

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
IN THE COMMONWEALTH OF DOMINICA**

Case No.: DOMHCV2024/0082

**IN THE MATTER OF SECTIONS 1(a), 1(b), 1(c), 5, 9, 13 AND 16 OF THE CONSTITUTION OF THE
COMMONWEALTH OF DOMINICA**

AND

**IN THE MATTER OF SECTIONS 56 AND 57 OF THE OFFENCES AGAINST THE PERSON ACT,
1873, CHAP. 10:31**

BETWEEN

**(1) AB
(2) DR. GEOFFREY LAFOND**

Claimants

– and –

ATTORNEY GENERAL OF THE COMMONWEALTH OF DOMINICA

Defendant

**(1) DOMINICA ASSOCIATION OF EVANGELICAL CHURCHES
(2) ROMAN CATHOLIC BISHOP OF THE DIOCESE OF ROSEAU**

**Interested
Parties**

Before Her Ladyship, Honourable Madame Justice Zainab. Jawara-Alami

APPEARANCES:

Ms. Dawn Yearwood-Stewart with Ms. Anika Gray and Ms. Sasha Sukhram led by Mr. Rishi Dass SC, Counsel for the Claimants

Mr. Jason Lawrence with Mrs. Tameka Burton led by Dr. David Dorsett, Counsel for the Defendant

Mrs. Gina Dyer-Munro Counsel for the Dominica Association of Evangelical Association, Interested Party

Ms. Joelle Harris, Counsel for the Roman Catholic Bishop of the Diocese of Roseau, Interested Party

2025: February 3 rd -	Hearing
March 11 th -	Ruling
July 16 th -	Submissions
September 1 st , 15 th , 29 th -	Submissions
October 21 st	Trial
2026: July 23 rd -	Decision

Constitutional Motion, challenge on the constitutionality of Section 56 and 57 Offences against the Person Act 1873, CHAP. 10:31 making it unlawful for a woman, to terminate a pregnancy and for health care providers to perform abortion services, inhuman or degrading treatment, freedom of conscience, protection against discrimination on the grounds of sex, protection of the law, security and liberty, declaration that sections 56 and 57 are unconstitutional and ought to be struck down, existing law construed with such modifications necessary to bring into conformity with the Constitution

JUDGEMENT

Background

- [1] **JAWARA-ALAMI.J-** The first named Claimant is a 26 year old citizen of the Commonwealth of Dominica. The second-named Claimant, Dr. Geoffrey Laffond is a Medical Doctor and a citizen of Dominica with over 26 years of practice in Obstetrician-Gynaecology based in Barbados.
- [2] The Claimants' bring this claim against the Defendant, The Attorney General of the Commonwealth of Dominica seeking declarations that sections 56 and 57 of the Offences against the Person Act (1873),¹(hereinafter referred to as "the Act") contravene the First Claimant's rights under sections 1(a), 1(b), 1(c), 5, 9 and 13 of the Constitution of Commonwealth of Dominica² ("the Constitution") and are accordingly null, void and of no effect.
- [3] The Claimants' originating motion challenges the constitutionality of sections 56 and 57 of the Offences Against the Person Act Chap 10:31 ("OAPA") on the grounds that those provisions contravene sections 1(a), 1(b), 1(c), 5, 9 and 13 of the Constitution of Dominica, namely;

¹ Chap. 10:3 Revised Laws of Dominica

² Chap1.01 Revised Laws of Dominica

1. Protection from inhuman or degrading treatment enshrined in section 5 of the Constitution of Commonwealth of Dominica and are accordingly null, void and of no effect;
2. Freedom of conscience enshrined in sections 1(b) and 9 of the Constitution of Commonwealth of Dominica and are accordingly null, void and of no effect;
3. Protection against discrimination on the grounds of sex enshrined in section 13 of the Constitution of Commonwealth of Dominica and are accordingly null, void and of no effect;
4. Protection of the law enshrined in section 1(a) of the Constitution of Commonwealth of Dominica and are accordingly null, void and of no effect;
5. A declaration that sections 56 and 57 of the Offences against the Person Act 1873, CHAP. 10:31 are unconstitutionally vague, contravene protection of the law guaranteed under section 1(a) of the Constitution and therefore null, void and of no effect; 7.
6. An order that sections 56 and 57 of the Offences against the Person Act 1873, CHAP. 10:31 are hereby struck down as being unconstitutional, null, void and of no effect

The Claimant's case

- [4] The originating motion of the claimant is supported by her affidavit, in which the 1st Claimant avers that sections 56 and 57 of the Act make it unlawful for her, as a woman, to terminate a pregnancy and for her health care providers to perform abortion services. She claims that the sections do not provide any lawful exceptions and it is unclear whether there are lawful exceptions and impact on her Constitutional Rights
- [5] According to the 1st Claimant, her birth control method failed when she was 19 years old, leaving her with an unplanned and unwanted pregnancy for which she was not financially or emotionally prepared. She knew that she wanted to terminate the pregnancy but did not know where to go to have the procedure performed. She tried various home remedies that she had heard about, including eating green papaya, but none was effective. Eventually, she contacted several doctors, and when one indicated that they could assist her, she did not

schedule an appointment because she was afraid of the stigma associated with having an abortion, including the aspersions of committing a sin.

- [6] When she eventually decided to schedule the appointment, she was informed that the procedure would cost XCD 1,700. She had no income, savings and had no one from whom she could obtain the money. She could not tell her parents or ask her partner who was also a teenager without a job or income. Her friends therefore gave her some of the money although she did not disclose to them the reason she required the money.
- [7] The Claimant avers that she was only able to afford the procedure because the assistant Nurse at the Doctor's Office loaned her most of the money required to pay for it. She further states that neither before or after the procedure was she provided with the information about what to expect. According to the Claimant, she subsequently experienced abdominal pain and bleeding for approximately two weeks, which left her feeling sad and confused.
- [8] She further states that her experience of an unplanned pregnancy and her subsequent abortion reinforced her belief that every woman has the right to make decisions concerning her own body, including the decision to terminate a pregnancy where she considers it to be in her best interests. She maintains that women should not be criminalised for acting in accordance with their conscience and personal beliefs, notwithstanding that those beliefs may differ from those of religious bodies. She also contends that decisions concerning whether and when to become a mother, and how to shape one's family life, should not be dictated by the State or the Church. In her view, such restrictions offend her dignity and undermine her bodily autonomy.
- [9] The Claimant emphasises that she is not aware of men being subjected to similar restrictions on their reproductive freedom. She considers this to be profoundly unfair, as it deprives her of the ability to control her own body and reinforces the idea that her body, and the bodies of other women, are the property of the men who made the abortion laws.
- [10] Having had her first abortion seven years ago, she avers that she fears being charged or imprisoned. She believes that she remains an un-apprehended criminal who may be charged, convicted, and imprisoned at any time.

- [11] The 1st Claimant maintains that the continuing criminalisation of women and girls for undertaking abortions violates her constitutional rights, and those of other women and girls, to private and family life, protection from discrimination on the basis of sex, freedom of conscience, and freedom from inhuman and degrading treatment.
- [12] In essence, the 1st Claimant states that she fears the consequences of the existing abortion laws, should she become pregnant in circumstances such as rape or where the pregnancy involves a serious foetal abnormality. She says that being compelled to carry a pregnancy resulting from rape would subject her to profound shame, trauma, and emotional anguish. Similarly, she asserts that being required to continue a pregnancy involving a dying foetus or one with severe abnormalities would impose significant psychological distress and potentially the lifelong responsibility of caring for a child with severe disabilities. She contends that, under the laws of the Commonwealth of Dominica, abortion in such circumstances is unlawful and that any attempt to terminate such a pregnancy could expose her to criminal prosecution, conviction, and imprisonment.
- [13] The Second Claimant also filed an affidavit in support of the originating motion, stating that in the course of his professional duties he provides abortion services to women for a range of reasons, including unplanned pregnancies, serious foetal abnormalities, and risks to the health or life of the mother. He avers that such services are delivered in accordance with international medical standards and that access to abortion forms an essential component of women's sexual and reproductive healthcare.
- [14] He contends that the law in Dominica, in particular sections 56 and 57 of the Offences Against the Person Act, is unclear as to the circumstances in which abortion may be lawfully performed. In his understanding, the provisions criminalise both the procurement and provision of abortion, with no clearly defined exceptions, and there is no authoritative judicial or governmental guidance clarifying their scope. He further submits that a request for clarification made by the Dominica Planned Parenthood Association in 2022 was declined by the Attorney General.
- [15] The Second Claimant argues that, in the absence of clear legal guidance, healthcare providers are exposed to a real risk of prosecution, which deters him from returning to

Dominica to provide obstetric and gynaecological services. He cites instances of past prosecutions and asserts that criminalisation does not prevent abortions but instead drives women to seek unsafe procedures, sometimes with serious or fatal consequences.

- [16] He further relies on international medical and human rights standards, including guidance from the World Health Organization and recommendations of the Human Rights Committee, which support the decriminalisation of abortion and access to safe abortion services.
- [17] In the circumstances, the Second Claimant maintains that the continued criminalisation of abortion services in Dominica violates his constitutional rights, in particular his freedom of conscience and his right to the protection of the law, and he seeks the relief set out in the originating motion.

The Defendant case

- [18] The Defendant rejects the Claimants' contention that the impugned legislation is inconsistent with the Constitution and submits that the constitutional motion is without merit and should be dismissed.
- [19] The Defendant argues that the laws of Dominica, including those regulating abortion, must have due regard to considerations of public morality.
- [20] In addition, the Defendant argues that the right to perform or obtain an abortion free from legal restriction on the basis of freedom of conscience, is incompatible with upholding standards of public morality and is contrary to public interest.
- [21] The Defendant accepts that the constitutional rights arising in these proceedings are those protected by sections 1(a), 1(b), 5, 9, and 13 of the Constitution. It contends that the right guaranteed by section 1(c) is not engaged by the issues raised in this claim.
- [22] Accordingly, the Respondent's position is that the impugned legislation is not vague and does not otherwise contravene the right to the protection of the law. They further contend that

restricting abortion is a limitation designed to ensure that the public interest is not prejudiced, does not subject anyone to inhuman treatment, is not discriminatory and does not contravene the right to protection from discrimination on the ground of sex.

- [23] In the circumstances the Attorney General invites the Court to dismiss the constitutional motion with costs.

The Case of The Interested Parties

- [24] The Interested Parties submit that sections 56 & 57 of the Act create offences relating to the procurement of abortions and argue that those provisions must be read together with section 8 of the Act, which permits an abortion where it is necessary to preserve the life of the mother.
- [25] The Interested Parties further submit that the constitutional issues raised in these proceedings must be considered in light of the preamble to the Constitution³ which affirms that the Commonwealth of Dominica is founded upon principles which recognise, inter alia, the supremacy of God, faith in fundamental rights and freedoms, the position of the family in a society of free men and free institutions and the dignity of the human person inter alia.
- [26] On that basis, the Interested Parties contend that the impugned provisions do not infringe any of the constitutional rights relied upon by the Claimants, particularly when section 8 of the Act is taken into account. They further submit that the preamble to the constitution and the obligation to honour international treaties support the conclusion that the Court should dismiss the Claimants' case
- [27] The Interested Parties emphasise that Claimants have failed to acknowledge that the right to life is expressly recognised in international human rights instruments, ratified by the Commonwealth of Dominica. In particular, they rely on Article 3 of the Universal Declaration of Human Rights which provides that everyone has the right to life, liberty and security of person⁴ and Article 4(1) of the American Convention on Human Rights which recognises the

³ See Preamble of the Constitution of the Commonwealth of Dominica

⁴ Universal Declaration of Human Rights (1948), Article. 3.

right to have one's life respected and provides that, in general, this right shall be protected by law from the moment of conception. They contend that these international instruments support the constitutionality of the impugned legislative provisions.

The Issues

[28] Having considered the submissions of all the parties, the issues arising for determination are as follows;

i. **Whether sections 56 and 57 of the *Offences Against the Person Act* infringe the Claimants' fundamental rights and freedoms guaranteed under sections 1(a), 1(b), 5, 9 and 13 of the Constitution of the Commonwealth of Dominica.**

ii. **If so, whether any limitation or restriction imposed by sections 56 and 57 of the *Offences Against the Person Act* is reasonably justifiable in a free and democratic society.**

Analysis and Decision

[29] This Constitutional Motion was brought pursuant to **Section 16 of the Constitution**, which confers jurisdiction on the High Court to hear and determine applications alleging that any of the provisions of sections 2 to 15 (inclusive) of the Constitution have been, are being, or are likely to be contravened in relation to a person.

[30] Section 16 provides that;

**"16. (1) If any person alleges that any of the provisions of sections 2 to 15 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him
(2) The High Court shall have original jurisdiction (a) to hear and determine any application made by any person in pursuance of subsection (1) of this section; (b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) of this section, and may make such declarations and orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 2 to 15 (inclusive) of this Constitution:**

Provided that the High Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law”.

- [31] In proceedings brought pursuant to Section 16, the issue of locus standi must be determined at the outset. This is because the jurisdiction conferred on the High Court by section 16 is not at large; it is engaged where a person alleges that a provision of sections 2 to 15 of the Constitution has been, is being, or is likely to be contravened in relation to him or her. The language of section 16 (1) therefore requires the Court, before considering the substantive constitutional issues, to determine whether the person bringing the proceedings has a sufficient personal interest in the alleged infringement to invoke the Court’s jurisdiction.
- [32] The Claimants contend that they satisfy this requirement and have standing to bring this claim. In support of this contention, they rely on the decision of the Caribbean Court of Justice (CCJ) in **McEwan et al v The Attorney General of Guyana**⁵ in which the Court held that applications for constitutional redress should be approached in a liberal and generous manner, rather than in a strict or technical manner.
- [33] The question for this Court, therefore, is have the Claimants demonstrate that the impugned provisions have been, are being, or are likely to be contravened in relation to their rights. In this regard, actual harm need not necessarily have already occurred. It is sufficient, for the purposes of section 16 (1), that the Claimants demonstrate that they are personally affected, or are likely to be personally affected, by the impugned Section.
- [34] The 1st Claimant has a sufficient personal connection to sections 56 and 57 of the Act, having previously terminated a pregnancy and expressing a continuing fear of the consequences of those provisions, that she may be prosecuted for the abortion she had or that should she become pregnant in circumstances such as rape or serious foetal abnormality. Her concerns are therefore neither hypothetical nor academic. Accordingly, she has the requisite locus standi to invoke the Court’s jurisdiction under section 16 of the Constitution, and the substantive constitutional issues may properly be considered.

⁵ [2018] CCJ 30 (AJ) [para.88,]

[35] Having settled the issue of the Claimant's standing, I now turn to consider the substantive issues raised. In doing so, it is necessary first to consider what sections 56 and 57 of the Act provide and the effect of those provisions. The Claimants challenge the constitutionality of Sections 56 and 57 of the Act which provides;

"56. Any woman being with child, who, with the intent to procure her own miscarriage, unlawfully administers to herself any poison or other noxious thing, or unlawfully uses any, or other means whatsoever, with the like intent, and any person who with intent the miscarriage of any woman, whether she is with child or not, unlawfully administers to her, or causes to be taken by her, any poison or other noxious thing, or unlawfully uses any instrument or other means whatsoever with the like intent, is liable to imprisonment for ten years.

57. Any person who unlawfully supplies or procures any poison or other noxious thing, or any instrument or thing whatsoever knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she is with child or not, is liable to imprisonment for two years."

[36] The plain and ordinary meaning of sections 56 and 57 of the Act is that they criminalise the unlawful procurement of a miscarriage in Dominica. The Act nevertheless recognises a limited exception in circumstances where the preservation of the mother's life is concerned. This is reflected in section 8 of the Act, which creates the offence of child destruction but provides that a person shall not be guilty where the act causing the death of the child was done in good faith for the sole purpose of preserving the life of the mother. **Section 8 provides:**

"8 (1) Subject as hereinafter in this subsection provided, any person who with intent to destroy the life of a child capable of being born alive by any wilful act causes a child to die before it has an existence independent of its mother is guilty of the offence of child destruction and liable on conviction on indictment to imprisonment for life; but no person shall be found guilty of an offence under this section unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother.

(2) For the purposes of this Act, evidence that a woman has at any material time being pregnant for a period of twenty-eight weeks or more shall be prima facie proof that she was at that time pregnant of a child capable of being born alive."

[37] The term abortion is not defined in the Act, however, In these proceedings, the term is used to describe the intentional termination of a pregnancy, which is the subject matter addressed by sections 56 and 57 of the Act.

[38] Having identified the scope and effect of the impugned provisions, it is at this point that I restate the settled principles of constitutional and statutory interpretation. These principles were considered by the Caribbean Court of Justice in **OO vs BK and The Attorney General Of Barbados vs Operation Safe Space Movement For Change (Oss)**, in association with **International Centre For Advocates Against Discrimination (ICAAD) Inc, Un Women, Multi Country Office– Caribbean**⁶. The Court emphasised that in constitutional democracies founded on the rule of law and the supremacy of the constitution, legislation must be interpreted in a manner that gives effect to the purpose and the intention of parliament while remaining consistent with fundamental rights and constitutional values. The Court further recognised that in interpreting legislation, the Court should seek to give effect to the objectives and intention of Parliament in a manner that is aligned with fundamental human rights and core constitutional values and principles contained in Commonwealth Caribbean Constitutions and, where appropriate, the state's international treaty obligations and commitments⁷. Furthermore, the Court observed that;

“Constitutional democracies function under the rule of law and in the context of constitutional supremacy. Accordingly, where the issue of statutory interpretation is at play, the Court should interpret legislation not only to achieve the objectives of the legislation, and the intention of Parliament but to achieve alignment with (1) fundamental human rights and core constitutional values and principles contained in Commonwealth Caribbean Constitutions and (2) international treaty obligations and commitments of these states”

[39] The requirement that constitutional provisions be interpreted in a manner consistent with the protection of fundamental rights was further emphasised by the CCJ in **McEwan et al**⁸ the Court stated that;

“A Constitution must be read as a whole. Courts should be astute to avoid hindrances that would deter them from interpreting the Constitution in a manner faithful to its essence and its underlying spirit. If one part of the Constitution appears to run up against an individual fundamental right, then, in interpreting the Constitution as a whole, courts should place a premium on affording the citizen his/her enjoyment of the fundamental right, unless there is some overriding public interest. That was this Court's approach in Joseph & Boyce' (2006) CCJ13 (AL), 69 WIR 104 when we held that, in order to assure a condemned man the right to the protection of the law, a constitutional ouster clause did not prevent the courts from inquiring into the decisions of the local Mercy Committee”.

⁶ CCL Appeal No BBCV2022/001

⁷ See paragraphs 146, 147 & 149 of the Judgment of Anderson J and paragraph 154 & 158 of Judgment of Jamadar J.

⁸ Supra 3 at paragraph 41.

[40] The same approach is reflected in comparative constitutional jurisprudence. In **David Tusingwire vs Attorney General**⁹ Mwhonda JSC summarised the relevant principles of constitutional interpretation as follows:

“These include that the Constitution is the supreme law and the standard against which all other laws are judged; that the purpose and effect of legislation are relevant in determining its constitutionality; and that provisions protecting fundamental rights should be given a dynamic, progressive, liberal, and flexible interpretation so as to give those rights their fullest possible benefit. The Court also recognised that clear and unambiguous constitutional language should ordinarily be given its plain and ordinary meaning, while imprecise or ambiguous language should be approached through a liberal, general, and purposive interpretation.”

[41] The importance of the purposive interpretation in the Commonwealth Caribbean constitutional context was similarly affirmed by the Caribbean Court of Justice in **Trust Co (Guyana) Ltd v Guyana Securities Council (2021) CCJ 11(AJ) GY**, the Court observed that:

“... an important principle of statutory interpretation, especially in the context of Commonwealth Caribbean Jurisdictions, is that legislation must be interpreted purposively to give effect to the fundamental rights and values and constitutional principle, contained in the Commonwealth Caribbean constitutions”

[42] Similarly, in the Barbados case of **Commissioner of Police v Alleyne**¹⁰ Jamadar JA observed that;

“ In constitutional democracies all statutory interpretation must include a consideration of whether the law as stated can be interpreted in a manner that is consistent with the Constitution, as to the extent that there is an inconsistency, the law is void, statutory interpretation in a state where there is constitutional supremacy, such as in Barbados, necessarily requires that all legislation be filtered through constitutional lenses”

[43] Of particular relevance to the present proceedings is the Court's recognition that constitutional interpretation may also require consideration of the State's international obligations. Jamadar JA observed;

“Consistent with the principle of sovereignty the task of statutory interpretation in Barbados included attending to the state's declared international undertakings through signed and subscribed international treaties and legal instruments. Sovereignty in a constitutional democracy means that a state that enters into treaty arrangements does so with full autonomy, intending to mean what it represents to the world and its citizens as having been done... The result is a constitutional impetus to interpret all domestic laws in alignment with state

⁹ Constitutional Appeal No. 4 of 2016 ([2017] UGSC 11)

¹⁰ (2022) CCJ 2 (AJ) BB,(2022) 2 LRC 590

undertaken international obligations and commitments, an approach recognised and endorsed by this Court”(my emphasis)

- [44] I am guided by these principles of constitutional interpretation in determining the issue arising in this case instant.
- [45] Now, it remains to consider whether the Claimants have established a prima facie case that the impugned provisions of the Act are inconsistent with the rights and freedoms guaranteed by the Constitution. The burden rests on the Claimants to demonstrate, by reference to the evidence and the constitutional provisions relied upon, that the prohibition on abortion, insofar as it applies in the circumstances complained of, constitutes an unjustifiable infringement of those rights and freedoms.
- [46] Once the Claimants have established a prima facie infringement of a constitutionally protected right or freedom, the burden shifts to the Defendants to establish that the limitation is constitutionally permissible. The Court must then undertake the limitation analysis required by the Constitution, considering whether the impugned restriction pursues a legitimate objective in the public interest and whether it is reasonably justifiable in a free and democratic society. In carrying out that exercise, the Court must determine whether the limitation is proportionate to the objective sought to be achieved and no more restrictive than is necessary to achieve that objective.
- [47] The Court will therefore consider, in turn, the constitutional rights relied upon by the Claimants, whether the impugned provisions constitute an infringement of those rights, and, if so, whether the resulting limitation is constitutionally justified.
- [48] It is not in dispute that the statutory scheme governing abortion in the Commonwealth of Dominica generally prohibits the procurement of an abortion. The only express exception recognised by the Act is where the act is done in good faith for the sole purpose of preserving the life of the mother. Against that background, the first question is whether the impugned provisions infringe the Claimant's rights to the protection of privacy of the home.

Relief #1 - Section 1(c) of the Constitution – protection of privacy of the home

[49] It is the Claimant's contention that even if it is accepted that **R v Bourne** and section 8 of the Act permit abortions undertaken to protect the life and health of the pregnant person, the continuing criminalization under sections 56 and 57 of the Act, of women, girls and health care providers who carry out abortions in cases of foetal impairment, rape, incest or for other reasons, constitute not only a breach of Dominica's international treaty obligations but also; (i) a serious infringement of the Claimants' constitutional right to privacy and family life, entrenched in section 1(c) of the Constitution (ii) an impediment to the first-named Claimant and similarly individuals exercising their personal autonomy to make decisions regarding their reproductive function and, (iii) a denial of the dignity inherent in the exercise of bodily autonomy free from government intrusion and the threat of criminal prosecution.

[50] The Defendant concedes on this point, the Claimant's argument that the right to privacy in section 1(c) extends beyond a mere "right to be let alone" or "to occupy a private space free from government intrusion" is misplaced. They submit that the fundamental right guaranteed by section 1(c) of the Constitution is **"protection for the privacy of his home and other property and from deprivation of property without compensation"** and that the relevant constitutional protection is therefore confined to a person's right to "privacy in his home or other property".

[51] The Defendant further argues that although Article 8(1) of the **European Convention of Human Rights** ("the Convention") provides that;

"Everyone has the right to respect for his private and family life, his home and his correspondence",

Section 1(c) of the Constitution is not a replica of Article 8. Rather, Section 1(c) provides for every person in Dominica **"protection of his home or other property"** which the Defendant submits, finds its full manifestation and elaboration in section 7 of the Constitution. Section 7(1) provides, in particular, that:

"Except with his own consent, a person shall not be subjected to the search of his person or his property or the entry by others on his premises."

[52] The Defendant further contends that Section 1(c) of the Constitution has no application to abortion or to any purported right to abortion. The Defendant submits that section 1(c) of the Constitution concerns the right to privacy in respect of a person's premises, including one's home or other property, and therefore has no bearing on the issues arising in this

instant case. Accordingly, the Defendant contends that Relief #1 is not a relief that the Court can properly grant.

[53] The Interested Parties, for their part, contend that the Claimant's reliance on the constitutional right to privacy must be considered in light of the express limitations contained in the said section. They further invite the Court to have regard to **Bruggeman and Scheuten vs Federal Republic of Germany**¹¹ in which the European Commission for Human Rights observed that a decision to procure an abortion was not a matter of private life because the woman's life was closely connected with that of the developing foetus.

[54] Having considered the parties respective submissions on this point, it is therefore necessary to examine the scope of the right to privacy. **Halsbury's Laws of England**¹² describes private life as a broad and evolving concept that is not susceptible to an exhaustive definition. It identifies the underlying principle as the protection of human autonomy and dignity, with the touchstone of private life being whether, in the circumstances of the particular case, the individual has a reasonable expectation of privacy.

[55] **Halsbury's** further explains that the concept of private life includes:

"The ability of a person to establish and develop relationships with other human beings and the outside world, including through activities of a professional or business nature. It is not limited to the notion of an 'inner circle' in which the individual may live their own personal life as they choose and to exclude the outside world, but extends also to those features which are integral to a person's identity or ability to function socially as a person. It can embrace multiple aspects of a person's physical and social identity, such as gender identification, name, reputation, sexual orientation and sexual life. Personal information, in particular about a person's health or ethnic identity, is an important element of private life, and the concept of 'private life' extends also to elements relating to a person's right to their image"

[56] The breadth of the concept of private life, and its connection with personal autonomy and bodily integrity has been recognised in the context of reproductive decision-making. In **A, B and C v. Ireland**¹³, the European Court of Human Rights considered whether restrictions on access to abortions engaged the right to private life under Article 8 of the **European Convention on Human Rights (ECHR)**, which protects the right to respect for private and

¹¹ (1981) 3 E.H.R.R 244

¹² Rights And Freedoms (Volume 88 (2025))

¹³ [2010] ECHR 2032

family life. Two of the applicants sought abortions on what were described as "health and well-being grounds", but the Court found no violation of Article 8 of the ECHR in respect of the two applicants. The third applicant, who had previously suffered from cancer, was concerned that continuing her pregnancy might endanger her life. In her case, the Court found a violation of Article 8, not on the basis of the general right to abortion, but because the State had failed to fulfil its positive obligation to secure effective respect for her private life. Specifically, there was no accessible and effective procedure through which she could have established whether she qualified for a lawful abortion in Ireland. The Court held that the assessment of whether pregnancy posed a risk to the applicant's life engaged a fundamental aspect of private life, including her physical integrity, personal autonomy and reproductive choices. The violation therefore arose from the absence of an effective mechanism by which the applicant could ascertain and vindicate her constitutional right to a lawful abortion where such a right existed.

[57] In **Re the Northern Ireland Human Rights Commission for Judicial Review**¹⁴, the Supreme Court of the UK considered the compatibility of Northern Ireland's abortion laws with Article 8. By a majority, the Court concluded that the prohibition of abortion in cases where the foetus had been diagnosed with fatal foetal abnormalities and in cases where a pregnancy arises as a result of rape or incest was incompatible with Article 8. However, the Court held that it lacked jurisdiction to grant a declaration of incompatibility.

[58] In **Tysi c v Poland**¹⁵ the European Court addressed the failure of Polish authorities to provide effective access to lawful abortion on health grounds. The Court found that Poland violated Article 8 of the European Convention on Human Rights, guaranteeing the right to respect for private life. The Court held that while Poland's law permitted abortion when a woman's health was threatened, it lacked any effective procedure to resolve disputes between patients and doctors about whether those conditions were met. This absence of procedural safeguards, it held, deprived Tysi c of effective respect for her private life. The Court stressed that once a state allows abortion on specific grounds, it must not structure its legal framework so as to render access to that right illusory.

¹⁴ (reference by the Court of Appeal (Northern Ireland)) [2018] UKSC 27, [2019] 1 All ER 173, [2018] All ER (D) 28 (Jun)

¹⁵ 2007 judgment of the European Court of Human Rights (Application no. 5410/03)

[59] The foregoing authorities establish that the jurisprudence of the European Court of Human Rights recognises that reproductive autonomy, including matters relating to access to abortion, may fall within the scope of the right to respect for private life protected by Article 8 of the ECHR. Taken together, they establish that Article 8 of the Convention is engaged in all cases involving decisions about pregnancy and abortion. They also establish that States retain a margin of appreciation and are not obliged to provide abortion on demand. However, and most critically, where abortion is permitted under domestic law, the State must ensure that access is real, effective, and governed by clear procedures. A failure to provide such framework, whether through legal uncertainty, lack of guidance, or absence of effective dispute-resolution mechanisms, may result in violation of the right to respect for private life.

[60] Having considered the authorities above, I now turn to the specific text of the Constitution of the Commonwealth of Dominica. Section 1 provides that;

“Whereas every person in Dominica is entitled to the fundamental rights and freedoms, that is to say, the right, whatever his race, place of origins, 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 - The Constitution of Dominica (a) life, liberty, security of the person and the protection of the law; (b) freedom of conscience, of expression and of assembly and association; and (c) protection for the privacy of his home and other property and from deprivation of property without compensation(my emphasis)

[61] It is immediately apparent that the language of section 1(c) of the Constitution differs materially from the wording of Article 8 of the ECHR. Article 8 provides;

1. “Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of other” (my emphasis)

[62] The distinction is significant. Article 8 expressly recognises a broad right to respect for private and family life, subject to specified limitations. By contrast, section 1(c) of the Constitution is framed in narrower terms, referring specifically to “protection for the privacy of his home and other property” and protection against deprivation of property without compensation. The question, therefore, is whether the broader understanding of private life developed in the jurisprudence concerning Article 8 can properly be imported into the distinct constitutional language of section 1(c).

[63] In addressing that question, guidance can be found from the Privy Council decision of **Leonard and others v The Attorney General of Trinidad and Tobago**¹⁶. The Board recognised that it has frequently had regard to sources of international human rights law when considering the general principles applicable to fundamental rights which are the common currency of civilised nations. These sources include international human rights instruments, the case law of international bodies charged with their interpretation, and the decisions of the domestic courts of common law jurisdictions including those of the Board on appeal from them.

[64] In **Reyes v The Queen**, Lord Bingham, delivering the advice of the Board, endorsed the practice of having regard to international human rights standards in interpreting constitutional rights, while emphasising that the starting point must always be the Constitution. The task of the Court is to;

"Consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving at the same time, this standards of decency that mark the progress of a maturing society.....at the same time, this does not mean that in interpreting the Constitution... effect need be given to treaties not incorporated into the domestic law of Belize or non-binding recommendations or opinions made or given by foreign courts or human rights bodies. It is open to the people of any country to lay down the rules by which they wish their state to be governed and they are not bound to give effect in their Constitution to norms and standards accepted elsewhere, perhaps in very different societies. But the courts will not be astute to find that a Constitution fails to conform with international standards of humanity and individual right, unless it is clear, on a proper interpretation of the Constitution, that it does."(my emphasis)

[65] However, the Privy Council in **Leonard and Others v Attorney General of Trinidad and Tobago** cautioned that, while the jurisprudence of the European Court of Human Rights may provide valuable guidance on general principles of human rights protection, its decisions must be approached with due regard to the constitutional context of the jurisdiction in which they are being considered. The Board recognised that different jurisdictions may develop their understanding of fundamental rights in ways that reflect their own constitutional traditions, legal systems, and collective values.

¹⁶ (2017) UKPC25

[66] The Board noted that the European Convention is a regional human rights instrument, reflecting the values and experiences of the Member States of the Council of Europe. Consequently, while the Strasbourg jurisprudence may be persuasive, its detailed application of rights may not always be directly transferable to jurisdictions with different constitutional arrangements and social contexts. The Board further observed that the European Court's jurisprudence is evolutionary and may develop in ways that are not necessarily applicable to independent non-party States. Accordingly, courts of such States are not required to follow every development in Strasbourg jurisprudence, particularly where doing so would extend beyond the proper interpretation of their own constitutional provisions.

[67] The Board therefore emphasised that decisions of the European Court of Human Rights do not constitute a source of binding law in jurisdictions that are not parties to the European Convention. Rather, such decisions may have persuasive value in identifying general principles underlying the protection of particular rights. However, greater caution is required when relying upon them to determine the specific content of a right or the procedural mechanisms through which that right must be protected. Ultimately, the Court must remain guided by the language, structure, and purpose of its own Constitution.

[68] Concluding on this point, the Board emphasised that;

"Compliance with the decisions of the European Court of Human Rights is not an international obligation of Trinidad and Tobago as it is of the United Kingdom. Instead, the international obligations of Trinidad and Tobago in relation to human rights arise under the instruments to which it is party, some of which have their own decision-making bodies and their own corpus of decisions. The decisions of the European Court of Human Rights are not a source of law which the courts of Trinidad and Tobago are bound to take into account, as the domestic courts of the United Kingdom are by virtue of section 2(1) of the Human Rights Act 1998, let alone are they a source of binding authority. They may bear valuable persuasive authority on the general principles underlying the protection of particular rights. But they are likely to be less valuable when prescribing the detailed content of those rights or the mode of giving effect to them procedurally. As far as the Board is concerned, particular importance will generally be attached to the views of the courts below before recognising any development of the law which is not warranted by the express terms of the Constitution or necessarily implicit in them.(my emphasis)

[69] Having considered the guidance provided by the Privy Council in **Leonard** and others, it is evident that Dominica is not a signatory to the ECHR, upon which the Claimants have placed considerable reliance and from which numerous authorities have been drawn. Applying the principles articulated by the Board, it is therefore necessary to distinguish

between the persuasive value of comparative human rights jurisprudence and the binding obligations applicable to Dominica. The Court may have regard to the jurisprudence of the European Court of Human Rights as persuasive authority concerning general principles of human rights protection, however, greater weight should be given to the international human rights instruments to which Dominica is a party, together with the jurisprudence and interpretive materials arising from those instruments. It is therefore necessary to consider the international obligations undertaken by Dominica which bear upon the right to privacy and the issues arising in these proceedings.

[70] The question which therefore arises is: which international treaties and conventions to which the Commonwealth of Dominica is a Party are relevant to the issues before this Court? These include, inter alia, the **International Covenant on Civil and Political Rights (ICCPR)**¹⁷ which was acceded to on 17th June 1993, the **Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)** acceded to on 15th September 1980, the **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT)** acceded to on 5th December 2024 and the **Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará)** and the **American Convention on Human Rights (ACHR)** acceded to on 3 June 1993, subject to several reservations. It is noted however, that Dominica did not accept the contentious jurisdiction of the Inter-American Court of Human Rights under Article 62 of the Convention

[71] Of these instruments, the ICCPR is of particular relevance to the issue of privacy. Article 17 expressly protects the right to privacy, providing that;

“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence...”

[72] The United Nations Human Rights Committee in its interpretation of Article 17, has recognised that the protection of privacy encompasses aspects of personal autonomy, bodily integrity, reproductive decision-making, and intimate personal choices. In its jurisprudence and General Comments, the Committee has also recognised that restrictive abortion laws may engage the rights to privacy, dignity, and freedom from cruel, inhuman, or degrading treatment under the ICCPR.

¹⁷ is a multilateral human rights treaty adopted by the United Nations in 1966 and entered into force in 1976

- [73] The recognition of these principles under international law does not, however, determine the scope of the corresponding protection afforded by section 1(c) of the Constitution. As already noted, international human rights instruments and the jurisprudence arising from them may provide persuasive guidance, but the starting point and ultimate guide must remain the language, structure and purpose of the Constitution itself. It is well established that, where constitutional words or phrases are clear and unambiguous, they should ordinarily be given their primary, plain, ordinary or natural meaning. Where, however, a constitutional provision is capable of more than one interpretation, a purposive approach may be adopted, having regard to the object, purpose and context of the Constitution.
- [74] In saying this, I have considered the wording of Section 1(c) of the Constitution and find that the protection afforded by that provision is directed to the privacy of the home and other property, rather than the general right to personal privacy or reproductive autonomy. The language of Section 1(c) when read in its ordinary and contextual meaning, does not extend to decisions concerning abortion. This conclusion is reinforced by the structure, which expressly identifies the protection of the privacy of the home and other property as distinct from other constitutionally protected rights under Section 1(c).
- [75] Accordingly, while the international jurisprudence demonstrates that reproductive autonomy and decisions concerning abortion may fall within the broader concept of private life protected under international human rights law, that broader conception cannot be read into section 1(c) in the absence of language in the Constitution supporting such an interpretation. I therefore find that the scope of section 1(c) of the Constitution does not extend to the matters complained of in these proceedings and that the impugned provisions do not infringe the right protected by that section. The relief sought on this basis is accordingly refused.

Relief #2 - Section 5 of the Constitution – The right to be free from inhuman treatment or punishment (section 5)

- [76] The Claimants contend that the impugned provisions infringe the right protected by Section 5 of the Constitution. Section 5 provides that;

“No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.”

[77] The Claimants submit that the right to freedom from inhuman or degrading treatment, guaranteed under section 5 of the Constitution, is infringed by the provisions of the Act which criminalise abortion in cases of foetal impairment, rape, incest, and other circumstances. It is argued that these provisions subject women and girls to emotional suffering and psychological distress, perpetuate the social stigma associated with abortion, and may compel them to seek abortion services clandestinely and in unregulated settings without adequate pre- and post-abortion care, thereby exposing them to the risk of unsafe abortions. The Claimant further submits that the legislation compels the First-Named Claimant, and others in a similar position, to continue their pregnancies until they become sufficiently advanced or give rise to life threatening complications before lawful access to abortion can be obtained.

[78] The Defendant contends that no limitations may lawfully be imposed on the constitutional protection afforded by Section 5 of the Constitution. The Defendant submits that section 5 of the Constitution is materially similar to section 7 of the Constitution of Antigua and Barbuda and in interpreting section 7 of the Antigua and Barbuda Constitution, the Privy Council in **Williams v Supervisory Authority**¹⁸ observed;

“That provision is concerned with the imposition of punishment and is primarily concerned with the physical conditions to which an individual is subjected by the state. Section 7(1) has no bearing on the present case.”

[79] The Defendant submits that this Court should take the same approach in this case and find that section 5 of the Constitution has no bearing on the present case.

[80] The interested parties, for their part, submit that the UK Supreme Court reached a similar conclusion in **the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review**¹⁹, rejecting the claim that Northern Ireland’s total prohibition on abortion infringed the protection against inhuman or degrading treatment.

[81] On consideration of Article 7 of the ICCPR which is comparable to Article 5 of the ACHR concerning protection against cruel, inhuman or degrading treatment. Article 7 provides that;

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment...”

¹⁸ [2020] UKPC 15, [2020] 5 LRC at [98]

¹⁹ [2018] UKSC 27

[82] The United Nations Human Rights Committee considered the application of this provision in **Mellet v Ireland**²⁰. In this case, the Applicant challenged the application of Ireland's abortion law on the basis that it subjected her to cruel, inhuman and degrading treatment and violated her dignity and physical and mental integrity. She contended that the legal framework denied her access to the reproductive health care and bereavement support she needed; forced her to continue carrying a dying foetus that was unlikely to survive; compelled her to terminate her pregnancy abroad; and subjected her to intense stigma.

[83] In assessing whether the circumstances amounted to treatment contrary to Article 7 of the Covenant, the Committee considered the combined effect of the State's legal framework and the resulting impact on the applicant's physical and psychological suffering. Having decided to terminate the pregnancy, the Author²¹ was unable to obtain healthcare and support she needed in Ireland and was compelled to make arrangements to obtain the termination abroad. The committee took into account her extreme vulnerability upon learning that her foetus was unlikely to survive, the uncertainty surrounding the continuation of her pregnancy, the prospect of giving birth to a child who would shortly thereafter die, and the financial, physical and emotional burdens associated with travelling abroad for the termination. Taken cumulatively, these circumstances contributed to the Committee's finding that the State's legal framework subjected her to treatment incompatible with Article 7, causing severe mental suffering and undermining her dignity and personal integrity

[84] Similarly, in **Whelan v Ireland**²² the Applicant /Author claimed that the application of Ireland's abortion law subjected her to cruel, inhuman and degrading treatment and encroached on her dignity and physical and mental integrity. She made substantially similar claims to the claims made in Mellet . The Committee again considered the cumulative effect of the legal framework and the circumstances in which the author was required to obtain an abortion abroad, including the vulnerability and mental anguish she experienced in the absence of adequate support and information from the Irish healthcare system.

²⁰ (Communication No. 2324/2013) (views adopted, 31 March 2016), UN Doc CCPR/C/116/D/2324/2013

²¹ UN Human Rights Committee decisions use "author" to describe the person who submits a communication under the Optional Protocol to the ICCPR.

²² (Communication no 2425/2014) (views adopted, 17 March 2017), UN HR Com

[85] In **Whelan**, the Committee further emphasised that the prohibition against cruel, inhuman or degrading treatment under Article 7 is absolute. It held that no derogation is permitted and that a State party cannot justify conduct falling within Article 7 by balancing an individual's rights against the "rights of others". The Committee also rejected the relevance of a margin of appreciation in assessing compliance with Article 7. The determinative question is whether the harm suffered amounts to ill-treatment and whether the conduct or omission giving rise to that harm is attributable to the State. The Committee further recognised that omissions may constitute ill-treatment and concluded that the failure of healthcare providers, acting pursuant to State laws and policies, to provide the abortion sought was attributable to the State and resulted in severe pain and suffering reaching the threshold required by Article 7.

[86] What can be deduced from the foregoing authorities is that cruel inhuman and degrading treatment is a broad concept encompassing conduct that causes severe physical or mental suffering, humiliation or an affront to human dignity. It is not confined to the infliction of physical pain, but may extend to conduct which causes profound psychological suffering . Importantly, Mellet and Whelan demonstrated that severe mental suffering arising from restrictive abortion laws engaged Article 7 of the ICCPR.

[87] The approach to inhuman or degrading treatment is also reflected in the Privy Council decision of **Pratt and Morgan v Attorney General for Jamaica**.²³ . The Board held that prolonged delay in carrying out the death penalty could amount to inhuman or degrading punishment because of the severe mental anguish caused by years spent awaiting execution. The Board recognised that the assessment depends not merely on physical suffering, but also on psychological suffering and the effect on human dignity.

[88] Having regard to the foregoing principles, the question that arises at this point is whether the evidence of the Claimants establish treatment of sufficient severity to fall within the prohibition against cruel, inhuman or degrading treatment under Section 5 of the Constitution. The 1st Claimant avers in her affidavit in support of the originating motion that;

"At age 19, my birth control method failed, leaving me with an unplanned and unwanted pregnancy. I was not ready to financially or emotionally care for a child. I knew I needed to terminate the pregnancy but I did not know where to go

²³ No. C.L. P049 of 1991 and C.L. M132 of 1991

to have it terminated. I tried different home remedies I had heard about (including eating green papaya) but nothing worked. Finally, I reached out to several doctors and when one office said they could help me, I ended the call and didn't schedule the appointment because I was scared of the stigma that came with having an abortion. As a woman I am keenly aware of the stigma attached to having an abortion, including that if you have had an abortion this means you have also committed a sin. When I finally decided to schedule the appointment, I was shocked at the price. I was told the procedure would cost me EC 1,700. I had no income, savings or anyone to give me this money since I could not tell my parents and my partner was also a teenager without a job or income. Friends gave me some of the money but I did not tell them why I needed the money. In my mind abortion was illegal and I did not want my friends letting out my secret if our friendship soured for whatever reason. I was only able to afford the procedure because the assistant nurse at the doctor's office loaned me most of the money to pay for the procedure. Neither before or after the procedure did the doctor give me information about what to expect with the procedure. I was therefore scared and confused when I started to feel the abdominal pain and experience the bleeding that lasted for two weeks. At the doctor's office I felt like a criminal, like I was doing something wrong and that at any moment, police officers would walk into the room to take me away for having an abortion"

[89] What has emerged from the decisions in **Whelan v Ireland and Mellet v Ireland** is that, the United Nations Human Rights Committee undertook a fact-sensitive assessment of the particular circumstances of each applicant in determining whether the threshold for cruel, inhuman or degrading treatment had been met. In both cases, the Committee's findings were grounded in detailed evidence of the applicants' personal experiences and the severe psychological suffering occasioned by the operation of the impugned law.

[90] It is settled that not every form of distress, hardship, or inconvenience will attain the minimum level of severity required to constitute inhuman or degrading treatment. The assessment is necessarily fact-specific and requires consideration of the nature, intensity, and consequences of the alleged treatment. I accept that the 1st Claimant genuinely feared criminal prosecution and experienced emotional distress in connection with her abortion, including remaining bedridden for approximately two weeks thereafter. The question, however is, whether taken cumulatively, these circumstances attain the level of severity required to engage Section 5 of the Constitution.

[91] Having considered the evidence as a whole, I am not satisfied that the circumstances experienced by the 1st Claimant reached the requisite threshold. While her experience was undoubtedly distressing, I do not consider that the evidence establishes suffering of the nature or severity found by the Committee in **Whelan and Mellet**. I therefore find that the Claimants

have not established that the impugned provisions subjected the 1st Claimant to inhuman or degrading treatment within the meaning of Section 5 of the Constitution. Relief No. 2 is accordingly refused.

Relief # 3- The right not to be discriminated on grounds of one's sex (section 13)

[92] The Claimants allege that section 56 and 57 of the Act, insofar as they apply specifically to women, are in violation of section 13 of the Constitution, which guarantees protection against discrimination. Section 13 provides as follows;

(1) Subject to the provisions of subsections (4), (5) and (7) of this section, 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) of this section, no person shall be treated in a discriminatory manner by any person or authority.

[93] Subsection 3 goes on to define what discriminatory means and identifies the grounds upon which discriminatory treatment may arise. It provides;

(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.

[94] The protection afforded by section 13 is, subject to the qualifications contained in subsections 4 to 8, of particular relevance to the present claim is subsection (4)(d) which provides;

(4) Subsection (1) of this section shall not apply to any law so far as that law makes provision—... (d) whereby persons of any such description as is mentioned in subsection (3) of this section 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 [emphasis mine].

Subsection 5 provides;

(5) Nothing contained in any law shall be held to be inconsistent with or in contravention of subsection (1) of this section to the extent that it makes provision with respect to standards or qualifications (not being standards or qualifications specifically relating to sex, race, place of origin, political opinions, colour or creed) to be required of any person who is appointed to or to act in any office or employment.

Subsection 6 provides;

(6) Subsection (2) of this section shall not apply to anything which is expressly or by necessary implication authorised to be done by any such provision of law as is referred to in subsection (4) or subsection (5) of this section.

Subsection 7 further provides;

(7) 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 whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any restriction on the rights and freedoms guaranteed by sections 7, 9, 10, 1 and 12 of this Constitution, being such a restriction as is authorised by section 7(2), section 9(5), section 10(2), section 11(2) or paragraph (a), (b) or (h) of section 12(3), as the case may be.

Finally, subsection 8 provides;

(8) Nothing in subsection (2) of this section shall affect any discretion relating to the institution, conduct or discontinuance of civil or criminal proceedings in any court that is vested in any person by or under this Constitution or any other law.

[95] Against this constitutional framework, the Claimants contend that the right to protection from discrimination on the basis of sex, as enshrined in section 13 of the Constitution, is violated in so far as sections 56 and 57 of the Act: (i) restrict the 1st Claimant's and similarly situated individuals' reproductive function without putting similar restrictions on men (ii) reinforce "gender-based stereotype that women should continue their pregnancies regardless of the circumstances, their needs and wishes, because their primary role is to be mothers and self-sacrificing caregivers. and; (iii) constitute intersectional discrimination by denying women and adolescents access to abortion in cases of rape and incest especially given the high levels and normalisation of sexual violence experienced by women and adolescent"²⁴.

[96] The Defendant in response submits that Section 56 of the OAPA does not afford different treatment to different persons attributable wholly or mainly to their genital configuration but applies to (1) "Any woman being with child, who, with the intent to procure her own miscarriage" (that is, the person on whom the abortion is performed) and (2) any person who with intent to procure the miscarriage of any woman, whether she is with child or not, unlawfully administers ...", that is, the provider of abortion services. Likewise, they argue that section 56 of the Act does not impose differential treatment on abortion providers based on their sex.

²⁴ See paras. 6, 7 & 9 of 1st Claimant's affidavit

[97] The Defendant contends that pregnancy is a condition which by its nature, can only apply to women and the legislation regulating abortion necessarily concerns circumstances unique to pregnancy. They submit that having regard to the nature of pregnancy and the special circumstances associated with it, the restriction imposed on a woman “with child” is reasonably justifiable in a democratic society. In this regard they rely on the reasoning in **Re the Northern Ireland Human Rights Commission for Judicial Review (at [22])**, which recognised that the “**community undoubtedly does have a moral interest in protecting the life, health and welfare of the unborn**”.

[98] The Defendant also places reliance on **Dobbs v Jackson Women’s Health Organization**²⁵ in which the US Supreme Court observed that; “**a State’s regulation of abortion does not constitute a sex-based classification**”. They argue that pregnancy is a condition unique to women and regulating it is not the same as treating women as second-class persons.

[99] The Interested Parties contend that the impugned provisions do not impose a restriction on women that is capable of comparison with any restriction imposed on men. They submit that the distinction arises not from legal discrimination but from biological reality, as only women are capable of becoming pregnant and, consequently, only women are capable of obtaining an abortion. In their view, the legislation regulates a biological condition unique to women rather than discriminating on the basis of sex. They further argue that there are numerous laws which, by their very nature, apply only to one gender because they regulate circumstances or conduct that are biologically specific to that gender.

[100] Having stated the submissions on this issue, I turn to Section 13 of the Constitution which guarantees protection against discrimination. At its most fundamental level, the provision reflects the constitutional principle that all persons are equal before the law and are entitled to the equal protection of the law. Section 13 therefore prohibits differential treatment where it is discriminatory within the meaning of subsection 3, subject to the exceptions expressed in the subsection. The question is therefore, whether the impugned provisions afford different

²⁵ 597 U.S. 215 (2022)

treatment attributable wholly or mainly to sex and, if so, whether that treatment is nevertheless reasonably justified in a democratic society within the meaning of section 13(4)(d).

[101] In interpreting and applying this constitutional guarantee, regard may properly be had to Dominica's international human rights obligation. The principle of equality and non-discrimination is recognised in numerous international human rights instruments and in particular, the prohibition of racial discrimination is recognised as a peremptory norm of customary international law. The broader principles of equality and non-discrimination are also protected by a number of human rights instruments, including; the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights of particular relevance to this present issue is the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).

[102] **CEDAW** addresses the issue of discrimination against women in all its forms and requires state parties to embody the principle of equality between men and women in their constitutions and legislation, establish legal protection for women's rights, and adopt appropriate measures to ensure their advancement of women. **Article 12**, requires state parties to eliminate discrimination against women in the field of health care and to ensure on the basis of equality between men and women, access to health care services, including those relating to family planning. **Article 16(1)(e)** further recognises women's equal right to decide freely and responsibly on the number and spacing of their children and to have access to the information and means necessary to exercise that right.

[103] It is against this international framework that section 13 of the Constitution must be considered. Section 13 expressly prohibits discrimination on the ground of sex and thereby gives domestic constitutional protection to the fundamental principle of equality between men and women. Although the Constitution does not provide that duly ratified treaties automatically become part of domestic law or take precedence over domestic legislation, Dominica's obligations under CEDAW remain relevant as an interpretive aid in determining the scope and content of the constitutional protection afforded by section 13. CEDAW does not, therefore, determine the validity of the Sections 56 and 57 of the Act as a matter of domestic law, rather its provisions will assist the Court in determining what constitutes discrimination against women, particularly in the context of health, reproductive autonomy and equality.

[104] The role of international human rights instruments in constitutional interpretation has been recognised by courts across the Commonwealth. To buttress this point, Anand CJ In ***Apparel Export Promotion Council v Chopra***, observed that, in cases concerning human rights violations, courts should remain attentive to international instruments and may have regard to their principles where they are not inconsistent with domestic law. This approach was also adopted in ***Maria Roches v Clement Wade*** ²⁶.

[105] In saying this, I recognise however, that Dominica, like other Commonwealth Caribbean jurisdictions operating within a dualist legal system, does not treat ratification of an international treaty as automatically incorporating its provisions into domestic law. The orthodox position is that international treaties do not form part of domestic law unless incorporated by legislation. This principle has been reaffirmed in ***OO v BK and The Attorney General et al v Boyce***, in which it was recognised that the authority to transform international obligation into domestic law rests with parliament.

[106] It follows that, where domestic legislation is inconsistent with an unincorporated treaty, the Court is bound to apply domestic law. However, it does not mean that ratified treaties are irrelevant to constitutional adjudication. Rather, international instruments may serve as valuable interpretive aids, particularly where domestic legislation is ambiguous or capable of more than one meaning.

[107] As recognised in ***OO v BK***, courts may presume that Parliament intends to legislate consistently with the State's international obligations, and may therefore use ratified treaties to resolve ambiguity in domestic law.

[108] This approach can also be found in ***Commissioner of Police v Alleyne***²⁷, Jamadar JA observed that in constitutional democracies governed by constitutional supremacy, all statutory interpretation must be conducted through the lens of constitutional values, and that courts may properly have regard to the State's international commitments as part of that interpretive exercise.

²⁶ Supreme Court of Belize, Action No. 132 of 2004.

²⁷[2022] CCJ 2 (AJ) (BB), [2022] 2 LRC 590.

[109] Having regard to the relevance of CEDAW to the interpretation of the constitutional guarantee against discrimination, it is necessary to consider how the convention has been interpreted by the Committee on the Elimination of Discrimination Against Women (“the Committee”), particularly in relation to women’s reproductive health and the criminalisation of abortion stereotypes.

[110] Article 12 of CEDAW has been considered extensively by the Committee including in its consideration of legislative restrictions. In examining Poland’s legislative framework in **CEDAW/C/POL/IR/1**. The Committee considered legislation, the 1993 Act on Family Planning, which generally prohibited abortion subject to limited exceptions, including where the pregnancy posed a threat to the life or health of the woman or resulted from a criminal act.

[111] In considering the implications of these restrictions, the Committee emphasised that Article 12 read together with Article 16 (1) (e), guarantees women the right to health, including sexual and reproductive health. The Committee explained that these provisions require states to eliminate discrimination against women in the provision of healthcare and to ensure access to services, including those relating to family planning, and respect of women’s right to decide freely and responsibly on the number and spacing of children.

[112] The Committee has also addressed the relationship between restrictions on reproductive health and gender based violence. In paragraph 18 of General Recommendation No. 35 (2017) updating general recommendation No. 19²⁸, the Committee recognised that certain restrictions on reproductive health may constitute forms of gender based violence. It identified, among other practices, the criminalization of abortion, the denial or delay of safe abortion and/or post abortion care, forced continuation of pregnancy, and abuse and mistreatment of women and girls seeking sexual and reproductive health information, goods and services, as forms of gender-based violence. The Committee further recognised that, depending on the circumstance, such conduct may amount to torture or cruel, inhuman or degrading treatment

²⁸ Committee on the Elimination of Discrimination against Women, General Recommendation No. 35 (2017) on gender-based violence against women, updating General Recommendation No. 19, UN Doc. CEDAW/C/GC/35 (14 July 2017), para. 18

[113] The principles articulated by the Committee also found expression in domestic constitutional jurisprudence concerning abortion. In particular, the Constitutional Court of Colombia has developed significant jurisprudence in this area in its Ruling **C-355/2006**²⁹. Here, the Court considered the constitutionality of provisions criminalising abortion. It held that the protection of life in gestation could constitute a legitimate objective, but that an absolute criminal prohibition could not be sustained where it resulted in the sacrifice of the fundamental rights of women. The Court accordingly identified circumstances in which termination of pregnancy could not be criminally punished, including where the continuation of pregnancy threatened the life or health of the woman, where the foetus suffered from a severe condition and was not viable, and where the pregnancy resulted from rape or incest.

[114] This approach was subsequently developed further in **Ruling C-055/2022 (Constitutional Court of Colombia 2022)**³⁰, where the Court extended access to abortion on request up to 24 weeks of gestation. In doing so, the Court established that the criminalisation of abortion engaged issues of discrimination rooted in a suspect classification based on sex, which requires strict constitutional justification in light of Colombia's equality guarantees under Article 13 and Article 43 of its Constitution, as well as its international obligations under CEDAW and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women.

[115] The Court held that provisions criminalising abortion may constitute direct discrimination where they disadvantage women in the exercise of fundamental rights and restrict equal access to health care services. It emphasised that such measures are not neutral in their effect, but instead disproportionately impact women because of their reproductive and gestational capacity. The Court further reasoned that the use of criminal law as a primary mechanism (*prima ratio*), rather than a measure of last resort (*ultima ratio*), in regulating abortion, imposes harm and suffering on women solely on the basis of their sex. It held that criminalisation in this context fails to adequately respect women's autonomy in decisions relating to motherhood and risks reinforcing harmful gender stereotypes, thereby engaging the State's obligation to eliminate discrimination and violence against women.

²⁹ **C-355/2006** Constitutional Court of Colombia 2006,

³⁰ Ruling C-055/2022 (Constitutional Court of Colombia 2022)

[116] As the Court explained, the use of criminal law as a primary regulatory tool in this context constitutes an imposition capable of causing harm and suffering to women solely because of their reproductive capacity, and is therefore in tension with the prohibition on discrimination and violence against women. The Court concluded that while the State is entitled to adopt measures to protect prenatal life, it must ensure that reproductive capacity is not used as a basis for criminalisation in a manner that undermines material equality and the constitutional principle that criminal law should be used only as a last resort.

[117] It is noteworthy that, although these decisions are not binding upon this Court, they provide useful comparative guidance. Of particular relevance is the recognition that the constitutional assessment of abortion cannot be confined to whether legislation expressly distinguishes between men and women. The Court must consider the actual burden imposed by the legislation and whether, by reason of their reproductive and gestational capacity, that burden falls disproportionately upon women. Thus, legislation that is neutral in its wording, may nevertheless constitute indirect discrimination where, in its operation or effect, it places women at a disproportionate disadvantage.

[118] This brings into focus the distinction between direct and indirect discrimination. Direct discrimination arises where a person is treated less favourably on the basis of a protected characteristic. Indirect discrimination arises where a provision which appears neutral on its face, places persons with a protected characteristic at a particular disadvantage, and cannot be justified as a proportionate means of achieving a legitimate aim.

[119] In the present context, abortion prohibitions may be subject to challenge as indirectly discriminatory on the basis of sex, given that pregnancy can be experienced only by women. Consequently, the criminal prohibition on abortion necessarily applies to women in a manner that does not apply to men.

[120] I therefore consider that the proper inquiry under Section 13(2) of the Constitution is not confined to the wording of Section 56 and 57 of the Act but extends to their practical operation and effect. The Court must determine whether the restrictions imposed upon women are attributable wholly or mainly to their sex and thereby constitute differential treatment within the meaning of Section 13(3). If that threshold is met, it becomes necessary to consider whether the differential treatment is nevertheless protected by Section 13(4)(d) as being

reasonably justified in a democratic society by women and that, as a result, only women are exposed to criminal liability under this provision for terminating their own pregnancies.

[121] I accept the Defendant's submission that section 56 regulates a condition that is unique to women. That, however, does not conclude the constitutional inquiry. The question under section 13 is not merely whether the legislation regulates pregnancy, but whether in its effect, it affords different treatment attributable wholly or mainly to sex, whereby persons of another sex are subjected to a disability or restriction to which persons of another sex are not subject to. By criminalising the termination of pregnancy, Section 56 imposes a burden arising from a condition that only women can experience. Even though the provision is framed by reference to pregnancy rather than sex, I find that, it operates to impose criminal liability exclusively upon women by reason of their reproductive capacity.

[122] In reaching this conclusion, I have had regard to the principles reflected in CEDAW, particularly Articles 1 and 2, as well as Article 12 and 16(1)(e). As discussed earlier in this judgement, CEDAW has not been comprehensively incorporated into the domestic law of the Commonwealth of Dominica and, as such, does not create directly enforceable rights in the absence of legislative implementation. Nevertheless, it is well established that ratified international human rights instruments may properly be used as interpretive aids when construing constitutional guarantees, particularly where the domestic constitutional provision is expressed in broad terms and is capable of more than one interpretation.

[123] Moreover, although Dominica has not enacted a single comprehensive statute domesticating CEDAW, its ratification of the Convention means that the State has undertaken, as a matter of international law, to give effect to the rights and principles contained therein. Furthermore, its legislative and policy framework demonstrate a clear commitment to addressing gender-based inequality and violence against women. Parliament has enacted legislation addressing these concerns, including the **Sexual Offences Act**³¹ and the **Domestic Violence Act**³², while successive national gender policies have sought to promote substantive equality between men and women and to eliminate gender-based discrimination. These measures reflect an acceptance by the State of the principles embodied in CEDAW and provide further

³¹ Amendment Act No.9 of 2016

³² Act No 14 of 2023

support for interpreting section 13 of the Constitution consistently with those principles, insofar as such an interpretation is compatible with the constitutional text.

[124] Against that background, I conclude that the concept of discrimination under section 13 should not be confined to formal distinctions based solely on sex. Rather, it extends to measures which, although framed in terms of a biological condition unique to women, have the effect of imposing burdens that fall exclusively or disproportionately upon women because of their sex and reproductive capacity. Section 56 is such a measure. It criminalises conduct that only women are biologically capable of and, in doing so, imposes a legal disability that is inextricably connected to sex. I am therefore satisfied that section 56 gives rise to discrimination on the ground of sex within the meaning of section 13 of the Constitution.

[125] Having reached that conclusion, the provision is not thereby rendered invalid without further examination. The finding that section 56 gives rise to differential treatment on the basis of sex does not end the inquiry, as section 13 of the Constitution recognises that certain forms of differential treatment may, in limited circumstances, be permissible. The burden therefore shifts to the Defendant to demonstrate that the restriction is justified within the constitutional framework. This requires the Court to consider whether the restriction pursues a legitimate objective and whether the means adopted are reasonably justifiable in a democratic society, taking into account the nature and severity of the burden imposed upon affected women.

The Proportionality Test

[126] Having found that the impugned provisions contravene section 13 of the Constitution, the question that now arises is whether that differential treatment is nevertheless reasonably justifiable in a democratic society. The Court accepts that the impugned provisions pursue a legitimate aim, namely the protection of prenatal life and the regulation of abortion and related medical procedures in the public interest.

[127] The identification of a legitimate objective, however, does not by itself establish that the impugned provisions are constitutionally justified. The Court must further determine whether the measures adopted are rationally connected to that objective reasonably justifiable in a democratic society by applying the proportionality analysis developed in the landmark case of **de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands**

and Housing³³. In that case, the Judicial Committee of the Privy Council considered the constitutionality of legislation restricting the freedom of expression of public servants.

[128] The judgment formulated a four-stage test for assessing restrictions on fundamental rights, later known as the **de Freitas test**, which is now taken to conform with the modern conventional approach to issues of proportionality. The test requires the Court to consider:

(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 interests of the community.

Whether its objective is sufficiently important to justify the limitation of a fundamental right;

[129] The Defendant and the Interested Parties contend throughout that the prohibition against a woman “with child” procuring an abortion is reasonably justifiable in a democratic society because the community has a legitimate moral interest in protecting the life, health, and welfare of the unborn.

[130] In conducting the proportionality analysis, the Court must first consider the objective underlying the impugned provisions contained in sections 56 and 57 of the Offences Against the Act. Guidance may be drawn from **R v Bourne**³⁴, where Macnaghten J observed that section 58 of the Offences Against the Person Act 1861 was a re-enactment of earlier statutory provisions reflecting a long-standing common law tradition of protecting unborn life. Similarly, in **A, B and C v Ireland**, the European Court of Human Rights recognised the importance afforded to the protection of prenatal life within the Irish constitutional and legal framework.

³³ [1998] UKPC 30; [1999] 1 AC 69

³⁴ [1939] 1 KB 687

[131] The Court therefore accepts that the original purpose of the impugned provisions was the protection of unborn life. That objective remains legitimate and is of considerable importance, however, the fact that a legislative objective was legitimate when enacted does not conclude the constitutional inquiry. The Court must consider whether the means adopted by Parliament to advance that objective remain proportionate in contemporary society. In doing so, it is necessary to briefly consider the historical context of the law in question and the circumstances in which they currently operate.

[132] The abortion offences contained in the Act originated in the nineteenth century and were enacted in a vastly different social, medical, and legal context. At that time, abortion procedures were frequently unsafe and posed substantial risks to the lives of pregnant women. Developments in medical science have since transformed reproductive healthcare, and lawful medical interventions are now significantly safer than the procedures that existed when the legislation was enacted.

[133] The Court also recognises that, unlike certain Constitutional systems, such as the Irish Constitution, which expressly recognise a right to life of the unborn, the Constitution of the Commonwealth of Dominica contains no provision expressly conferring constitutional personhood or independent constitutional rights upon a foetus. The fundamental rights and freedoms protected by Chapter I of the Constitution are guaranteed to persons, and no corresponding constitutional right of the unborn is expressly articulated. While the State is entitled to pursue the legitimate objective of protecting prenatal life through legislation, that interest must be balanced against the express constitutional rights of women, including their rights to liberty, privacy, dignity, equality, and protection from discrimination. In undertaking that balancing exercise, the Court must remain mindful that the rights asserted by the Claimants are expressly guaranteed by the Constitution, whereas the rights claimed on behalf of the unborn derive from policy rather than explicit constitutional text.

[134] Comparative constitutional jurisprudence is of assistance in considering this question. In this regard, the decision of the Constitutional Court of Colombia in **C-355/06**³⁵ is of particular assistance. The Court recognised that the protection of pre-natal life must be considered alongside the fundamental rights of the pregnant woman. The Court observed that:

³⁵ Judgment C-355/06 on the constitutional right to abortion in Colombia (2006)

" a criminal law that prohibits abortion in all circumstances extinguishes the woman's fundamental rights, and thereby violates her dignity by reducing her to a mere receptacle for the foetus, without rights or interests of constitutional relevance worthy of protection absolute prevalence of the foetus' rights in these circumstances implies a complete disregard for human dignity and the right to the free development of the pregnant woman whose pregnancy is not the result of a free and conscious decision, but the result of arbitrary, criminal acts against her in violation of her autonomy; acts that are penalized in the Penal Code. "

[135] The significance of C-355/06 for the present case is not that the Constitutional framework of Colombia is identical to that of Dominica. Rather, the decision is persuasive as it demonstrates the constitutional difficulty presented by an absolute prohibition which gives overriding weight to the protection of prenatal life without adequately accounting for circumstances in which continuation of a pregnancy may affect the fundamental rights of women. Accordingly, I find that sections 56 and 57 of the Act are not reasonably justifiable in a democratic society to the extent that they impose a blanket criminal prohibition on abortion without adequate exceptions to protect women's constitutional rights. Safeguarding gestational life is a legitimate objective but the criminalisation of abortion is not a suitable means of achieving that objective.

The measures must be rationally connected to the objective

[136] This leads me to the second stage of the proportionality test which requires the Court to consider whether the impugned measures are rationally connected to the stated objective of protecting prenatal life.

[137] While the Court accepts that, at a general level, criminalising abortion may be intended to deter women from terminating pregnancies and thereby advances the protection of prenatal life. The Court is not persuaded, however, that criminalisation necessarily operates as an effective deterrent. A blanket criminal prohibition, particularly one which admits only the narrow exception contained in section 8, may drive abortion into unsafe or unregulated contexts, thereby undermining rather than protecting legitimate state interests in health and safety.

[138] This concern is reflected in the observations of the CEDAW Committee, which has found that Criminal regulation of abortion serves no known deterrent value. When faced with restricted access, women often engage in clandestine abortions, including self - administering

abortifacients, risking their life and health. Criminalization, albeit with few exceptions, has a stigmatizing impact on women and deprives them of their privacy, self-determination and autonomy of decision, offending women's equal status, constituting discrimination. It also has a chilling effect on doctors, instilling fear for their own safety when providing medical assistance.

[139] Regional and international human rights bodies have likewise recognised that restrictive abortion laws violate women's rights where they disproportionately affect women and fail to account for their healthcare needs. The Inter-American Commission on Human Rights has recognised that restrictive abortion laws can perpetuate gender-based discrimination and undermine women's autonomy. Additionally, under CEDAW, restrictive abortion laws have similarly been considered as discriminatory where they deny women access to necessary healthcare services.

[140] Comparative jurisprudence demonstrates the difficulties associated with treating criminalisation as an effective means of protecting prenatal. In C-355/06, the Constitutional Court of Colombia recognised the legitimacy of protecting prenatal life but considered that criminalisation could not be assessed in isolation from its impact upon the fundamental rights and circumstances of pregnant women. The Court held that the state's interest in protecting prenatal life did not require an absolute criminal prohibition in every circumstance.

[141] In the circumstances, the Court is not satisfied that the criminalisation of abortion under sections 56 and 57 is rationally connected, in any meaningful or effective sense, to the objective of protecting prenatal life. The evidence and comparative experience suggest that criminalisation does not necessarily deter abortion and may instead displace it into clandestine and potentially unsafe circumstances.

Whether a less intrusive measure could have been used;

[142] The third stage of the proportionality analysis requires the Court to consider whether the means adopted impair the relevant constitutional rights no more than is necessary to achieve the legislative objective. This requires an assessment of whether less restrictive but equally effective measures were reasonably available to the State.

[143] In the present case, the Court is not satisfied that the statutory scheme meets this requirement. Sections 56 and 57 of the Offences Against the Person Act, read together with section 8, establish a near-absolute prohibition on abortion, permitting termination only where necessary to save the life of the pregnant woman. The legislation does not provide for exceptions in cases of rape, incest, severe foetal abnormality, or serious risks to physical or mental health, nor does it establish a regulatory framework permitting lawful and medically supervised termination in narrowly defined circumstances. In C-355/06, the Court considered the protection of prenatal life required the criminalisation of abortion and concluded that criminalisation was not indispensable, identifying less restrictive measures through which the state could pursue that objective, including sexual and reproductive education, access to contraception, measure promoting responsible parenthood, and appropriate medical and social interventions.

[144] Accordingly, the Court finds that the impugned provisions go further than is reasonably necessary and therefore fail the requirement of minimal impairment.

Whether a fair balance has been struck between the rights of the individual and the interests of the community

[145] In considering whether a fair balance has been struck between the rights of the individual and the interests of the community, guidance may be found from the observations of the Board in **Dominic Suraj and 4 others v Attorney General of Trinidad and Tobago**³⁶ and in the **Attorney General of Trinidad and Tobago v Akili Charles (No 2)**³⁷. The Board observed that;

"The proportionality approach for bringing into account both individual rights on the one hand and the general interest of the community on the other is aimed at ensuring that a balance is struck between the two. The stronger the public interest in issue, the greater the interference with individual rights which may be permitted without there being any violation."

[146] The Board further observed that, in a democratic society, it is primarily for Parliament to identify the public interest and the measures required to promote it. As Baroness Hale observed in Suraj; **"It is for Parliament in the first instance to strike the balance between individual rights and the general interest."**

³⁶ (2022)UKPC26

³⁷ [2022] UKPC 31

[147] It is accepted that the protection of prenatal life is an important public interest and that Parliament is entitled to a degree of deference in determining how best to pursue that objective. The Court also recognises that abortion raises complex moral, social, and religious questions on which reasonable persons may hold differing views.

[148] However, whilst Parliament is entitled to identify the public interest, it remains the duty of the Court to determine whether the measures adopted to advance that interest are consistent with the Constitution. The Court's duty therefore is to assess whether the balance struck by the impugned provisions places a disproportionate burden on the constitutional rights of women.

[149] In this case instant, it is without a doubt that although the protection of prenatal life is a matter of public concern, the burden imposed by the criminal prohibition falls exclusively upon women, because only women by their biological composition can become pregnant. Consequently, only women bear the physical, psychological and legal consequences of being compelled to carry a pregnancy to term according to sections 56 and 57 regardless of whether the pregnancy resulted from rape or incest or whether the foetus suffers from a severe abnormality. The legislation therefore places upon women the burden of giving effect to an interest that is said to be shared by the community as a whole.

[150] Having regard to the serious impact of the legislation, the absence of adequate exceptions, and the rights to freedom from discrimination guaranteed by the Constitution, the Court is not satisfied that a fair balance has been struck between the interests of the community and the rights of affected women. The burden imposed by the impugned provisions is disproportionate to the objective sought to be achieved.

[151] Having regard to the serious consequences of the impugned provisions, their discriminatory impact upon women, and in the absence of adequate exceptions, the Court is not satisfied that a fair balance has been struck between the protection of prenatal life and the constitutional rights of women.

[152] Accordingly, I conclude that sections 56 and 57 fails the final stage of the proportionality analysis and are not reasonably justifiable in a democratic society.

Reliefs #5 and #6 - Section 1(a) life, liberty, security of the person and the protection of the law – right to the protection of the law

- [153] The Claimants contend that the right to the protection of the law, as enshrined in section 1(a) of the Constitution of Dominica, is a fundamental and expansive constitutional principle grounded in justice and the rule of law. That it prohibits arbitrary or unfair government actions that deprive individuals of their constitutional rights and encompasses access to judicial remedies, and safeguards against irrationality, unreasonableness, and arbitrary exercises of power. They submit that the state has a positive obligation to secure the enjoyment of these rights, and failures to act or omissions that frustrate citizens' rights can constitute a breach of this protection.
- [154] The Claimants further submit that the protection of the law encompasses the principle of legal certainty, particularly in the context of criminal legislation. They argue that criminal offences must be formulated with sufficient specificity to avoid vagueness and ensure legal certainty to enable individuals to ascertain what conduct is prohibited and to prevent arbitrary or discriminatory enforcement.
- [155] The Claimants further rely in particular, on **Tysiac v Poland and R. v Poland**, in which the European Court of Human Rights emphasised the importance of an effective legal and procedural framework governing access to lawful abortion.
- [156] The Respondents on the other hand, submit that Governments including prosecuting authorities must operate according to established legal rules. In the instant case, they contend that what constitutes an offence under section 56 or 57 of the Act is determined by the terms of the legislation itself and not what the Director of Public Prosecutions or any member of the executive may propose. They submit that what constitutes an offence under section 56 or 57 of the OAPA is not a matter of judicial or prosecutorial discretion and that sections 56 and 57 of the OAPA are not impermissibly vague.
- [157] The competing submissions therefore make it necessary to determine the scope of the constitutional right to the protection of the law, in particular, whether that right encompasses the requirement that criminal laws be sufficiently certain to guard against arbitrary or irrational

state action. In doing so, a close look at Section 1(a) of the Constitution is required as well as the jurisprudence in this area.

[158] **Section 1(a)** of the Constitution guarantees to every person in Dominica regardless of race, place of origin, political opinions, colour, creed, or sex certain fundamental rights and freedoms, subject to respect for the rights and freedoms of others and the public interest. Among the rights expressly protected are the right to life, liberty, security of the person, and the protection of the law.

[159] Section 1(a) provides that ;

“Whereas every person in Dominica is entitled to the fundamental rights and freedoms, that is to say, the right, whatever his 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:

(a) life, liberty, security of the person and the protection of the law;

b) freedom of conscience, of expression and of assembly and association; and....”

[160] The Caribbean Court of Justice has repeatedly affirmed the broad and expansive nature of the right to the protection of the law. In **Maya Leaders Alliance v. Attorney General of Belize**³⁸, the Court described the right as “a multi-dimensional, broad and pervasive constitutional precept grounded in fundamental notions of justice and the rule of law.

[161] The Court explained that;

“The right to protection of the law prohibits acts by the Government which arbitrarily or unfairly deprive individuals of their basic constitutional rights to life, liberty or property. It encompasses the right of every citizen of access to the courts and other judicial bodies established by law to prosecute and demand effective relief to remedy any breaches of their constitutional rights. However, the concept goes beyond such questions of access and includes the right of the citizen to be afforded adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power”.(emphasis mine)

[162] The same principle was recognised in **Joseph and Boyce**³⁹ which examined the ambit of the right to protection of the law. The Court connected the right to the protection of the law with due process, procedural fairness and the rule of law and emphasised that;

³⁸ (2015)CCJ 15 (AJ)

³⁹ 2018)CCJ 19 (AJ)

"The protection of the law is therefore one of the underlying core elements of the rule of law which is inherent to the Constitution. It affords every person, including convicted killers, adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power. "

[163] An important aspect of the protection of the law in the context of criminal legislation is the requirement of legal certainty. In **McEwan v Attorney General of Guyana**⁴⁰ the Court concluded that;

"Vague statutes, fail to give sufficient notice to the public, lead to arbitrary and discriminatory enforcement and represent an unwarranted delegation to law enforcement. Criminal statutes which are vaguely drawn operate as a threat to the balance of power between the state and the individual. There is an added dimension of statutory certainty which is connected to the notion that governments must operate by rules. This serves to protect the autonomy of the citizens by setting forth, in a manner that is done publicly and in advance, the parameters of any proscribed activity"

[164] It follows therefore that the rights to life, liberty and security of the person protected by section 1(a) must be interpreted in light of their fundamental purpose of protecting the individual from unjustified state interference. In **R v Morgentaler**⁴¹, the Supreme Court of Canada recognised that these rights are expressed in broad and purposive terms and should be interpreted generously and purposively so as to enhance human dignity, autonomy, and physical well-being.

[165] The Court further established that state-imposed interference with a woman's bodily integrity and psychological well-being may engage the constitutional protections of liberty and security of the person. The Court recognised that criminal regulation of abortion may infringe a woman's security of the person by depriving her of control over her own body and thereby affecting her dignity and physical and psychological integrity. It further recognised that such restrictions may deprive a woman of control over their lives by interfering with their ability to make a fundamental personal decision as to whether or not to bear a child. This decision establishes the fact that state interference with reproductive decision making is capable of engaging the constitutional rights to liberty and security of person.

⁴⁰ 2018CCJ30(AJ)

⁴¹ [1988] 1 SCR 30 (Supreme Court of Canada).

[166] The connection between reproductive health and fundamental rights has also been recognised in international and comparative jurisprudence. In **CEHURD & 3 Others v Attorney General**⁴², the Ugandan Constitutional Court considered the relationship between the right to health and the right to life. Such authorities reinforce the broader principle that rights relating to health and reproductive decision making cannot be considered in isolation from the fundamental rights to life, liberty and security of the person.

[167] International human rights framework similarly the importance of protecting individuals against arbitrary or unjustified interference with their liberty, physical integrity and personal autonomy. Articles 3 and 9 of the Universal Declaration of Human Rights, recognise the rights to life, liberty and security of persons, while Articles 2, 3 and 9 of the International Covenant on Civil and Political Rights protect against arbitrary arrest or detention. These provisions, together with the broader protections contained in CEDAW, reinforce the importance of interpreting constitutional guarantees of liberty and security in a manner that protects individuals against arbitrary state interference.

[168] In applying the foregoing principles, It is necessary to determine first, whether the impugned sections impose restrictions on liberty or security that are arbitrary, disproportionate, or lack procedural safeguards, and, second, whether the protection of the law is thereby engaged. Sections 56 and 57 impose criminal liability for acts related to procuring a miscarriage. Section 8(1) further criminalises the intentional destruction of the life of a child capable of being born alive, with an exception for acts done in good faith to preserve the life of the mother. The existence of the exception demonstrates that the legislation recognises circumstances in which the protection of the woman's life may justify termination of a pregnancy. The question that arises is whether the statutory framework provides sufficiently clear and adequate protection where continuation of the pregnancy poses serious risks to the woman's psychological or physical well-being.

[169] The Claimants contend that the exception is narrowly framed and uncertain in its practical application. They rely on **R v Bourne**, in which the concept of preserving the life of the mother was interpreted in the context of the mother's physical and mental health. They submit , however, that the present statutory framework does not adequately address circumstances

⁴² Constitutional Petition No. 16 of 2011,

involving serious psychological distress, including trauma arising from rape or incest, severe mental anguish or other circumstances in which continuation of the pregnancy may have profound consequences for the woman's physical or psychological integrity.

[170] It is apparent that section 56 and 57 contain no exceptions and do not consider circumstances in which continuing a pregnancy may place a woman's psychological or physical health at risk. The absence of wider exceptions therefore, raises concern as to whether the statute provides adequate protection for her liberty and security of person. While these provisions seek to protect the life of the unborn, their application may significantly restrict a woman's ability to make decisions concerning her own health and well-being. The lack of guidance as to the circumstances in which a termination may be lawfully undertaken, may also create uncertainty in the enforcement of the provisions, including how sections 56 and 57 interact with other criminal offences, including manslaughter.

[171] Similar concerns arise from the potential overlap between child destruction under section 8(1) and offences under sections 56 and 57 raises similar concerns. For example, depending on the evidence presented, a jury may be required to determine whether the conduct falls within the offence of child destruction or within one of the offences under section 56 or 57, particularly where the evidence does not support a conviction for murder or manslaughter. The availability of different offences arising from substantially similar conduct may therefore create uncertainty as to the applicable offence if the evidence does not support a charge of child destruction. This flexibility, therefore, may result in inconsistent or arbitrary application of the criminal law and undermine the protection afforded by the right to the protection of the law.

[172] The importance of a clear and effective legal framework is further illustrated by the decision of the European Court of Human Rights in **A, B and C v Ireland**. The Court considered the effect of Ireland's abortion restrictions upon the applicants' private lives and emphasised the importance of an accessible and effective procedure for determining whether a woman was entitled to obtain a lawful abortion. The Court also noted that the absence of clear criteria and procedures created uncertainty concerning the circumstances in which a lawful abortion could be obtained.

[173] The foregoing authorities and discussions lead to the conclusion that the criminal legislation regulating abortion in Dominica is uncertain with no adequate safeguards against arbitrary or inconsistent application. In those circumstances, the legislation engages and infringes the constitutional right to the protection of the law. In the present case, the criminalisation of abortion, coupled with the absence of adequate safeguards and exceptions, imposes a serious interference with a woman's bodily integrity, autonomy and psychological well being and therefore infringes the right to security of the person.

Proportionality of the restriction

[174] Having determined that the Claimants have made a prima facie case that the right to the protection of the law, liberty and security has been contravened, the burden now shifts to the Defendant to justify the limitation of a fundamental rights and freedoms of women in the public interest. It is therefore necessary at this stage to consider whether the restrictions imposed by the impugned provisions satisfy the applicable constitutional standard. In this regard, the De Freitas test must be applied to determine whether the restrictions are proportionate to the objective sought to be achieved and whether the limitation is acceptable and demonstrably justifiable in a free and democratic society.

[175] The Court had earlier in this judgement considered the De Freitas test in detail. It is therefore unnecessary to repeat that analysis as the reasonings set out at Paragraphs 120 to 152 of this judgement remain relevant to the considerations of proportionality under this constitutional right. Having regard to that earlier consideration, the Court will proceed to consider in general terms whether the impugned provisions and the limitations imposed are proportionate to the legitimate objectives.

[176] There is no doubt that the protection of prenatal life and the protection of public morality is a legitimate and important aim. However, the question is whether the means chosen by the legislature, a near total criminal prohibition on abortion, subject only to a limited life-saving exception go further than is necessary to achieve that objective. The Constitution requires that where fundamental rights are restricted, the restriction must be carefully tailored and must impair those rights no more than is reasonably necessary. This demonstrates the constitutional difficulty presented by an absolute prohibition which gives overriding weight to

the protection of prenatal life without adequately accounting for circumstances in which continuation of a pregnancy may affect the fundamental rights of women.

[177] The authorities cited earlier establish that constitutional guarantee of protection of the law requires more than the existence of a criminal prohibition. It requires a legal framework that operates fairly, rationally, and with due regard for the rights and interests of those affected. Where legislation takes no account of circumstances involving serious risks to physical or mental health, pregnancy resulting from rape or incest, or fatal foetal abnormality, a legitimate question arises as to whether the restriction imposed is proportionate to the objective pursued.

[178] While the State is entitled to protect prenatal life, that interest must be balanced against the constitutional rights of women and girls. The comparative material considered in paragraphs 120 to 154 of this judgement, demonstrates that other jurisdictions have been able to protect prenatal life through regulatory frameworks that accommodate exceptional circumstances while still recognising the importance of that objective. This suggests that less restrictive means may be available. In those circumstances, the complete criminalisation of abortion, save where necessary to preserve the life of the mother, may impose a burden on liberty, security of the person, bodily autonomy, and the protection of the law that is greater than is reasonably necessary to achieve the State's aim.

[179] Accordingly, the restrictions imposed by sections 56 and 57 are disproportionate to the objective sought to be achieved. The limitation of the rights to liberty, security of the persons and the protection of the law cannot, in the circumstances identified above, be regarded as acceptable and demonstrably justifiable in a free and democratic society.

Sections 1(b) and 9 of the Constitution – right to protection of freedom of conscience

[180] The Claimants contend that the right to freedom of conscience, enshrined under **sections 1(b) and 9 of the Constitution**, is violated in so far as; (i) the Claimants and individuals similarly situated are forced to comply with beliefs that do not necessarily coincide with their conscience and (ii) the First-Named Claimant and similarly situated individuals are compelled

to assume motherhood without considering their personal beliefs, convictions and reproductive autonomy.

[181] The Defendant submits in response that freedom of conscience does not mean each person can act solely according to their own moral code in defiance of duly enacted law. Such an interpretation, it is submitted, would produce an untenable result, as individuals could seek to justify acts prohibited by laws on the basis of a sincerely held constitutional belief. The Defendant submits that laws restricting abortion are intended to prevent fatal violence to the unborn who are unable to defend themselves and uphold public morality.

[182] Against that background, the Court accepts that reproductive decision-making may engage profound moral, ethical, and philosophical convictions and that the inability to terminate a pregnancy may place a significant burden on individual conscience. The Court does not consider itself properly positioned to determine the correctness of competing religious or moral beliefs concerning abortion. The question before the Court is not which belief prevails, but whether the Act enacted to give effect to particular moral or societal interest, is inconsistent with the constitutional rights guaranteed to all persons. Furthermore, in light of the Court's earlier finding that the statutory prohibition on termination of pregnancy constitutes unjustifiable discrimination on the basis of sex and impermissibly interferes with bodily autonomy, the Court does not consider it necessary to determine the freedom of conscience claim as a separate and independent ground for relief.

[183] The essence of the constitutional wrong identified by the Court lies in the fact that the legislation imposes a gendered and coercive burden on women by denying them equal control over their reproductive capacity. This substantially addresses the Claimant's grievance, namely that the State has imposed its own moral judgment upon women in relation to a deeply personal decision concerning their bodies, health and reproductive lives.

[184] To the extent that the Claimants frame this as a violation of freedom of conscience, the Court considers the claim to be largely subsumed within the findings already made in relation to discrimination and bodily autonomy. It does not therefore give rise to any additional or independent basis upon which further relief is required. Accordingly, while the Court acknowledges the sincerity and importance of the conscience-based arguments advanced, it

declines to grant relief on freedom of conscience as a separate head of claim, as it would not alter the outcome already reached.

Relief #7 – order striking down sections 56 and 57 of the OAPA

[185] The Defendants contend that, having regard to paragraph 2(1) of Schedule 2 to the Constitution, the impugned provisions are protected by the savings clause and, in any event satisfy the applicable proportionality test. They submit that Sections 56 and 57 of the Act are constitutionally valid enactments of the Parliament of Dominica. It is also submitted that the Act is a pre-independence law.

[186] **Paragraph 2(1) of Schedule 2 of the Commonwealth of Dominica Constitution Order 1978 (“the savings clause provision”)** provides that;

“The existing laws shall, as from the 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.”

[187] The Defendant submits that such a provision, means that, the declarations sought by the Claimants, principally, that sections 56 and 57 of the OAPA are “null, void and of no effect” and should be struck down as being unconstitutional, are reliefs which the Court is unable to grant.

[188] On that basis, the Defendant submits that the issue for determination is not whether sections 56 and 57 are unconstitutional and should be struck down but whether those provisions can be construed so that they are compliant with the savings clause provision. The Defendant contends that the only proper course of action is for the Court, where constitutionally permissible, to adopt a construction of Sections 56 and 57 that is consistent with the Constitution rather than declare the provision null and void.

[189] In addressing this issue, guidance may be drawn from the decision of the Caribbean Court of Justice in **McEwan et al v Attorney General of Guyana**⁴³. In that case, the lower courts had rejected a constitutional challenge to section 53 of the Criminal Law (Offences) Act on the

⁴³ Supra 5

basis that the provision was protected by the Constitution's savings law clause and, as a pre-independence law, could only be altered through legislative action.

[190] The CCJ examined the operation and effect of Guyana's savings law clause, noting that such clauses were incorporated into Commonwealth Caribbean constitutions as part of the transition from colonial rule to independence. The Court considered the effect of Guyana's savings clause contained in Article 152 of the Constitution, which provided that nothing contained in or done under the authority of any pre-independence written law shall be held to be inconsistent with or in contravention of Articles 138 to 149 of the Constitution, which protect a range of fundamental rights.

[191] The CCJ acknowledged that the conventional approach had been to regard savings clauses as providing substantial protection to pre-independence laws from constitutional challenge. However, drawing upon its earlier decision in **Nervais v The Queen and Severin**, the CCJ emphasised that savings clauses pose significant challenges to constitutional supremacy and judicial review. The Court rejected an approach which would leave colonial era legislation effectively “caught in a time warp” and immune from constitutional review notwithstanding evolving understandings of fundamental rights.

[192] The CCJ stated that law and society are dynamic and that a constitution must be interpreted as a whole. Courts should avoid interpretations that hinder the protection of fundamental rights and should give effect to those rights unless there is an overriding public interest in limiting them. The Court further observed that, because of the potentially severe consequences of savings clauses on the protection of fundamental human rights, such clauses must be construed narrowly and restrictively.

[193] The CCJ in **McEwan** identified four broad and interlocking approaches that courts may adopt relevant to the application of a savings law clause. First, because of its potentially severe impact on the enjoyment of human rights, a savings clause must be construed narrowly and restrictively. Secondly, even where the clause is applied fully and literally, it protects only those laws that infringe the specific fundamental rights identified in the clause itself; it does not prevent a court from finding a pre-independence law invalid where it conflicts with other constitutional provisions or core constitutional principles. Thirdly, the Court observed that application of a savings clause may place the State on a collision course with its treaty

obligations. The Court noted the well-established principle that courts should, so far as possible, avoid an interpretation of domestic law that would place the State in breach of its international obligations. Fourthly, the Court considered the more contentious approach, supported by distinguished jurists, namely that courts should first apply the modification clause to the relevant pre-independence law before considering the application of the savings law clause.

[194] Similarly, in **Nervais v The Queen**⁴⁴, the CCJ rejected an interpretation of the general savings law clause in the Barbados Constitution which would permanently freeze colonial era legislation in its pre-independence form and place it beyond constitutional scrutiny. The Court rejected the “time warp” or absolute immunity approach but did not treat the savings clause as having no effect, rather it held that the clause must be interpreted narrowly and in harmony with the constitution as a whole, including the principle of separation of powers and the protection of fundamental rights. Where an existing clause is inconsistent with the constitution, the Constitution must prevail, and the existing law must be applied with such modifications as are necessary to bring it into conformity with the constitution.

[195] I am guided by the foregoing authorities and in light of those principles, I do not accept the Defendant’s submission that the mere fact that sections 56 and 57 in their present form, unjustifiably interfere with constitutionally protected rights. In particular, their operation places a disproportionate burden upon women and fails to provide adequate protection for their constitutional rights by restricting a woman’s ability to access abortion, with the only recognised exception being where the continuation of the pregnancy poses a threat to the woman’s health. In doing so, the provisions unjustifiably interfere with fundamental rights.

[196] The Court must therefore give effect to the Constitutional direction in paragraph 2(1) of Schedule 2 to the Constitution which does not simply preserve the existing law in the pre-independence state, but expressly requires that the existing law be construed with “**such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution**”.

⁴⁴ 2016 CCJ 19(AJ)

[197] In the circumstances of this case, I am satisfied that sections 56 and 57 of the Act cannot constitutionally continue to operate in their present form. The provisions must therefore be modified to the extent necessary to remove the constitutional inconsistency identified by the Court. In particular, the exceptions to the criminal prohibition must extend to circumstances in which the continuation of the pregnancy would result in serious infringement of the constitutional rights of women, including pregnancy resulting from rape or incest or cases of severe fatal foetal abnormality. Such a modification would also provide the necessary legal framework that healthcare professionals are able to perform their lawful duties without fear of criminal sanctions or other forms of reprisal.

Conclusion

[198] Accordingly, the Court concludes that section 56 and 57 are unconstitutional to the extent of their inconsistency. Relief No. 7 is therefore granted in part. The Court declines the Claimants' request to strike down sections 56 and 57 in their entirety. Instead, pursuant to paragraphs 2(1) of Schedule 2 of the Constitution, the provisions shall be construed and modified to the extent necessary to bring them into conformity with the Constitution as directed by the Court. This approach is consistent with the position stated by the CCJ in **Zuniga v the Attorney General of Belize**⁴⁵ where the Court explained that;

“... **the Constitution itself makes it clear that inconsistent laws are to be invalidated by the court to the extent of the inconsistency. This means that provided it is possible and feasible to save a law that may contain one or more inconsistent provision, a scalpel, rather than a machete is to be used by the court to sever that which is inconsistent**”

Disposition and Orders

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

- [1] Sections 56 and 57 of the Offences Against the Person Act violates the right to equality and non-discrimination guaranteed under section 13 of the Constitution of Dominica;
- [2] Sections 56 and 57 of the Offences Against the Person Act violate the right to liberty, security and pr of the law guaranteed under Section 1(a) of the Constitution of Dominica;

⁴⁵ (2014) CCJ 2 (AJ)

- [3] Sections 56 and 57 of the Offences Against the Person Act shall be modified as necessary to bring those provisions into conformity with the Constitution of Dominica and the fundamental rights and freedoms guaranteed therein;
- [4] The Court invites the relevant authorities to take the necessary legislative and regulatory measures to give effect to this judgement, preferably within 6 months; and
- [5] There shall be no order as to costs.
- [202] I wish to express my appreciation to all counsel for their helpful submissions and authorities, which have been of considerable assistance to the Court.

Zainab Jawara-Alami
High Court Judge



BY THE COURT

REGISTRAR(Ag.)

The court office is at Dame Eugenia Charles Blvd., Roseau Telephone Number ext. 266 3029, 4526, 3388 and 4535. The email address is registrydominica@gmail.com.