiable loss of interest in property forming part of their fathers' Estate on the ground of their status.

AG's Submissions

- [41] The AG submits that the claimants have not shown what property, if any, their deceased fathers had a right to or interest in. The claimants are therefore inviting the Court to decide the matter presumptively and not on evidence. Cheryl claims her father has an interest in Block 1449B Parcels 454 and 455, however these parcels are not registered in her father's name. She states that the properties belong to her grandfather however has provided no evidence in support. Kara on behalf of Shakira avers that Mr. Francis died leaving property, however, the property has not been identified. He states that it was submitted on behalf of the claimants that article 579 “goes against the wishes of the men”, however there is no evidence of what the wishes of the deceased were and there is no means for the Court to verify the extent of the deceased's involvement in each of the claimants' lives and what their respective fathers' final wishes were with respect to them. The AG submits that the claimants cannot establish a breach of a section 6, as they have not proven what interest in property, if any, article 579 precludes them from being entitled to.

[42] The AG further submits that section 6 cannot be invoked in the circumstances of this case. He relies on the case of **Attorney General v McKenzie Frank and Trevor Walker**,¹⁴ where the court stated:

“This section can only be properly invoked where property rights already exist, and such rights have been compulsorily taken possession of or acquired.”

[43] Thus, the AG says that the claimants do not have standing to make such a claim. He submits that should the Court find that the claimants have standing, they have not provided evidence of the nature and extent of their interest, which the Court is required to assess by virtue of section 6(2)(a) of the Constitution and therefore the Court is not in a position to adjudicate on the matter. He submits that it is dangerous to so adjudicate, as any supposed right or interest of the claimants will affect the rights and interests of their father’s Estate which is not represented, in particular, the deceased’s wife and children of the marriage.

C. Freedom of Expression-Section 10 of the Constitution

Claimants’ Submissions

[44] The claimants state that article 579 of the Code is a breach of their fathers’ constitutional right to freedom of expression, which in turn directly affects their rights to succession of property or interest in property of their father, contrary to section 10 of the Constitution. They submit that over the years, courts have recognized the mutable nature of the application of constitutional protection. In **Minister of Home Affairs v Fisher**,¹⁵ Lord Wilberforce examining the duty of the court in interpreting the Constitution observed that it calls for a generous interpretation, avoiding what has been called ‘the austerity of tabulated legalism’ suitable to give individuals the full measure of the fundamental rights and freedoms referred to, subject only to such limitations contained in it, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the public interest. They submit that the Constitution must be seen as a living instrument in

¹⁴ ANUHCVP2018/0006 delivered 26th June 2020, unreported.

¹⁵ [1980] AC 319.

the sense that while its meaning does not change over time, its application will, citing the case of **Sepet (FC) and another v Secretary of State for the Home Department**.¹⁶

- [45] Thus, the claimants submit that freedom of expression is not only applicable to the right to express views and receive information; but that it has been applied to the expression of a person's gender identity. In the Indian Supreme Court case of **National Legal Services Authority v Union of India and others**,¹⁷ the Court held that the expression of one's identity through words, dress, action and behavior is included in the right to freedom of expression under the compatible article of the Indian Constitution; and the CCJ in **Quincy McEwan et al v Attorney General of Guyana**¹⁸ arrived at similar conclusions. Therefore, the claimants submit that their father's choice to cause children to be conceived outside of their marriage is an expression of their father's choice to act and behave in that way and the right to his freedom of expression was breached by article 579 of the Code as the said provision stifles that expression, which in turn affects the claimants' right of succession to their fathers' Estates.

AG's Submissions

- [46] The AG submits that it must first be determined whether the claimants have sufficient locus standi or nexus to the cause of action to seek relief for a breach of section 10(1) of the Constitution. He submits that it is clear from section 16(1) that to enforce contravention of a right contained in sections 2 to 15 of the Constitution, the alleged contravention must be in relation to him or her; further, the person alleging contravention in relation to him or her must apply for redress in order for the High Court to have original jurisdiction. The only exception to this is in the case of a person who is detained. The claimants however seek a declaration that article 579 of the Code is a breach of their father's constitutional right to freedom of expression. The AG submits that the claimants have no locus standi to enforce any

¹⁶ [2003] UKHL 15.

¹⁷ Writ Petition (Civil) No. 400 of 2012.

¹⁸ [2018] CCJ 30 (AJ) 1.

alleged contravention of section 10 as they are not alleging that their right to freedom of expression has been or is likely to be infringed. The alleged contravention is in relation to their deceased fathers having chosen to cause children to be born.

- [47] The AG submits that the distinction is illustrated in the case of **Chief of Police v Calvin Nias et al**,¹⁹ in which the appellant was held to have locus to challenge the constitutionality of legislation because he alleged that his right to freedom of expression was infringed when he was charged under section 8(a) of the Small Charges Act for use of abusive language. The AG submits that the cases of **National Legal Services Authority v Union of India and others**²⁰ and **Quincy McEwan et al v The Attorney General of Guyana**²¹ cited by the claimants are also distinguishable on the basis that the courts there were looking at the freedom to express one's chosen gender identity and not expression of gender by another. He submits that the claimants have not satisfied the requirements of sections 16(1) and (2) of the Constitution. Accordingly, the claim of alleged breach of section 10 cannot be maintained.

D. Protection from Discrimination on the Ground of Sex-Section 13 of the Constitution

Claimants' Submissions

- [48] The claimants submit that article 579 of the Code discriminates against their father on the ground of his sex which militates against their ability to inherit property forming part of his Estate contrary to section 13 of the Constitution. They state that section 13 provides that no law shall make any provision that is discriminatory either of itself or in its effect and no person shall be treated in a discriminatory manner by any person or authority. They submit that the distinctions between 'single man' and 'married man', and 'single woman' and 'married woman', and 'single woman' and 'single man' born out of wedlock or in wedlock, and children born out of wedlock are

¹⁹ SKBHCVP2007/0010, delivered 25th November 2008, unreported.

²⁰ Writ Petition (Civil) No. 400 of 2012.

²¹ [2018] CCJ 30 (AJ) 1.

repugnant to the Constitution and are not reasonably required or justifiable in a democratic society.

- [49] They submit that in this case, the discrimination is one sex being favored over another, which is illustrated in **Josine Johnson v The AG of Trinidad and Tobago**.²² The Privy Council held that discrimination was found as a fact where regulations affected female police officers when deciding whether or not to marry, but male officers were not similarly affected when making the same decision. They submit that where it can be shown that legislation produces a discriminatory effect, it is not necessary to prove any discriminatory intent on the part of the relevant authority citing **Nadine Rodriguez v Minister of Housing and another**.²³
- [50] They disagree that section 13(4)(c) has the effect that such a law cannot be found to be discriminatory and submit that section 13(4)(c) must be read in conjunction with section 13(4)(d), which casts the onus on the defendant to show that where a citizen is subject to disability or restriction by a law, the said law is reasonably justifiable in a democratic society. They rely on the case of **De Freitas v The Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing and others**²⁴ where Lord Clyde held that even if the subsection under consideration in that case satisfied the first requirement, namely, that restraint upon the freedom of civil servants was reasonably required for the proper performance of their functions, it would still have to satisfy the second requirement of being reasonably justifiable in a democratic society. The four criteria to be satisfied to show that a law is demonstrably justified in a free and democratic society are that – there is a sufficiently important objective for the restriction, there is a rational connection with the objective, it involves the use of the least drastic means and does not have a disproportionately severe effect on those to whom the restriction applies. The quality of reasonableness depends on the question whether the provision under challenge arbitrarily or excessively invades the enjoyment of the guaranteed right

²² [2009] UKPC 53.

²³ [2009] UKPC 52.

²⁴ [1998] UKPC 30.

according to the standards of a society that has a proper respect for the rights and freedoms of individuals. They also cite the case of **R (on the application of Johnson) v Secretary of State for Home Department**²⁵ where it was observed that discrimination could not be justified by the argument that motherhood is certain whereas fatherhood is not.

- [50] The claimants submit that if one is to revisit the statement of the then Attorney General in 1991, one cannot escape concluding that the reasoning behind the failure to amend article 579 of the Code in relation to a married man, as was done in relation to a married woman, is highly irrational, disproportionate, lacks objectivity and justification. It therefore fails the test and is unconstitutional.

AG's Submissions

- [51] The AG submits that the claimants are precluded from alleging breach of section 13(1) the Constitution in the circumstances of this case because section 13(4)(c) provides that section 13(1) shall not apply to any law so far as that law makes provision *“for the application in the case of persons of any such description as mentioned in subsection (3) ... of the law with respect to ... devolution of property on death or other like matters, which is the personal law of persons of that description.”* The AG submits that article 579 of the Code is a law which governs devolution of property on death as article 579 clearly only takes effect upon the death of a single man or a single woman as defined therein. Support for this approach, he submits may be found in the case of **Magaya v Magaya**.²⁶
- [52] The AG also submits that subsections (a) to (c) of section 13(4) are to be read disjunctively. He disagrees with the claimants' submission that section 13(4)(c) is to be read in conjunction with section four 13(4)(d), which imposes the requirement that any law which authorizes a difference in treatment must be shown to be reasonably justifiable in a democratic society. Subsections (a)-(c) of section 13(4)

²⁵ [2016] UKSC 56.

²⁶ [1999] 3 LRC 35.

refer to laws which may be discriminatory but are immune from being declared inconsistent with section 13(1) of the Constitution. Section 13(4)(d) on the other hand refers to laws which do not fall within the categories in subsections (a)-(c). The AG submits that it should be noted that the word 'and' is not used to link subsection (c) to subsection (d). He submits therefore that once a law is found to fall within subsections (a) to (c) there is no need to further examine whether it is reasonably justifiable in a democratic society. On this basis, the claim alleging an infringement of section 13 of the Constitution should be dismissed.

[53] In the event he is wrong, the AG submits that in **Bank Mellat v Her Majesty's Treasury (No. 2)**,²⁷ Lord Sumpton examined the principles of rationality and proportionality as depending "on an exacting analysis of the factual case advanced in defense of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interest of the community. These four requirements are logically separate but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them.

[54] Applying the **Bank Mellat** analysis, the AG notes the 1988 and 1991 amendments and the then Attorney General's response to questions concerning fathers who had previously divorced, where he expressed the view that: the provisions regarding succession are difficult; they are interwoven and require a great deal of thought and preparation; that this is the reason that all that was being attempted was to supply what was needed to correct one omission; and that in respect of unmarried fathers, it is a bit more complicated, and the House may have to further consider what ought to be done with respect to persons who have been married at any one time. The AG submits that this position is supported by law as an amendment or repeal of

²⁷ [2013] UKSC 39.

article 579 would have implications for other provisions of the Code including those that deal with legitimacy, regulate intestate succession and community property. The AG submits that the object of article 579 is to provide for persons born outside of marriage to inherit in certain circumstances and that the law as it stands is proportional, balancing the right of the person born out of wedlock without affecting property rights which arise as a result of marriage. It also leaves the father of the child born out of wedlock free to make provisions for these persons via a testamentary disposition. Accordingly, article 579 is reasonably justified in a democratic society.

- [55] The AG further notes that the claimants rely on jurisprudence from the European Court of Human Rights, decisions, which have found differing regimes of inheritance in respect of legitimate and illegitimate children to be inconsistent with the European Human Rights Convention, in particular articles 8 and 14. However the AG distinguishes article 14 of the European Convention which includes as a ground of discrimination 'birth or other status unlike section 13 of the Saint Lucia Constitution. Article 8 of the European Convention provides that "everyone has the right to respect for his private and family life, his home and his correspondence." He notes that there is no equivalent to article 8 in the Saint Lucia Constitution. Whilst section 1 mentions 'protection for his or her family life', section 1 does not create any enforceable right. The AG submits that the European Court of Human Rights has in any event found that such discrimination exists on grounds of birth status rather than sex as urged by the claimants in the present case. Accordingly, the European jurisprudence is not applicable to the Saint Lucia Constitution.

E. Relief Claimed: Striking Down of Article 579 of the Code.

- [56] The AG notes that the claimants seek a declaration striking down article 579 of the Code in its entirety. However, he submits that article 579 is the only law in Saint Lucia which permits persons born outside of marriage to inherit upon intestacy as Saint Lucia's law maintains the concept of illegitimacy. Thus, striking down article

579 in its entirety would have the unintended consequence of completely disinheriting persons born out of wedlock.

- [57] In light of the above, I invited the parties to file additional submissions on the question of severability and modification in relation to article 579.

Severance/ Modification

Claimant's Submissions

- [58] The claimants submit that the issue is whether the Court can sever the impugned words from article 579 of the Code in the event that the Court finds that it is repugnant to the Constitution on any of the grounds claimed. The locus classicus on the test for severance is the case of **AG of Alberta v AG of Canada**²⁸ which was subsequently applied by the Privy Council in the case of **AG of Gambia v Jobe**.²⁹ The Board stated the principle thus:

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

This test was also applied in the EC case of **Loris James v The AG of St. Kitts and Nevis**.³⁰

- [59] The claimants concede that severing sub-article 6(a) and (b) from article 579 would mean extracting it altogether. Such exercise would negate the gains of the 1991 amendment which allowed children born out of wedlock to single men and women to succeed as heirs to their Estates; it would not be beneficial to children born out of wedlock to married men; and would create confusion in the laws as the wider definition given to single woman would evaporate and create ambiguity as presumably the ordinary English meaning of single woman would apply. Therefore,

²⁸ Privy Council Appeal No. 22 of 1947.

²⁹ [1984] UKPC 10.

³⁰ SKBHCVP2007/015, delivered 6th October 2008, unreported.

the claimants submit that sub-articles 6(a) and (b) are so inextricably bound up with article 579 that severance is inapplicable.

- [60] In relation to modification which would allow the Court to delete from or add words to a provision to bring the law into conformity with the Constitution, the case of **Commissioner of Police and another v Rudolph Maduro**³¹ establishes that firstly, the Constitution must have a modification provision and secondly modification is to be resorted to only after invalidity has been established. Further, the claimants submit a modification clause must speak to a power granted to the Court. Section 124(13)(b) of the Constitution is the only section which makes reference to modification, however, relates to section 41 of the Constitution, which concerns Parliament's law-making function. Nothing in the section suggests that power is being given to the Court to carry out the function of modification. Therefore, the claimants submit that the Court is not empowered by the Constitution to carry out the function of modification. Should the Court find in favour of the claimants, the Court must strike down article 579 of the Code in its entirety and allow Parliament to amend the provision accordingly.

AG's Submissions

- [61] The AG submits that the issue is whether the Court's powers of severance can be exercised or applied in relation to article 579 of the Code and the definition of 'single man'. He submits that the relevant test is as identified in **Commissioner of Police v Davis and another** in which the Court stated that *"this test requires that when the court must modify the text in order to achieve severance, this can only be done when the court is satisfied that it is effecting no change in the substantial purpose and effect of the impugned provision."* In that case the court was considering whether severing part of section 22(8) of the Dangerous Drugs Act would change the substantial purpose and effect of the section. The subsection related to the penalty imposed upon convictions on information and summary convictions but its applicability to summary convictions resulted in constitutional infringement. It was

³¹ BVIHCVAP2009/016, delivered 7th February 2011, unreported.

determined that the severing of the section to reduce its applicability to convictions on information would effect no change in the substantial purpose and effect of the subsection and that ultimately the test of substantial severability had been satisfied.

- [62] The AG submitted that the present case does not satisfy the test for severance. Severing article 579(6)(b), which defines single man, would clearly affect the substantial purpose of article 579 of the Code as the result would be that the law would be in the state that it was prior to the 1991 amendment of the **Civil Code**, that is, children born out of wedlock to single men would not be considered heirs capable of succeeding to the Estate of their fathers.
- [63] Further, modification of article 579 would be an infringement on the function vested in the legislature or would involve an encroachment on the legislature's policymaking function. He submits that in the case of **Commissioner of Police of the Virgin Islands Police Force and The Attorney General of the Virgin Islands v Rudolph Maduro**, the Court of Appeal examined the approach to modification of a provision that is inconsistent with the constitution and that that approach cannot be applied to the Saint Lucia Constitution.
- [64] The AG submits that the savings law clause contained in section 2 of schedule 2 of the Saint Lucia Constitution does not apply to the case at bar as the savings law clause does not apply to amendments to legislation which post-date the Constitution. Section 2 states that *“the existing laws shall as from commencement of the Constitution be construed with such modifications, adaptations, qualifications, and exceptions as may be necessary to bring them into conformity with the Constitution and the Supreme Court Order.”* The amendments to the definition of ‘single man’ in article 579(6) of the Code occurred in 1988. The effect is that the amendment in question post-dated the Constitution which came into effect in 1979. The savings law clause is therefore not applicable. This principle was applied in the case of **Attorney General v Cecil Toussaint**³² where the Court held that the

³² SLUHCVP2018/0029, delivered 5th June 2019, unreported at para 58.

savings law clause was inapplicable to section 49(A) of the Proceeds of Crime Act which post-dated the Constitution, being amended in 2010. The court stated that-

“...there could be no question of seeking to modify the amendments to the Proceeds of Crime Act to bring them into conformity with the Constitution by utilizing the savings law clause. Put another way it is therefore clear that there could be no question of there being a breach of the Constitution by an existing law when the Constitution was in existence before the relevant amendments and therefore section 2 of schedule 2 of the Constitution is not engaged. In my view the savings law clause has no relevance to the case at bar.”

- [65] The AG concludes by saying that, should it be determined that article 579 is unconstitutional, severance is not an appropriate remedy as it would affect the substantial purpose and effect of the impugned provision and therefore not satisfy the requisite test. The act of severance would further affect existing property rights of persons which would be the purview of Parliament. He invites the Court to consider the very interwoven nature of succession law that an act of severance would not provide for and submits that these complexities are best resolved by Parliamentary amendment.

Analysis

Preliminary Issue:

Application to Amend Claim

- [66] During the course of oral arguments, the Court pointed out to Mr. Fraser, counsel for the claimants that the claimants' case was that their fathers' rights have been breached and therefore they have been affected but that he now seemed to be suggesting that the claimants' rights have been breached because of the status of their fathers which was different from their pleaded cases. In response Mr. Fraser asked that he be permitted to amend the claim to read that the claimants' rights have been breached because of the status of their fathers. As would be expected, the AG raised an objection and the Court noted that it would address this issue in the judgment.

[67] The short response is that the Court would not permit such an amendment as CPR 20 is clear as to how amendments to statements of case ought to be made. The defendant would have had no prior notice of such an amendment which is coming way after case management and therefore would not have had an opportunity to address the proposed amendment. In any event, application to amend the statement of case would have had to have been made by way of a written application and not orally at the hearing of the claims. That having been clarified, I will now address the substantive claims.

Substantive Claim

The Impugned Provision

[68] Article 579 of the **Civil Code**, provides, so far as relevant, as follows:

“CHAPTER THIRD

THE DIFFERENT ORDERS OF SUCCESSION

Section VI Other Successions

579.

(1) If the deceased being a single man or a single woman dies leaving children his or her succession falls to them in equal shares.

...

(6) In this article—

(a) “single woman” includes a widow, a married woman living apart and separated from her husband and also a divorced woman; and

(b) “**single man**” means a man who has never been married. (Substituted by Act 4 of 1988).”

Presumption of Constitutionality

[69] One of the basic rules of statutory interpretation is that legislation passed by Parliament is presumed to be constitutional. However, the High Court has the jurisdiction to review legislation to determine its constitutionality. In **Attorney General of Saint Lucia v Lorne D. C. Theophilus**,³³ Rawlins JA spoke of this jurisdiction as being:

“...implicit from the Supreme Law Clause-section 120; section 40, which circumscribes the sovereign law-making power of the Legislature within the ambit of the provisions of the Constitution; section 41 which stipulates the

³³ SLUHCVP2005/0013, delivered 20th March 2006, unreported.

manner in which the Legislature may amend the Constitution, and sections 16 and 105, which confer jurisdiction on the High Court to entertain applications for constitutional redress.”

[70] In **Faustin v Attorney General of Trinidad and Tobago**³⁴ Kelsick JA stated:
“—Nullification of enactments and confusion of public business are not lightly to be introduced. **Unless, therefore, it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the Constitution, it must be allowed to stand as the true expression of the national will.**” (my emphasis)

[71] In **Attorney General of Saint Lucia v Lorne D. C. Theophilus**, Rawlins JA spoke to the manner in which the High Court is to exercise its powers to review legislation and referred to the case of **Attorney General v Lawrence**³⁵ where the court said:

“In determining the question of constitutionality of a statute, what the court is concerned with is the competence of the legislature to make it, and not the wisdom or motives. The court has to examine its provisions in the light of the relevant provisions of the Constitution. The presumption is always in favour of constitutionality of an enactment, and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles.”

[72] With these principles in mind I will now address the specific contraventions of the Constitution as alleged by the claimants.

Discussion

A. Breach of the Right to Protection of the Law and Equality before the Law-Section 1 of the Constitution

[73] I agree with the AG that section 1 of the Constitution of Saint Lucia is not a free-standing right for the reasons cited. Section 1(a) provides:

“1. Fundamental rights and freedoms

Whereas every person in Saint Lucia is entitled to the fundamental rights and freedoms, that is to say, the right, whatever his or her **race, place of origin, political opinions, colour, creed or sex**, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely—

³⁴ [1978] 30 WIR 351.

³⁵ (1983) 31 W.I.R. at page 179j – 180a.

- (a) life, liberty, security of the person, **equality before the law and the protection of the law...**"

- [74] This section is then followed by sections 2 to 15, each of which details a specific fundamental right and the protections afforded by it and the limitations to the right; and then by section 16 which provides that a person may apply to the High Court for redress where there is an allegation that any of the provisions of **sections 2 to 15 inclusive** has been, is being or is likely to be contravened in relation to him or her.
- [75] Section 16 is very specific as to the sections and therefore the rights as contained therein, for which any person may apply to the High Court for redress where the right is or is likely to be contravened, being sections 2 to 15. It excludes section 1 from being enforceable as a provision protective of fundamental rights or freedom, which it could easily have included had that been the intention of Parliament. Indeed, counsel for the claimants conceded this point in oral submissions.
- [76] In any event, in considering any case law, the Court must ensure that the provisions considered in the cases and the scheme of the Constitutions are similar.³⁶ With respect to the cases cited by the claimants, they are not. Indeed, the Singapore Constitution, which was being considered in **Ong Ah Chuan v Director of Public Prosecutions**,³⁷ contained a specific right to equality before the law and protection of the law and the appellants therein were not relying on a provision similar to section 1a of the Saint Lucia Constitution.
- [77] In relation to the case **Maya Leaders Alliance v The Attorney General of Belize**, the Belize Constitution does contain a provision equivalent to section 1 of the Saint Lucia Constitution and the CCJ did take the view that that section, section 3, is not merely a preamble or introduction but rather an enacting provision that declares that

³⁶ Ong Ah Chuan v Director of Public Prosecutions [1981] AC 648 at 669.

³⁷ [1981] AC 648.

individuals are entitled to protection of the law. The CCJ however did not discuss or provide any reasoning for that conclusion, save that undue emphasis should not be placed on location, and that section 3 should not be given a narrow or restrictive interpretation, given the wide spectrum of rights contained therein. The Court made this statement in the context that there were detailed provisions corresponding to the rights in section 3 which must be construed in light of section 3 but do not curtail the ambit of section 3. Thus, it concluded that the right to protection of the law granted in section 3(a) is not limited by the right of access to independent and impartial courts and tribunals contained in section 6(7). Protection of the law should be given the widest scope and meaning in terms of the ways it can be invoked or infringed. The CCJ confirmed this position in **The Attorney General v Joseph and Boyce**, in respect of the equivalent provision in the Barbados Constitution.

[78] These two authorities, being from the Caribbean Court of Justice, are persuasive but not binding on this Court and due consideration must be given to cases emanating from the Privy Council, which has ruled on the approach to be taken to Constitutions with provisions similar or identical to section 1 of Saint Lucia's. The approach consistently applied by the Board is that the section is in the nature of a preamble and prefatory or explanatory of the scheme of the sections which follow. It is declaratory of every person's entitlement to rights and freedoms subject to limitations to that entitlement as are contained in the sections that follow. It does not confer any separate and independent or freestanding right not contained in the subsequent provisions.

[79] In **Newbold v Commissioner of Police**, the Board considered the same issue in respect of article 15 of the Constitution of The Bahamas, which is, so far as relevant, identical to section 1 of Saint Lucia's Constitution. The Board reviewed the conflicting case law on the issue before concluding that the equivalent to section 1 was not an enacting provision and was unenforceable. The Board said thus:

"[28] ...it is no surprise that Jamaican courts up to and including the Board have under the (for relevant purposes identical) provisions of Chapter III of the Jamaican Constitution rejected the argument that the Jamaican

equivalent of art 15 conferred separate and independent or freestanding rights that could be relied upon to provide redress not available under the subsequent provisions of Chapter III of the Jamaican Constitution (more particularly the article protecting against deprivation of property): *Campbell-Rodrigues v A-G* [2007] UKPC 65, [2008] 4 LRC 526. There is earlier authority to the same effect on a similarly worded article in the Constitution of Malta: *Olivier v Buttigieg* [1966] 2 All ER 459. But Mr Fitzgerald relied upon *Thomas v Baptiste* (1999) 54 WIR 387, [2000] 2 AC 1 (an appeal from Trinidad and Tobago), *Lewis v A-G* (2000) 57 WIR 275 and *A-G v Joseph* [2006] CCJ 3 (AJ), [2006] 69 WIR 104 as indicating a different conclusion.

[29] All three were cases where the death penalty had been passed and the person sentenced had petitioned the Inter American Commission on Human Rights under the American Convention on Human Rights which the respective countries had ratified at the international level. **The Constitution of Trinidad and Tobago was in very different form to that of The Bahamas. The provision invoked in *Thomas v Baptiste* was on any view an enacting provision, s 4, recognising and declaring fundamental rights which included the right not to be deprived of life 'except by due process of law'. There were no other provisions enacting fundamental rights...**

[30] In *Lewis* the circumstances were similar. The appellants contended that they should not be executed until the Inter American Commission and UN Human Rights Committee had reviewed and reported on their petitions. As already observed, the Jamaican Constitution is, however, in the same form as the Bahamian, rather than that of Trinidad and Tobago. None the less, the Board, without commenting on this difference, treated 'the protection of the law' to which art 13 of the Jamaican Constitution (art 15 of the Bahamian) refers as equivalent to the 'due process of law' referred to in the Constitution of Trinidad and Tobago. Lord Hoffmann dissenting, it thus applied the reasoning in *Thomas v Baptiste* to reach a conclusion that execution should be stayed.

[31] Finally, in *A-G v Joseph* the Caribbean Court of Justice was also concerned with a Constitution, that of Barbados, in materially identical form to the Jamaican and Bahamian Constitutions. In para [58] onwards the court accepted that s 11 of the Barbados Constitution, the equivalent of art 15 of the Bahamian Constitution, was basically a preamble, save, it concluded, in relation to the reference to protection of the law. That reference was elucidated only in s 18 (art 20 of the Bahamian Constitution), which on its face dealt only with aspects of the trial process. The court thought that 'the protection of the law' referred to in s 11 (art 15) 'would be a very poor thing indeed if it were limited to cases in which there had been a contravention of the provisions of s 18' (at [60])...

[32] The Board does not consider that these three authorities assist the appellants in the present case. They are emphatically not authority for any proposition that art 15 of the Bahamian Constitution operates as and provides a general source of protection of human rights, overlapping with the substance of all the rights provided by the subsequent specific articles. They address a completely different subject matter to the present and at best support the view that the concept of 'protection of the law' can extend to matters outside the scope of art 18 of the 1973 Constitution. In the present case the relevant substantive rights are to be found in arts 21 and/or 23 or not at all. **Article 15 is in this respect no more than a preamble, as the Board held it to be in Campbell-Rodrigues. There is a distinction between on the one hand Constitutions in the form adopted in The Bahamas, Jamaica and Malta, in which the equivalent of art 15 is wholly or predominantly a preamble and on the other hand Constitutions in the form adopted in Trinidad and Tobago and Mauritius, which contain instead an enacting provision. ...**

[33] In short, Mr Fitzgerald's submission does not only run counter to the natural meaning of art 15. It also ignores the word 'Whereas' and the recital in art 15 that it is 'the subsequent provisions of this Chapter' which 'shall have effect for the purpose of affording protection of the aforesaid rights'. Finally, it ignores the clear implication of the restriction of the right of redress under art 28 and the restriction of the saving of existing laws from challenge to cases of alleged contravention of arts 16–27. If art 15 had been understood as an independent enacting provision, the constitutional right of redress would have been extended to it. ... The Board therefore considers that art 15 has no relevance or application in this case, save as a preamble and introduction to the subsequently conferred rights.” (my emphasis)

[80] Similarly, in relation to section 5 of the **Malta Constitution**, which is identical to section 1 of the Saint Lucia Constitution, the Board of Privy Council in **Oliver and another v Buttigieg**³⁸ had this to say:

“It is to be noted that the section begins with the word “Whereas”. Though the section must be given such declaratory force as it independently possesses, it would appear in the main to be of the nature of a preamble. It is an introduction to and in a sense a prefatory or explanatory note in regard to the sections which are to follow. It is a declaration of entitlement—coupled however with a declaration that though “every person in Malta” is entitled to the “fundamental rights and freedoms of the individual as specified, yet such entitlement is “subject to respect for the rights and freedoms of others and for the public interest”. The section appears to proceed by way of

³⁸ [1966] 2 All ER 459 at 461.

explanation of the scheme of the succeeding sections. ... (my emphasis)

- [81] Again, in **Campbell-Rodriques and others v Attorney General**,³⁹ after reviewing the authorities, the Board said of section 13 of the Jamaican Constitution, identical to section 1 of the Saint Lucia Constitution:

“[12] Both the Constitutional Court and the Court of Appeal rejected the Appellants' argument that s 13 conferred separate and independent rights. They regarded it as in essence a preamble and accepted the Respondent's submission that its declaratory force was confined to declaring that the rights set out in Ch III of the Constitution were not being created de novo but existed prior to the Constitution. Their Lordships are satisfied that s 13 does not confer any freestanding rights and that on the clear interpretation of the provisions of Ch III the rights and freedoms enforceable under s 25 are to be those set out in ss 14 to 24 inclusive. They agree with Cooke JA when he said (Record, p 379) that “a 'generous and purposive interpretation' does not permit a distortion of the explicit relevant constitutional provisions.” (my emphasis)

- [82] Following these binding authorities, in the case of **Elesia Crip v The Attorney General**,⁴⁰ I held that section 1 of the Saint Lucia Constitution is of declaratory effect and does not confer rights capable of being breached. No reason has been presented to warrant any departure from these well-established authorities.⁴¹ I simply take the opportunity to note here that, in any event, the claimants would still have the hurdle of proving that they fell within the categories identified in section 1, which does not include circumstances of birth or status as alleged.

Denial of Access to the Court

- [83] I accept that the right of access to the court is an element of the right of protection of the law.⁴² However, I agree entirely with the AG that it is not the case that the **Civil Code** does not make any provision for illegitimate children to seek redress

³⁹ [2007] UKPC 65.

⁴⁰ SLUHCV2015/0398, delivered 20th July 2017, unreported.

⁴¹ See also *The Attorney General of Anguilla et al v Bernice Lake QC et al*, AXAHCV2004/0004, delivered 4th April 2005, unreported at paragraphs 39 to 42.

⁴² *Maya Village Leaders* at para 47.

before a court or tribunal to prove paternity. Provision is made by article 209 of the Code for an illegitimate child to seek to judicially establish paternity in accordance with the procedure set out in articles 200-203. Article 209 states as follows:

“209. An illegitimate child has a right to establish judicially his or her claim of paternity or maternity, and the proof thereof is made by writings or testimony, under the conditions and restrictions set forth in articles 200, 201 and 202, and the petition to establish his or her claim is presented in the manner set forth in article 203.” (Amended by Act 34 of 1956)

- [84] Further article 579(7) of the Code does provide numerous other ways in which paternity can be established. This does not assist the claimants as their hurdle is not with proving paternity but from the definition of single man which does not include a man who is or has been married. Therefore, denial of access to the Court does not arise.

Legitimate Expectation

- [85] The first point to be made concerns the relationship between international treaties and domestic law and is that the ratification of a treaty does not have the effect of making the treaty terms part of the domestic law unless and until it is specifically incorporated into the domestic law by an Act of Parliament. This, the dualist tradition is well-established despite the two Privy Council cases of **Thomas v Baptiste** and **Lewis v The Attorney General** which suggest otherwise. Those two cases are anomalous and can be explained by the fact that they concerned the execution of the death penalty on convicted persons while awaiting recommendations as to pardon or commutation of their sentences from international human rights bodies pursuant to treaties ratified but unincorporated by the respective States. It appears that the Board felt compelled, if not constrained, in those circumstances to find that the ratified treaty obligations could not simply be disregarded by the respective States and that States were required to await the outcome of the petitions pursuant to the constitutional rights of due process or protection of the law. Even in these cases there were very powerful dissents on this point.

[86] The dualist approach was affirmed in the CCJ case of **Joseph and Boyce**, where the CCJ was also considering whether there was an obligation on the State to await the processing of petitions to international human rights bodies, pursuant to treaties that have been ratified by the executive but not implemented by Parliament. The CCJ held that:

“[55] In States that international lawyers refer to as 'dualist', and these include the United Kingdom, Barbados and other Commonwealth Caribbean States, the common law has, over the centuries, developed rules about the relationship between domestic and international law. **The classic view is that, even if ratified by the executive, international treaties form no part of domestic law unless they have been specifically incorporated by the legislature. In order to be binding in municipal law, the terms of a treaty must be enacted by the local Parliament. Ratification of a treaty cannot ipso facto add to or amend the Constitution and laws of a State, because that is a function reserved strictly for the domestic Parliament.** Treaty-making on the other hand is a power that lies in the hands of the executive; see *J H Rayner (Mincing Lane) Ltd v Department of Trade & Industry*³². **Municipal courts, therefore, will not interpret or enforce the terms of an unincorporated treaty. If domestic legislation conflicts with the treaty, the courts will ignore the treaty and apply the local law:** see *The Parlement Belge*³³.

[56] It does not at all follow that observance of these rules means that domestic courts are to have absolutely no regard for ratified but unincorporated treaties. The classic view is that the court will presume that the local Parliament intended to legislate in conformity with such a treaty where there is ambiguity or uncertainty in a subsequent Act of Parliament. In such a case, a municipal court will go only so far as to look at the treaty in order to try to resolve the ambiguity; see *R v Secretary of State for the Home Department, ex parte Brind*³⁴ and *R v Chief Immigration Officer, Heathrow Airport, ex parte Salamat Bibi*³⁵.”

[87] The CCJ continued:

“[76] ... We are unable to accept however the reasoning which underpins the decisions in *Thomas and Lewis*. Many of the trenchant criticisms of Lord Hoffmann in *Lewis* and Lord Goff and Lord Hobhouse in *Thomas* appear, with respect, to have merit. The majority judgments in those two cases did not explain how mere ratification of a treaty can add to or extend, even temporarily, the criminal justice system of a State when the traditional view has always been that such a change can only be effected by the intervention of the legislature, and not by an unincorporated treaty. It seems to us that the effect which the majority gave to the treaty, ie expansion of the domestic criminal justice system so as to include the proceedings before the Commission, was inconsistent with their protestations of support for the

strict dualist doctrine of the unincorporated treaty. Nor did the judgments explain how, if ratification has that effect, the appropriate domestic authorities can be entitled to impose even reasonable time limits for the disposal of the case in the absence of any such limitation on the State's obligation in the treaty itself. In the result, both the accretion to the domestic criminal justice system and its disappearance after the lapse of a reasonable time according to Lord Millett's judgment in *Thomas*, were unsupported by legal principle."

[88] I am in agreement with the CCJ's analysis and conclusion.

[89] The second point concerns whether, notwithstanding that a ratified but unincorporated treaty does not form part of domestic law, it gives rise to a legitimate expectation of a right which can be enforced. This issue was looked at extensively by the CCJ and I think it is worth quoting some of the discussion albeit a bit lengthy. Having reviewed a long line of conflicting cases on the issue, the CCJ opined:

"[103] ... The frequency and force of the dissents and the high incidence of reversals by the JCPC of its own recent decisions demonstrate very forcefully the fact that this branch of the law is in an unsettled state and is still evolving. Novel and difficult questions of law are involved here. Judges all over the world are struggling to give form and coherence to ideas that only began to engage their attention in fairly recent times. In the judgments examined above there is a divergence of opinion and approach, not only as between different courts but as between judges of the same court...

"[104] The differences reflect in part a variety of responses to underlying changes that have been taking place in the manner in which treaties, and human rights treaties in particular, are drawn. These changes affect the reach of such treaties and the entities that are accorded rights under them. Traditionally, individual citizens derived no entitlement under treaties concluded between States. Such instruments imposed obligations and conferred benefits upon States. The subject matter of the treaties was not intimately bound up with rights of human beings now regarded as fundamental and inalienable.

"[105] Over the last 60 or so years, however, it has become quite common for treaties to grant to individual human beings 'rights' directly enforceable by them with the result that, far from being passive subjects, individuals can now become active players on the international plane pursuant to treaties entered into by their Governments... Pursuant to the ACHR for example, without formal incorporation by Parliament, individual citizens may initiate proceedings and obtain relief from an international body.

...

"[107] The Australian decision in *Minister of State for Immigration and Ethnic Affairs v Teoh* appears to have been received and approved throughout the common law world as an appropriate response to the evolving situation. The view seems to have emerged that, unless municipal law rules this out, a ratified but unincorporated treaty can give rise to a legitimate expectation of a procedural benefit. When a treaty evidences internationally accepted standards to be applied by administrative authorities in dealing with basic human rights, courts will be hesitant to regard the relevant terms of the treaty as mere 'window-dressing' capable of being entirely ignored on the domestic plane.

"[108] Turning our attention to the position of the respondents in this case, the punishment that faced them, the real detriment they sought to avoid, was death... Death is not to be treated as simply just another punishment. It is a punishment in a class of its own, warranting special procedures before it is carried out...

"[109] ... The condemned man may have been convicted of murder, but even after his domestic appeals have been exhausted he is not altogether at the mercy of the executive. He does still have, at a minimum, a right to the protection of the law. He understands that the Government has ratified an international treaty that entitles him, without more, liberty to petition an international tribunal... He can put forward reasons why, in all the circumstances, he ought not to be regarded as deserving the penalty of death...

"[110] Put in stark terms, by ratifying the treaty, the executive has thrown to the condemned man, fighting for his life to be spared, a lifeline, albeit one that perhaps offers only a slim chance of rescue. The real issue facing judges is this: as the man is about to grasp this lifeline, is it fair for the executive, which placed it there in the first place, to yank it away? Is it enough for the court then merely to explain to the man that unincorporated international treaties form no part of domestic law; that he has derived no 'right' from the mere accession of his Government to the treaty; that the executive does not have to await the determination of his petition by the international body before executing him, even though the report of that body, if it were available, would have to be considered by the authority responsible for exercising the prerogative of mercy and might persuade that authority to spare his life? Those are the haunting questions that cause judges much discomfort.

...

"[115] As we saw earlier, the Attorney-General of Barbados represented to the Court of Appeal that her country does take seriously, and desires to abide by, its international obligation not to execute a condemned man while his petition is pending before the international body. This is also reflected in the

legislature's amendment of the Barbados Constitution to add s 78(6) which authorises –

'[t]he Governor-General, acting in accordance with the advice of the Privy Council, ... by instrument under the public seal [to] direct that there shall be time limits within which persons ... may appeal to, or consult, any person or body of persons (other than Her Majesty in Council) outside Barbados in relation to the offence in question.'

“[116] Parliament in making that amendment impliedly recognised that it was the practice and indeed the obligation of the State to await the Commission's process, at least for some period of time, and has therefore contributed to the creation of the legitimate expectation that the right to apply to the Commission will be respected. ...

...
“[118] What are the facts and circumstances that could have given rise to the legitimate expectation claimed by the respondents? Quite apart from the fact that Barbados had ratified the ACHR, positive statements were made by representatives of the executive authority evincing an intention or desire on the part of the executive to abide by that treaty. Such statements were, for example, made in Parliament during the debate on the Constitution Amendment Act. Further, it appears that it was the practice of the Barbados Government to give an opportunity to condemned men to have their petitions to the international human rights body processed before proceeding to execution. In all these circumstances we would hold that the respondents had a legitimate expectation that the State would not execute them without first allowing them a reasonable time within which to complete the proceedings they had initiated under the ACHR by petition to the Commission.

...
“[125] ... In our view, to deny the substantive benefit promised by the creation of the legitimate expectation here would not be proportionate having regard to the distress and possible detriment that will be unfairly occasioned to men who hope to be allowed a reasonable time to pursue their petitions and receive a favourable report from the international body. The substantive benefit the condemned men legitimately expect is actually as to the procedure that should be followed before their sentences are executed. It does not extend to requiring the BPC to abide by the recommendations in the report.” (my emphasis)

[90] The CCJ concluded that the Barbados Privy Council (BPC) ought not to have decided to advise the Governor-General to proceed with the executions before

allowing the respondents a reasonable time to complete the processing of their petitions. In doing so, the BPC defeated the legitimate expectation of the respondents. Its conclusion was qualified however by these further comments:

“[130] In our view the respondents' legitimate expectation can only be defeated by some overriding interest of the State... The State cannot reasonably be expected to delay indefinitely the carrying out of a sentence, even a sentence of death, lawfully passed by its domestic courts pending the completion of the hearing of a petition by an international body, even though the State has by treaty conferred on the person sentenced the right to pursue that petition.

[131] This decision should not be seen as opening up avenues for the wholesale domestic enforcement of unincorporated treaties. States, and small States in particular, enter into treaties for a host of different reasons and a Caribbean court is acutely sensitive to such realities. Our application of the doctrine of legitimate expectation in this case is rooted in a number of considerations which are peculiar to the situation in which it has been invoked. These include: the desirability of giving the condemned man every opportunity to secure the commutation of his sentence; the direct access which the treaty affords him to the international law process; and the disproportion between giving effect to the State's interest in avoiding delay, even for a limited period, in the carrying out of a death sentence and the finality of an execution. Our decision may be viewed as merely a further step in the development of the capital punishment jurisprudence which has been rapidly growing since the Pratt decision.” (my emphasis)

- [91] Even accepting that a legitimate expectation may arise from a State's ratification of a treaty which has not been incorporated, I am unable to so find in the circumstances of this case. This case is very different from **Boyce** in particular the features which led the Court to a positive finding of a legitimate expectation. This is not a matter of the imposition of the death penalty, that is life or death. The treaty obligation being relied upon is section 4 of the Convention which requires States to undertake all legislative, administrative and other measures for the implementation of the rights recognized in the Convention. It is an obligation imposed on the State, rather than a right afforded to the individual like the right of the individual to directly petition human rights bodies in **Boyce**.

- [92] No practice by the government that could be said to give rise to a legitimate expectation arises here, which is dissimilar to the practice of the Government in **Boyce** awaiting the outcome of the petitions. Similarly, there has been no amendment to the law recognizing any practice or obligation by the Saint Lucian Government or demonstrating intention to fulfill same as with the constitutional amendment setting the relevant timelines in **Boyce**.
- [93] Contrary to what the claimants allege, there have been no positive statements by the Government evincing an intention or desire to abide by the Convention or to amend article 579. I do not agree with the claimants' interpretation of the comments of the Parliamentarians in the Hansard. They did not express any promise to amend the law at any future date. To the contrary they recognized the complexity of the issue and that it would require further consideration such that it could not be undertaken at that time. Thus, the statements relied upon are of no assistance. It was not clear, unambiguous and unqualified. The claimants have also not established on the evidence that they relied on the statement which is in contrast to **Boyce** where the appellants had filed their petitions and were awaiting the outcome and had therefore clearly relied upon the expectation.
- [94] Finally, I note that the nature of the treaty provision relied upon requires the State to take certain legislative and administrative steps to implement treaty rights. Doing so does not necessarily mean that the amendment to article 579 that the claimants claim to be entitled to would have been passed by Parliament even if the Government had complied with the treaty provision. The notion of Parliamentary freedom subsists. For all these reasons, I conclude that the claimants have not established any legitimate expectation that article 579 would be amended in their favour. Further, even if such legitimate expectation could be said to exist, frustration of same by the State must amount to an abuse of power to warrant restraint by the Court in the absence of some overriding interest. No abuse of power can fairly be said to have been wielded here and in conducting the balancing exercise, the Court would have to give due weight to the interests of others that would be affected.

[95] Based on all the foregoing, the claimant has failed to establish any breach of the right to protection of the law pursuant to section 1(a) of the Constitution on the basis of either denial of access to the courts or legitimate expectation.

B. Protection from Deprivation of Property-Section 6 of the Constitution

[96] The case of **Maya Leaders Alliance** cited by the claimants does not support their case. Whilst the Court did state that protection from arbitrary deprivation of property was not limited to instances of compulsory acquisition, it did not relieve the appellants from the burden of establishing that they had a right or interest in property and the appellants were unsuccessful because the nature of their property rights and the entitlement flowing therefrom were yet to be precisely defined:

“In this case, however, these Appellants face two substantial hurdles in successfully pursuing their claim relating to arbitrary deprivation of property. **The first is that the nature of the property rights they enjoy is still to be precisely defined.** The Consent Order records the undertaking of the Government to adopt affirmative measures to identify and protect those rights. In these circumstances it would be somewhat incongruous for this Court to award damages against the Government for breaching rights which the Maya accept are still to be identified. The second hurdle is related to the first. **Until the rights are defined this Court cannot satisfy itself as to the nature and extent of the entitlement of the particular Appellants before it.**”⁴³

[97] Earlier in the judgment, the Court noted:

“It is true that paragraphs 2, 3, and 4 of the Consent Order make clear that the nature of Maya customary land tenure is yet to be worked out in the envisaged collaborative process. The precise scope and extent of Maya customary land tenure will therefore necessarily remain inchoate and uncertain until authoritatively identified and codified by the laws of Belize...”⁴⁴

[98] The AG relied upon the case of **Attorney General v Frank and Walker**.⁴⁵ In that case, the facts are that:

⁴³ [2015] CCJ 15 at para 35.

⁴⁴ Ibid, at para 12.

⁴⁵ ANUHCVP2018/0006, delivered 26th June 2020, unreported.

“The respondents, Mr. McKenzie Frank (“Mr. Frank”) and Mr. Trevor Walker (“Mr. Walker”) are both nationals of Barbuda who... assert that on 3rd November 2014, the Government of Antigua and Barbuda (“the Government”) entered into a lease agreement with a company, Paradise Found LLC (“Paradise Found”) to lease land in Barbuda for the purpose of a tourism development project in Barbuda (“the lease agreement”).

In order to give effect to the lease agreement, the Government passed the Paradise Found (Project) Act (“the Paradise Found Act”). The Paradise Found Act explicitly provides in section 3(3), that the provisions of the Barbuda Land Act, 2007 (“the Land Act” or “the Act”) do not apply to the lease of the parcels of land situate in Barbuda leased to Paradise Found, its subsidiaries or affiliates (“the leased land”)...

Mr. Frank and Mr. Walker claimed entitlement to constitutional relief on the basis that they are Barbudans within meaning of the Land Act, that the land in Barbuda was owned in common by the Barbudan people and that the Crown only held a bare legal title on their behalf and for their benefit. They maintained that if the statutory lease created by the Paradise Found Act is to take effect, it will amount to compulsory acquisition of their interest in the land without compensation. The respondents commenced a claim seeking, inter alia, declarations that: (i) the Government compulsorily acquired and took property specified in Schedule 1 of the Paradise Found Act by securing the enactment of same; (ii) the Government did not acquire the land for public use; and (iii) section 3 of the Paradise Found Act and the sections dependent on section 3 violate section 9 of the Constitution of Antigua and Barbuda Order and therefore null and void.

They also sought an order to strike down the Paradise Found Act as being inconsistent with the Constitution of Antigua and Barbuda Order (“the Constitution”) and alternatively, determination of the amount of compensation to which the Barbudan people (including themselves) were entitled, if the court found that the Government acquired and took possession of the leased land.”

[99] So far as relevant, on the issue whether rights to property enjoyed by Barbudans solely on the basis of their status as Barbudans, amount to an interest in or right to or over the property protected by the Constitution the Court of Appeal held that:

“... The Act essentially established the principle that the Crown holds the legal title to lands in Barbuda, for and on behalf of “the people of Barbuda”, a defined class of people. It does not, however, operate to transfer ownership or entitlement in lands in Barbuda to Barbudans. This is further reinforced by section 5(2) which expressly precludes private ownership of land in Barbuda...”

... Under the Land Act, “ownership in common” encompasses the collective right of the Barbudan people, exercised through the Barbuda Council, to control of the administration, development and use of the land and to be consulted on and consent to major developments of land on the island. An individual Barbudan under the Act must apply to the Council for permission to use the land in relation to which he or she is described as a co-owner. Prior to obtaining the grant of a right of occupation, individual Barbudans cannot deal with their interest in the land even in transactions between each other and even after obtaining such grant, their ability to deal with their property is restricted. The Land Act created or confirmed the existence of beneficial interests in the land to which the legal title held by the Crown was subject, such beneficial interests vested not in individual Barbudans, but in the people of Barbuda as a defined class.

Section 9 of the Constitution protects against the compulsory taking of property of any description and an interest or right to or over property of any description, except where certain conditions are satisfied. **This section can only be properly invoked where property rights already exist**, and such rights have been compulsorily taken possession of or acquired. In the instant case, **even if a generous and purposive interpretation were given to section 9, the rights accorded to Barbudans solely by virtue of that status do not constitute an interest in or right over property since they have no immediate entitlement to use, possess or deal with their interest in such property without permission. Therefore, though within the Constitutional context, a right to exclusive use of land can constitute an interest in or a right to or over property, such an interest or right does not exist until permission is granted. The respondents have made no claim to entitlement of any immediate right to use or occupy any portion of the leased lands and so their statement of claim discloses no personal entitlement to an interest or right which was compulsorily acquired without compensation by the Paradise Found Act. Accordingly, they have no locus standi to pursue a claim for relief under section 9 of the Constitution.**” (my emphasis)

- [100] Thus, in order for the Court to find a breach of this right, it must be in a position to assess the nature and extent of the claimants’ entitlement to any property they claim they have been deprived of. Neither claimant has proven ownership of any property or the precise, present and immediate right or interest they have in any property. On this basis, I am unable to find a breach of section 6 of the Constitution.

C. Freedom of Expression-Section 10 of the Constitution

- [101] I agree with the AG that the words of section 16(1) plainly and unambiguously state that only a person who alleges a contravention of the rights in sections 2-15 in relation to himself or herself can apply to the High Court for redress. The only exception is in relation to a person who is detained which is not applicable here. It is clear that the claimants cannot apply to the High Court for redress for breach of their fathers' constitutional rights. The claimants alleged contravention of the right to freedom of expression is in article 579 of the Code impairing their fathers' right to act in such manner to cause a child to be born outside of his marriage. Neither of the cases cited by the claimants assist them, as they address the content of the right of freedom of expression. However, this does not arise if the contravention alleged is not in relation to them but to others. Therefore, the claimants have failed to establish a breach of section 10 of the Constitution.

D. Protection from Discrimination on the Ground of Sex-Section 13 of the Constitution

- [102] Section 13 so far as is relevant provides as follows:

“13. Protection from discrimination on the grounds of race, etc

- (1) Subject to the provisions of subsections (4), (5) and (7), no law shall make any provision that is discriminatory either of itself or in its effect.
- (2) Subject to the provisions of subsections (6), (7) and (8), no person shall be treated in a discriminatory manner by any person or authority.
- (3) In this section, the expression “discriminatory” means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by sex, race, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.
- (4) **Subsection (1) shall not apply to any law so far as that law makes provision—**
 - (a) for the appropriation of public revenues or other public funds;
 - (b) with respect to persons who are not citizens;

- (c) **for the application, in the case of persons of any such description as is mentioned in subsection (3) (or of persons connected with such persons), of the law with respect to adoption, marriage, divorce, burial, devolution of property on death or other like matters which is the personal law of persons of that description;**
- (d) whereby persons of any such description as is mentioned in subsection (3) may be subjected to any disability or restriction or may be accorded any privilege or advantage that, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society...."

[103] The claimants allege that their fathers right to freedom from discrimination has been breached in that article 579 of the Code is a law that, either of itself or by its effect discriminates against their father on the basis on his sex. However, as discussed, only a person who alleges a contravention in relation to himself or herself can apply to the High Court for redress. The claimants have not asserted any discrimination against them on the basis of any of the categories set out in section 13 of the Constitution. For this reason, the alleged contravention of this right also fails from the outset.

[104] In any event, I cannot agree with the claimants that section 13(4)(c) must be read in conjunction with 13(4)(d). As pointed out by the AG the section does not utilize the word 'and'. The plain words of the section do not otherwise suggest that the subsections are conjunctive. Further, it would be of no help to the claimants for the Court to interpret the provision in this way.

[105] The provision does not have the effect that the claimants purport, which is to cast the onus on the defendant to show that, where a citizen is subject to disability or restriction by a law, the said law is reasonably justifiable in a democratic society. What it merely does is to provide those laws that may be passed that treat a set or class of persons differently on the basis of the prescribed descriptions, where it is reasonably justifiable in a democratic society to impose a restriction or accord a privilege to such person having regard to the nature of the law or the special

circumstances of the person. It enables affording of different treatment to persons where it is justified as opposed to being prohibitory of treating persons differently. It does not shift the burden of proof. On that interpretation of section 13(4)(d) it is even more implausible that it was intended to be read conjunctively with section 13(4)(c).

- [106] This is a case that obviously involves devolution of property on death and section 13(4)(c) permits the passing of such a law, though it may be discriminatory. There is therefore no need to further examine whether it is reasonably justifiable in a democratic society.

E. Relief Claimed: Striking Down of Article 579 of the Code/Severance or Modification

- [107] As the claimants have failed to establish breach of any constitutional rights, this issue is now moot. However, for completeness, I will briefly address the matter. The parties agree that severance of the definition of single man from article 579(6) of the **Civil Code** is inappropriate as the legal requirements to do so have not been satisfied. I prefer the test presented by the claimants as applied by our Court of Appeal in the case of **Loris James v The Attorney General of Saint Kitts and Nevis** where the court said:

“The locus classicus for the test of severance is the case of **Attorney General for Alberta v Attorney General for Canada**. The test was stated in these terms:

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

- [108] I agree that the other provisions of article 579 of the Code and the provisions relating to succession generally are inextricably bound up with definition of single man such that what would remain if it were severed could not independently survive. I am of the view that Parliament would not have enacted the surviving provisions without

enacting the definition of single man contained in article 579(6) which took the law from a state where a child born out of wedlock could not inherit at all to the current position where children born out of wedlock could succeed to the estate of their father as a single man despite the restrictive definition.

[109] Both parties also agreed that modification would be inappropriate. Based on the case of **Commissioner of Police of the Virgin Islands Police Force and The Attorney General of the Virgin Islands v Rudolph Maduro**, the first requirement that there must be the existence of a modification provision granted to the Court by the Constitution is not satisfied. As pointed out by the AG, the power of modification by the Court only exists in relation to existing laws, meaning laws existing from the commencement of the Constitution pursuant to section 2 of Schedule 2 to the Saint Lucia Constitution Order 1978. Although the Code predates the commencement of the Constitution, as article 579 was amended in 1988 and 1991, it is not as such an existing law at commencement of the Constitution which the Court could seek to modify to bring into conformity with the Constitution, as established in **Attorney General v Cecil Toussaint**.

[110] Even if the claimants had managed to establish a breach of any of the constitutional rights claimed, it would be inappropriate for the Court to strike down article 579 of the Code in its entirety and allow Parliament to amend the provision accordingly. It would also be inappropriate to sever the definition of single man as argued by the claimants. Both these options would have the absurd and most unjust effect of disinheriting persons born out of wedlock to a single man as defined. It would further not assist the claimants as it would not allow them to inherit and would simply leave a lacuna within the laws of succession and take us back pre-1991. This argument is simply unsustainable.

[111] Any amendment to article 579 requires a wholistic approach and consideration of all the relevant provisions of the **Civil Code** relating to succession to ensure that the rights of all persons who may be affected are taken into account. It does not

require a piecemeal approach as appears to have been done by the 1988 and 1991 amendments. I believe the then Attorney General as captured in Hansard of 12th November 1991 said it correctly, 'that the provisions regarding succession are very difficult and interwoven and require a great deal of thought and preparation'. Perhaps the time has come for Parliament to undertake a wholistic review of the existing succession laws to address the concerns of certain sectors of society given that the last amendment to article 579 was in 1991.

Conclusion

- [112] Based on the foregoing, the claimants have failed to establish breach of any of the rights claimed. The Court is therefore unable to grant any of the declarations sought by the claimants as pleaded and therefore the motions must be dismissed. There shall be no order as to costs in accordance with CPR 56.13(6).

**Kimberly Cenac-Phulgence
High Court Judge**

By The Court

Registrar