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**REPORT No. 239/22**  
**PETITION 1081 -18**  
REPORT ON ADMISSIBILITY

ALEXA HOFFMANN ET AL.  
BARBADOS

Approved electronically by the Commission on September 26, 2022.

**Cite as:** IACHR, Report No. 239/22, Petition 1081-18. Admissibility.  
Alexa Hoffmann et al. Barbados. September 26, 2022.

**I. INFORMATION ABOUT THE PETITION**

<b>Petitioners:</b>	Alexa Hoffmann, Petitioner S.A. <sup>1</sup> , and Petitioner H <sup>2</sup>
<b>Alleged victims:</b>	Same as above (Petitioners)
<b>Respondent State:</b>	Barbados <sup>3</sup>
<b>Rights invoked:</b>	Articles 5 (Right to Humane Treatment), 8 (Right to a Fair Trial), 11 (Right to Privacy) 13 (Right to Freedom of Thought and Expression, 17 (Right to Family Life), 24 (Right to Equal Protection), and 25 (Right to Judicial Protection) in connection with Article 1.1 (obligation to respect rights) of the American Convention on Human Rights <sup>4</sup>

**II. PROCEEDINGS BEFORE THE IACHR<sup>5</sup>**

<b>Filing of the petition:</b>	June 6, 2018
<b>Additional information received at the stage of initial review:</b>	July 16, 2019
<b>Notification of the petition to the State:</b>	July 22, 2019
<b>State's first response:</b>	December 6, 2019
<b>Additional observations from the petitioner:</b>	July 8 and 17, 2020

**III. COMPETENCE**

<b>Competence <i>Ratione personae</i>:</b>	Yes
<b>Competence <i>Ratione loci</i>:</b>	Yes
<b>Competence <i>Ratione temporis</i>:</b>	Yes
<b>Competence <i>Ratione materiae</i>:</b>	Yes, American Convention (deposit of instrument of ratification made on November 27, 1982)

**IV. DUPLICATION OF PROCEDURES AND INTERNATIONAL *RES JUDICATA*, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION**

<b>Duplication of procedures and International <i>res judicata</i>:</b>	No
<b>Rights declared admissible</b>	Articles 5 (Right to Humane Treatment), 8 (Right to a Fair Trial), 11 (Right to Privacy) 13 (Right to Freedom of Thought and Expression, 17 (Right to Family Life), 24 (Right to Equal Protection), and 25 (Right to Judicial Protection) in connection with Articles 1.1 and 2 thereof
<b>Exhaustion of domestic remedies or applicability of an exception to the rule:</b>	Yes, under the terms of section VI
<b>Timeliness of the petition:</b>	Yes, under the terms of section VI

<sup>1</sup> The petitioner requested that their name be withheld pursuant to Article 28 (2) of the Commission's Rules of Procedure

<sup>2</sup> The petitioner requested that their name be withheld pursuant to Article 28 (2) of the Commission's Rules of Procedure.

<sup>3</sup> In keeping with Article 17(2)(a) of the Commission's Rules of Procedure Commissioner Roberta Clarke, a Barbadian national, did not participate in the deliberations or decision in this matter.

<sup>4</sup> Hereinafter, the "American Convention" or the "Convention."

<sup>5</sup> The observations submitted by each party were duly transmitted to the opposing party.

## V. ALLEGED FACTS

1. The petition alleges that Barbados is in violation of its obligations under the American Convention by continuing to criminalize private consensual sexual activity between adult males; as well as between adult members of the broader lesbian, gay, bisexual, and transgender (LGBT) community. The petition further alleges that this criminalization serves to encourage and legitimate discrimination and abuse against LGBT people to the detriment of multiple rights guaranteed by the American Convention. The petition contends that there is no justification for this criminalization of consensual sexual activity, and that there is no adequate, effective remedy under Barbadian law to challenge this criminalization.

2. According to the petition, sections 9 and 12 of the Sexual Offences Act of Barbados (“the SOA”) is the law that criminalizes consensual sexual activity to the detriment of the LGBT community, and in particular to the detriment of the Petitioners. The petition states that section 9 of the SOA criminalizes the act of “buggery”. The petitioner further alleges that the Barbadian courts have confirmed that buggery means anal sex between men and between a man and a woman. With respect to section 12 of the SOA, the petition indicates that this provision criminalizes “serious indecency”, which is defined as any act by anyone “involving the use of the genital organs for the purpose of arousing or gratifying sexual desire.” According to the petition, the acts of buggery and serious indecency are criminalized notwithstanding the consent of the participants. The petition indicates that the maximum penalty for buggery is a term of life imprisonment, while the maximum penalty for serious indecency is a term of ten years imprisonment.

3. The petition asserts that the harm occasioned by SOA sections 9 and 12 serve to (a) codify and contribute to hatred against the LGBT community in Barbados; (b) legalize the persecution of a minority; and (c) embolden and encourage hateful speech and actions against the LGBT community. The petition contends that the status quo both violate and encourage violations of multiple rights of LGBT people in Barbados (including the Petitioners). These rights include the right to physical, mental, and moral integrity; the right to equality before the law; the right equal protection of the law; the right to judicial protection, the right to privacy; the right to family, and the right to freedom of expression. In support of the foregoing, the petition mentions numerous examples of persecution of LGBT persons in Barbados. These examples include: (a) harassment, threats, and violence directed to Darcy Dear, the founder of the group United Gays and Lesbians Against AIDS Barbados (“UGLAAB”) (between 2002 and 2005); (b) the public rape of a transgender man in May 2016, with photos being posted online afterwards; and (c) harassment of LGBT persons by police (for example - in September 2016, Raven Gill, a transgender woman, alleged that after she was arrested for causing a disturbance, the police verbally abused her and publicly humiliated her by forcing her to strip before male police officers). The petition also contends that the police often fail to respond to or follow up on complaints made by LGBT persons about criminal conduct directed at them.

4. The petition identifies three Petitioners who are all members of the LGBT community in Barbados. They are Alexa Hoffmann (“Petitioner Hoffmann”), Petitioner S.A., and Petitioner H. According to the petition, Petitioner Hoffmann is a transgender woman who is sexually attracted to men. As Barbados does not provide legal recognition of her female identity, she is legally a man who is sexually attracted to other men. The petition further indicates that Petitioner S.A. is a lesbian, and that Petitioner H is a gay man. The petition states that all three Petitioners have experienced frequent stigma and discrimination due to their sexual orientation and/or gender identity, as well as threats of violence. Additionally, the petition states that Petitioners Hoffmann and S.A. have also suffered physical violence because of their sexual orientation or gender identity. Further, the petition indicates that Petitioner Hoffmann's efforts to report these crimes to the police have resulted in inaction or delayed action accompanied by discriminatory treatment because of her gender identity. Derived from the petition, the following paragraphs provide further details about each Petitioner.

### *Petitioner Hoffmann*

5. Petitioner Hoffmann is a human rights advocate who has advocated to eliminate stigma and discrimination against LGBT people. Petitioner Hoffmann identified as female since early childhood and transitioned to live her life as a woman in 2013, at the age of twenty. She became aware of her sexual attraction to men when she was a teenager. As a transgender person, she has experienced various forms of discrimination

and abuse, impaired familial relationships, as well as threats of violence, violent encounters, and police inaction. During her childhood, Petitioner Hoffman was frequently teased and bullied for her gender expression and her suspected sexual orientation. Teachers punished Petitioner Hoffmann for her feminine mannerisms and preference to be addressed with female pronouns and by her chosen female name. Fellow classmates excluded her from both school and extracurricular activities.

6. Petitioner Hoffmann has had a difficult relationship with her family members. When she was young, her mother reprimanded her for her gender expression, and in particular, her desire to be referred to by female pronouns and by a girl's name. As Petitioner Hoffmann grew older, her mother attempted to curtail her gender non-conformity by increasing Petitioner Hoffmann's exposure to religion, enforcing masculine behavior, and policing her clothing choices. When Petitioner Hoffman began her transition to live her life as a woman in 2013, her mother berated her because of her difficulties in obtaining employment as a transgender person. Subsequently, Petitioner Hoffmann's mother evicted her from the family home under the supervision of the police. During this process, a police officer was verbally abusive to Petitioner Hoffmann telling her that she was causing her mother unnecessary embarrassment.

7. Until she found employment in August 2015, Petitioner Hoffman had difficulties in obtaining employment because she is a transgender woman. In or about June 2014, she applied to a local car dealership for a sales representative position. During the job interview, she revealed she was transgender, and the tone of the interview changed significantly. The interview was quickly ended by the interviewer. Two weeks later, she received a letter from the dealership stating that "while they were impressed with [her] qualifications, [she] did not meet the criteria for the position." When Petitioner Hoffmann questioned the criteria, the dealership's human resources department refused to discuss it and stated that "the answer is no."

8. Petitioner Hoffmann has been subjected to regular threats of violence because she is a transgender woman who is sexually attracted to men. While expressing homophobic and/or transphobic statements, people frequently make hand gestures at her, imitating the firing of a gun, or loud outbursts reminiscent of gunfire.

9. On the night of January 6, 2016, Petitioner Hoffmann's car was vandalized while it was parked in her driveway at home. The rear window was smashed. Petitioner Hoffmann reported the incident to the police, and the car was subsequently photographed and checked for fingerprints by the responding constables. However, it took nearly three weeks for the responding constables to contact Petitioner Hoffmann to ask her to give an official statement, despite her attempts to contact and follow up with the constables after the incident occurred. The matter is still open for investigation and no culprits have been charged. Petitioner Hoffmann has since sold the vandalized car because she feared being too easily identifiable while driving the car.

10. On the night of February 18, 2018, Petitioner Hoffmann was brutally attacked by Brandon Keron Aakeem Coward when she tried to return property to him and questioned him about taking some of her belongings. In response, Coward pulled a meat cleaver from his pocket and swung at her face. Petitioner Hoffmann was severely injured, with lacerations on her forehead, nose, upper lip, shoulder, and the side of her neck. Her glasses were also destroyed during the attack. Petitioner Hoffmann reported the attack to the police and, after receiving medical attention, gave her official statement. On February 20, she returned to the police station to follow up on her report. According to the petition, Coward had not been arrested and had been allowed to be free despite being easily locatable. Petitioner Hoffmann was upset about the handling of her case, especially because when a similar attack occurred in 2017, leaving a (apparently) straight young man bleeding from stab wounds on a lawn, the police immediately had his attacker in custody. When Petitioner Hoffmann voiced her concerns to a police officer, the said police officer then made several negative comments about Petitioner Hoffmann, including a transphobic statement referring to her as "he/she/I don't know."

*Petitioner S. A.*

11. Petitioner S.A. has lived in Barbados almost all her life. She has been aware of her attraction to girls since she was four years old. Petitioner S.A. married a woman in 2017 in Canada. Petitioner S.A. lives in

Barbados with her spouse, but her marriage is not legally recognized. Petitioner S.A. has faced various forms of persecution because of her sexual orientation – from her family and others.

12. With respect to her family, when Petitioner S.A. was seven years old, her mother humiliated her for wearing clothes she considered "too boyish" by forcing her to change into a girl's swimsuit to attend a church picnic when nobody else was wearing one. Throughout her youth, her mother meted out "extra punishment" for refusing to wear a dress, including angry verbal abuse. During her childhood, Petitioner S.A. was stabbed twice by her mother. Her mother also threw hot water on her on two occasions. Her other siblings who are all cisgender heterosexuals, did not experience such violence. Petitioner S.A.'s relationship with her mother has contributed to her depression and anxiety.

13. When she was 12 years old, Petitioner S.A. was seen by her step-uncle kissing a girl. Consequently, Petitioner S.A.'s step-uncle used this information as a pretext for sexually abusing Petitioner S.A. for a period of five years.

14. Petitioner S.A. has also experienced threats of violence. In one instance, a man threatened her, uttering: "You want to be a man, you want killing."

15. Despite having a degree in sociology from the University of the West Indies, Petitioner S.A. is unemployed. She has been told by a human resource person that "people don't want your kind of person in a customer service job, because they are afraid that customers won't come back."

16. Given the homophobic nature of Barbadian society Petitioner S.A. is worried that her participation in LGBT advocacy will affect her family and her wife. In this regard, for many years, Petitioner S.A. wore a mask to all LGBT events because she was concerned her godfather's job as a pastor would be at risk if it were known that his goddaughter was involved in LGBT advocacy. Petitioner S.A. also does not show signs of public affection with her wife outside of their home because she is worried about their physical safety and because it might affect her wife's job.

#### *Petitioner H*

17. Petitioner H grew up in Barbados and became aware that he was gay when he was around fourteen or fifteen years old. Petitioner H. has been verbally attacked, including being threatened with severe violence and death, because of his sexual orientation. One man in his neighborhood used to yell homophobic slurs at him, such as "Batty boy." When Petitioner H lived with his male partner, he experienced a pattern of negative comments and threats from his neighbors including "Bulla men living here", "You is a bulla man" ("bulla is also a homophobic slur), and "Your house want burning down". He has also heard his neighbors talking about keeping their sons away from "that bulla" because the neighbors were worried that Petitioner H would turn their sons gay.

18. Petitioner H's familial and romantic relationships are affected by Barbados' homophobic society. His parents tolerated his sexual orientation, but his brother is less accepting of the fact he is gay. When their mother died in 2016, his brother did not want Petitioner H's two gay friends to be pallbearers at the funeral, even though the two friends had been very close with their family. His brother stated he was not lifting any coffin with "those people". In terms of romantic relationships, Petitioner H is unwilling to show any signs of public affection with a male partner because of the stigma, discrimination, and possible violence they would face. He only feels safe expressing intimacy in the privacy of either his own or his partner's home or at private LGBT events.

19. According to the petition, Barbados' domestic law does not afford due process of law for the protection of the rights that have been violated by the criminalization of consensual sexual activity (pursuant to the SOA), including between persons of the same sex. The petition contends that this situation brings the

petition within the purview of the exception to requirement of exhaustion prescribed by both Article 31(2)(a)<sup>6</sup> and Article 31(2) (b)<sup>7</sup> of the Commission's Rules of Procedure.

20. The petition contends that the principal reason for this is the "saving clause" in the Constitution of Barbados that immunizes from constitutional challenge, before the domestic courts, the most prominent aspect of the continued criminalization of LGBT people in Barbados, namely, the criminal prohibition on "buggery" under section 9 of the SOA. In this regard, the petition explains that the Constitution adopted by Barbados upon Independence included Chapter III, titled "Protection of Fundamental Rights and Freedoms of the Individual." The petition also mentions that section 24 of Chapter III empowers the Barbadian High Court to provide redress to individuals alleging violations of the rights and freedoms contained in Chapter III. However, Chapter III also includes section 26, which "saves" from constitutional scrutiny any law existing prior to the adoption of the new Constitution in 1966. In this respect, the petition contends that the offence of buggery pre-dated the Constitution and is therefore immunized from constitutional challenge. Accordingly, the petition submits that the "saving clause" prevents the domestic courts of Barbados from ruling that the law of Barbados on buggery is contrary to the Constitution's provisions that protect fundamental rights and freedoms.

21. Generally, the petition states that the Privy Council (the highest court of appeal for Barbados until 2005) has handed down decisions upholding Barbados' saving clause, as well as similar general saving clauses in the constitutions of other countries. For example, in *Boyce et al. v. Barbados*, the Privy Council upheld the constitutionality of Barbados' mandatory death penalty, stating it was preserved by section 26 of the Constitution, even though the provision itself was found to be substantively in violation of the rights guarantees of the Constitution.

22. With regard to the offence of serious indecency (under section 12 of the SOA), the petition notes that it was not a criminal offence under the law of Barbados before the adoption of the 1966 Constitution. As a result, unlike the prohibition on buggery, the offence of serious indecency is not saved from constitutional scrutiny by section 26 of the Constitution. However, the Petitioners submit that the Commission should nonetheless examine the violation of Convention rights arising out of section 12 of the SOA, alongside its assessment of the violations arising out of the criminalization of buggery under section 9 of the SOA (for which Barbadian law offers no domestic remedy). In this regard, the Petitioners submit that the criminalization of consensual sexual activity by LGBT people, whether of a specific act prohibited as "buggery" or instead a broader, more amorphous category of "indecent" acts is harmful and objectionable. Accordingly, the Petitioners submit that, if the Commission were to recommend repeal of the SOA section 9 prohibition on buggery (and Barbados were to act on that recommendation) but fail to address the SOA section 12 provision on indecency, this would leave the Petitioners (and other LGBT people in Barbados) still exposed to much the same taint of criminalization as before, with all the harmful consequences that flow from such status. The Petitioners further assert that artificially truncating the Commission's inquiry in such a fashion would not be in keeping with the spirit and purpose of the Convention and would be at odds with a purposive interpretation of the Convention provisions to protect rights.

23. Regarding timeliness, the Petitioners assert that the petition qualifies for an exception under Article 32 (2) of the Commission's Rules of Procedure, on the ground that the alleged facts demonstrate ongoing human rights violations primarily as result of the prevailing criminalization of consensual sexual activity between LGBT persons. Accordingly, the Petitioners contend that the petition was submitted within a reasonable time.

24. The Petitioners acknowledge the State's submission regarding the Caribbean Court of Justice (CCJ) decision in the consolidated cases of *Nervais v. The Queen* and *Severin v. The Queen*<sup>8</sup>. However, the Petitioners reject the State's contention that this decision ultimately serves to render the petition inadmissible. In this regard, the Petitioners submit that despite the position of the State that the savings law clause in Section

<sup>6</sup> Under 31 (2) (a) of the American Convention, an exception is warranted where "the domestic legislation of the State concerned does not afford due process of law for protection of the right or rights that have allegedly been violated".

<sup>7</sup> Under 31 (2) (b) of the American Convention, an exception is warranted where "the party alleging violation of his or her rights has been denied access to the remedies under domestic law or has been prevented from exhausting them".

<sup>8</sup> [2018] CCJ 19 AJ.



26 of the Constitution of Barbados is no longer a bar to challenging legislation (including the impugned SOA provisions), before the domestic courts, the petition is nevertheless admissible because: a) the Convention rights enumerated in the petition are not adequately protected under Barbadian law; and therefore, b) notwithstanding the decision in *Nervais v The Queen* and *Severin v The Queen*, domestic remedies for the violations identified by the Petitioners remain practically unavailable.

25. The Petitioners reaffirm that the petition raises prima violations of the following rights under the American Convention: right to non-discrimination (Article 1) and rights to equality before the law and equal protection of the law (Article 24); right to privacy (Article 11); right to respect for physical, mental and moral integrity (Article 5); right to freedom of expression (Article 13); right to family (Article 17); right to a hearing for the determination of rights (Article 8); and right to judicial protection (Article 25). The Petitioners submit that, the Constitution of Barbados fails to provide for these rights or only does so to a very limited extent (as they relate to the criminalization of consensual sexual activity between LGBT persons). The Petitioners therefore argue that at the very least, this status quo qualifies for an exemption (to the requirement of domestic remedies) under Article 31(2)(a) of the Commission's Rules of Procedure.

26. Regarding the right to non-discrimination, the Petitioners submit that section 23<sup>9</sup> of the Constitution of Barbados provides for only a limited right to non-discrimination. The Petitioners further submit that unlike the American Convention, the list of grounds on which persons are protected from discrimination in Barbados under section 23 is closed. It does not protect the right to freedom from discrimination based on sex, sexual orientation, or gender identity/expression, and so does not afford an avenue in law to challenge the impugned provisions of the SOA, which discriminate on these grounds in the criminalization of "buggery" and "serious indecency."

27. With respect to the right to equality before the law, the Petitioners submit that unlike the American Convention, the Barbadian Constitution contains no provision that guarantees a right to equality before the law. Regarding the right to privacy, the Petitioners submit that this right is very limited under section 17<sup>10</sup> of the Constitution of Barbados, and that this provision does not capture the interpretation found in the American Convention or in the jurisprudence of the Inter-American human rights system<sup>11</sup>. Instead, the right

<sup>9</sup> Section 23 of the Constitution of Barbados provides:

(1) Subject to the provisions of this section—

(a) no law shall make any provision that is discriminatory either of itself or in its effect; and

(b) no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

(2) In this section the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by 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 afforded to persons of another such description.

<sup>10</sup> Section 17 of the Barbados Constitution provides:

(1) Except with his own consent, no person shall be arbitrarily subjected to the search of his person or his property or the entry by others on his premises.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision that is reasonably required—

(a) in the interests of defense, public safety, public order, public morality, public health, town or country planning, the development or utilisation of mineral resources, or the development or utilisation of any other property in such manner as to promote the public benefit;

(b) for the purpose of protecting the rights or freedoms of other persons;

(c) for the purpose of authorising an officer or agent of the Government, or of a local government authority or of a body corporate established directly by law for public purposes to enter on the premises of any person in order to inspect those premises or anything thereon for the purpose of any tax, duty, rate, cess or other impost or in order to carry out work connected with any property that is lawfully on those premises and that belongs to the Government or that authority or body corporate, as the case may be;

(d) for the purpose of authorising the entry upon any premises in pursuance of an order of a court for the purpose of enforcing the judgment or order of a court in any proceedings; or

(e) for the purpose of authorising the entry upon any premises for the purpose of preventing or detecting criminal offences.

<sup>11</sup> The Petitioners cite for example, the decision of the Inter American Court of Human Rights in *Atala Riffo and Daughters v. Chile*, where the Court determined that privacy "is an ample concept that is not subject to exhaustive definitions and includes, among other protected realms, the sex life and the right to establish and develop relationships with other human beings" (I/A Court H.R., Case of Atala Riffo and daughters v. Chile. Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 239 at para. 162). The Petitioners

[continues ...]

to privacy as defined in Barbadian law is confined to entry upon, and search of, an individual's property and search of one's person.

28. Regarding the right to respect for one's physical, mental, and moral integrity, the Petitioners submit that this right is understood as the right to humane treatment, and that the Inter American Court of Human Rights has recognized that mental anguish amounts to a violation of the right to protection from inhuman treatment under the American Convention<sup>12</sup>. The Petitioners further submit that section 15 of the Constitution of Barbados comes the closest to embodying this right. However, the Petitioners contend that section 15 focuses on physical punishment and has never been interpreted in Barbadian law as including the type of mental anguish inflicted on the Petitioners because of sections 9 and 12 of the SOA.

29. Regarding the right to freedom of expression, the Petitioners contend that there is no established protection in Barbadian law for consensual sexual intimacy as a form of expression protected under the Constitution. The Petitioner further submit that it would be entirely speculative to assume that the domestic Constitution renders impermissible the SOA's criminalization of "buggery" and "gross indecency."

30. With respect to the right to family, the Petitioners argue that the right to family has never been articulated in Barbadian law and that accordingly, there is no redress available under Barbadian law for the violation of this Convention-protected right that arises out of the provisions of the SOA criminalizing "buggery" and "serious indecency."

31. Regarding the right to a hearing for the determination of rights and the right to judicial protection, the Petitioners acknowledge that there is provision for this under section 24 of the Constitution of Barbados. However, the Petitioners submit that given the limited nature or non-existence in Barbadian law of several of the rights (under the American Convention) that are violated by the SOA provisions, this status quo is likely to make any (domestic) hearing an academic exercise with limited prospects of success.

32. The State generally contends that the Petitioners failed to challenge the constitutionality of sections 9 and 12 of the SOA, and therefore failed to exhaust available domestic remedies. In this regard the State states that (a) sections 11 to 23 of the Constitution of Barbados set out the rights protected by the Constitution; (b) the Constitution prescribes that all other laws are subject to these provisions; (c) the Constitution provides for challenges to any laws that are inconsistent with the rights prescribed under the Constitution. The State also acknowledges that section 26 of the Constitution does contain a "savings clause."<sup>13</sup> In response to the Petitioners' claim that this provision precludes any constitutional challenge to the SOA, the State argues that this claim would have been worthy of consideration, prior to the decision of the Caribbean

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also cite the Court's Advisory Opinion OC-24/17, finding that the right to a private life includes "the way in which individuals [...] decide to project themselves towards others" and "is fundamentally linked to autonomy and dignity." (I/A Court H.R., Gender identity, and equality and non-discrimination with regard to same-sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights). Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24 at paras. 87-88.)

<sup>12</sup> In this regard, the Petitioners cite I/A Court H.R. Case of Fernandez Ortega et al. v Mexico, Series C., No. 215 Judgment of August 30, 2010, at para 133.

<sup>13</sup> Section 26 of the Constitution of Barbados provides:

(1) Nothing contained in or done under the authority of any written law shall be held to be inconsistent with or in contravention of any provision of sections 12 to 23 to the extent that the law in question-

(a) is a law (in this section referred to as "an existing law") that was enacted or made before 30th November 1966 and has continued to be part of the law of Barbados at all times since that day;

(b) repeals and re-enacts an existing law without alteration; or

(c) alters an existing law and does not thereby render that law inconsistent with any provision of sections 12 to 23 in a manner in which, or to an extent to which, it was not previously so inconsistent.

(2) In subsection (1)(c), the reference to altering an existing law includes references to repealing it and re-enacting it with modifications or making different provisions in lieu thereof, and to modifying it, and in subsection (1) "written law" includes any instrument having the force of law; and in this subsection and subsection (1) references to the repeal and re-enactment of an existing law shall be construed accordingly."



Court of Justice (CCJ) (the highest appellate Court for Barbados) in the consolidated cases of *Jabari Sensimania Nervais v. The Queen* and *Dwayne Omar Severin v. The Queen* delivered on the 27th of June 2018<sup>14</sup>.

33. According to the State this decision by the CCJ has determined two issues critical to the matter at hand. Firstly, the State submits that the CCJ held that the effect of section 26 of the Constitution of Barbados, has been inaccurately applied hitherto, and that it is no longer a bar to constitutional challenges of legislation which existed prior to the 30th of November 1966. In this regard, the State indicates that the CCJ ruled that "the correct approach to interpreting the general savings clause is to give it a restrictive interpretation which would give the individual full measure of the fundamental rights and freedoms enshrined in the Constitution." Secondly, the State indicates CCJ also determined that Section 11<sup>15</sup> of the Constitution of Barbados is "separately enforceable". As such any legislation may be challenged as being inconsistent with any right articulated from Sections 11 to 23 of the Constitution of Barbados.

34. The State contends that this development of the law by the CCJ has determined that the savings law clause is no longer a bar to the constitutional challenge of legislation, which existed prior to the 30th of November 1966. Accordingly, the State therefore submits that there is at present an adequate and effective remedy, which the Petitioners may explore to address any infringement of their legal rights. Given that the Petitioners have not invoked or exhausted this remedy, the State submits that the petition before the Commission is inadmissible.

## **VI. ANALYSIS OF EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION**

35. The parties diverge on the issue of domestic remedies. The Petitioners claim that they have been unable to seek relief in the domestic courts with respect to the impact of the SOA, principally because of the savings clause contained in the Constitution of Barbados. Accordingly, the Petitioners claim that they entitled to exemption from the requirement to exhaust domestic remedies. On the other hand, the State submits that a decision of the Caribbean Court of Justice (CCJ) in June 2018 has effectively made it possible for the Petitioners to challenge provisions of the SOA, and that the Petitioners have failed to do so. Accordingly, for the State the Petitioners have failed to invoke or exhaust available domestic remedies.

36. The petition's claims are based primarily on the combined effect of sections 9 and 12 of the SOA on the rights of the Petitioners as members of the LGBT community. According to the petitioners, section 9 (offence of buggery) predated the 1966 Barbados Constitution, whereas section 12 (offence of serious indecency) of the SOA was enacted after the 1966 Barbados Constitution. Technically, therefore, the savings clause in the Barbados Constitution applied to section 9 but not to section 12 of the SOA.

37. The Commission observes firstly that the decision of the Caribbean Court of Justice was delivered on June 27, 2018, whereas the petition was filed on June 6, 2018. The State has not denied that up to the date of this decision, the savings clause did have the effect of barring challenges to laws that predated the Constitution of Barbados. Accordingly, at the time of the filing of the petition, the Commission considers that

<sup>14</sup> According to the State the CCJ ruled that the Offences Against the Person Act 1994 of Barbados was in breach of Section 11 of the Constitution to the extent that the death penalty was mandatory

<sup>15</sup> Section 11 of the Constitution of Barbados provides:

Whereas every person in Barbados is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, color, 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 -

a. life, liberty and security of the person;

b. protection for the privacy of his home and other property and from deprivation of property without compensation;

c. the protection of the law; and

d. freedom of conscience, of expression and of assembly and association,

the following provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

the savings clause of the Constitution of Barbados did effectively prevent the challenges to the Constitution as set out above.

38. As already noted, the nature of the claims in the petition incorporates both section 9 and section 12 of the SOA. So, while the savings clause appears to apply to section 9 (and not section 12), the impact of this clause appears to have made it impossible for the Petitioners to challenge both provisions contemporaneously. For the Commission, challenging one provision but not the other, would not provide the Petitioners with an effective remedy. Accordingly, the Commission considers that the Petitioners are entitled to an exemption from the requirement to exhaust domestic remedies pursuant to Article 31 (2) (a) of the Commission's Rules of Procedure.

39. Likewise, the Commission finds that the petition was filed in a reasonable time, given that some of the effects of the alleged facts continue to persist. Accordingly, the Commission considers that the admissibility requirement of timeliness established in Article 32 (2) of the Commission's Rules is met.

## VII. ANALYSIS OF COLORABLE CLAIM

40. As it was established in its merits report of the case "*T.B and S.H*", the Commission reiterates that the law that criminalizes consensual sexual activity constitute a restriction on private life, which in some cases has a disparate impact on LGBTI persons, as these laws have a disproportionate impact on gay men and other men who have sex with men<sup>16</sup>. In addition, although most of these laws "do not specifically address sexual acts between women, rampant homophobia puts women who do have sex with women, or women who do not conform to a more feminine gender identity, at risk. Moreover, trans persons, and gender non-conforming persons also experience a disproportionate impact, given their visibility"<sup>17</sup>.

41. In view of the elements of fact and law presented by each party, and given the allegations concerning a context of violence and discrimination against LGBTI people and the impact of the laws on buggery and serious indecency on that situation, the Commission finds that, if proved, the alleged facts relating to threats to life, personal integrity, suppression of and interference with private and family life, unequal treatment, lack of access to justice and judicial protection, could establish possible violations of Articles 5 (Right to Humane Treatment), 8 (Right to a Fair Trial), 11 (Right to Privacy) 13 (Right to Freedom of Thought and Expression, 17 (Right to Family Life), 24 (Right to Equal Protection), and 25 (Right to Judicial Protection) in connection with Articles 1.1 and 2 to the detriment of the Petitioners.

## VIII. DECISION

1. To find the instant petition admissible in relation to Articles 5, 8, 11, 13, 17, 24, and 25 of the American Convention, in connection with Articles 1.1 and 2 thereof; and

2. To notify the parties of this decision; to continue with the analysis on the merits; and to publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 26<sup>th</sup> day of the month of September, 2022. (Signed:) Julissa Mantilla Falcón, President; Stuardo Ralón Orellana (dissident vote), First Vice President; Esmeralda E. Arosemena Bernal de Troitño, and Joel Hernández, Commissioners.

<sup>16</sup> See IACHR, Report No. 401/20, Case 13.095, Reports on the merits, T.B and S.H. Jamaica. December 31, 2020, para 90.

<sup>17</sup> See IACHR, Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas, Oas/Ser.L/V/II.rev.1, Doc. 36, 12 November 2015