



UNDP- “Being LGBTI in the Caribbean- Regional Dialogue on the Role of the Judiciary”

The Honourable Mr Justice Winston
Anderson, Judge of the Caribbean Court
of Justice

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Address

By

The Honourable Mr Justice Winston Anderson, Judge of the Caribbean Court of Justice,

on the occasion of

**The UNDP’s Sponsored Webinar: “Being LGBTI in the Caribbean- Regional Dialogue on
the Role of the Judiciary”**

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Introduction

It is a great pleasure to be here with you today and I thank you for inviting me.

I was happy to accept your invitation, not least of all because it is a requirement for judicial officers to have an “understanding of people and society”.¹ I do not know enough about the LGBTI community (truth be told I had to look up the acronym!) but I am sure I will learn and know much more over the course of the next 90 minutes.

I was also pleased to participate in this discussion because speaking about the role of the judiciary in enforcing rights of the LGBTI community raises in an acute way an issue in which I am very interested namely, the location of law-making power in the society: who makes the law for the society; how is that law made; how is it best to change the law?²

Function of the Judiciary

The function of the judiciary is to settle disputes by faithfully interpreting and applying the laws of the State without fear or favor, affection or ill-will.³

¹ CCJ Agreement, Article IV (11).

² Justice Winston Anderson (2021) *The rule of law and the Caribbean Court of Justice: taking jus cogens for a spin*, Oxford University Commonwealth Law Journal.

³ Judicial oath (appendix to CCJ Agreement).

The Constitution

In interpreting and applying the laws, the Constitution is special. Why? Because, first, it is the supreme law of the land. The Constitution prevails over all other laws and other sources of law. Other laws that are inconsistent with the Constitution are void to the extent of the inconsistency.⁴

Second, the Constitution recognizes that **all persons** – whatever the community to which they belong - have certain fundamental rights. Consider the Preamble to the Belize Constitution which affirms that the nation of Belize is founded upon principles which acknowledge the supremacy of God and faith in human rights and fundamental freedoms, the dignity of the human person and equal and inalienable rights. Sections 3-19 of the Constitution then elaborate on the fundamental rights and freedoms, addressing life, liberty, security of the person and the protection of the law, protection for family life, personal privacy, the privacy of the home, and recognition of human dignity.

Methods of interpretation and application

At the risk of oversimplification there are two broad methods of interpreting and applying the provisions of the Constitution. Firstly, the literal interpretation applies the ordinary meaning of the words used by the framers of the law. However, where this approach presents ambiguity or absurdity, the court may resort to looking at the object and purpose of the law. This approach has the advantage of predictability but has the disadvantage that it could lead to the freezing of rights conferred to the specific era when the laws were adopted. Secondly, the ‘living tree doctrine’ bases interpretation on evolution and changes of society. This leads to interpreting constitutional rights as consistent with modern societal norms and has the advantage of flexibility but also has the disadvantage that it could lead to law-making by the judiciary, the least democratic of the branches of government.

⁴ See e.g., sect. 2 of Belize Constitution, sect. 2 of The Constitution of the Republic of Trinidad and Tobago, sect. 1 of the Constitution of Barbados.

It seems to me that fidelity to the judicial oath to faithfully interpret and apply the law of the State in which the judge exercises judicial office must mean that the extent of the rights and the enjoyment of such freedoms will depend on the precise statement of those rights and freedoms in the specific State concerned. A great deal turns upon the actual wording used in the Constitution (and other laws), particularly as regards the applicability of international human rights norms. The only exception presents in the case of *jus cogens* norms which are overriding and must be applied regardless of wording of the law.

Illustration from the cases

In *Tomlinson v TVJ and CVM*,⁵ the appellant argued that the failure of the 2 major TV stations in Jamaica to air his video promoting tolerance for homosexual men breached his constitutional right to freedom of speech and his right to disseminate information on any media, as guaranteed by section 13 of the Charter of Fundamental Rights and Freedoms.⁶ This argument did not prevail in the Supreme Court and the Court of Appeal dismissed the appeal on the basis that the TV stations were private entities. However, the appellants contend that these courts did not adequately consider the argument that the TV stations were making use of the public airwaves to facilitate their operation and as such, arguably, owed a duty to the members of public to facilitate their freedom of expression and sharing of opinions. It will be interesting to see the stance taken by the Privy Council as this point is being appealed to the Board.

Contrariwise, section 18 of The Charter uses clear and unambiguous words to preserve the traditional definition of marriage as a union of one man and one woman. It would therefore be more difficult to argue for a constitutional right to same-sex marriages, although one must never underestimate the ingenuity of counsel. The Cayman Islands case of *Day v Cayman Islands*,⁷ confronted the issue of whether the right to marry extended to same-sex couples. Notwithstanding their evident sympathies to the arguments of the appellants, the 3-member Court of Appeal

⁵ [2020] JMCA 52.

⁶ S.13(3)(c) and (d) *The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act*, 2011

⁷ CICA No. 9 of 2019

considered that actual wording of the Bill of Rights made clear that the institution of marriage does not extend to same-sex couples. The court acknowledged the use of the ‘living tree doctrine’ as it relates to the shift in “social mores as far as same-sex marriage is concerned” and acknowledged the importance of interpreting the Constitution in a broad and purposive way when it comes to citizens’ rights. However, the Court found that the words “the right of every unmarried man and woman of marriageable age...freely to marry a person of the opposite sex” could not be made to admit same -sex marriages.

Courts in other jurisdictions have found that the wording of the Constitution allows for decisions more favourable to LGBTI interests. In *Attorney General v Caleb Orozco*,⁸ the claimant sought to challenge the constitutionality of section 53 of the Belize Criminal Code. This section states that “*every person who has carnal intercourse against the order of nature with any person or animal shall be liable to imprisonment for ten years.*” Section 53 therefore criminalized consensual sexual intercourse between adults of the same sex. The Court of Appeal of Belize upheld the earlier 2016 decision of Chief Justice Benjamin of Belize, finding that the criminalization of homosexual conduct breached the constitutional guarantees in two regards; (1) there was a violation of the rights to privacy, dignity and equality before the law, and (2) the prohibition of discrimination on the ground of sex on the basis that ‘sex’ included sexual orientation.⁹

The Court of Appeal agreed with the Chief Justice that the criminalization violated the rights to privacy, dignity, and equality before the law, which are all protected by the Constitution. With its application and interpretation of a wide range of international and comparative law decisions, the Court of Appeal became the first appellate tribunal in the Caribbean to arrive at this conclusion.

Another famous case that addressed the constitutionality of laws inimical to the interests of the LGBTI community was *McEwan v The Attorney General of Guyana*.¹⁰ This case was centered around four appellants who were “arrested, detained, charged, convicted and punished essentially

⁸ Civil Appeal No 32 of 2016

⁹ Civil Appeal No 32 of 2016

¹⁰ [2018] CCJ 30 (AJ)

for cross-dressing in public.”¹¹ The appellants were found to be in breach of section 153 (1)(xlvii) of the Summary Jurisdiction Offences Act¹² which stated that a person commits an offence if,

“being a man, in any public way or public place, for any improper purpose, appears in female attire; or being a woman, in any public way or public place, for any improper, appears in male attire.”

The trial judge found that section 153(1)(xlvii) was precluded from human rights challenge on the ground that *“the Constitution’s savings clause immunizes laws enacted during the colonial era against constitutional challenge.”*¹³ The judge also disagreed with the appellants that section 153(1)(xlvii) was too vague and uncertain to be regarded as “law”. Lastly, the judge found that the section did not infringe on the appellants’ right to freedom from discrimination as it applied equally to men and women and that decision was upheld by the Court of Appeal.

At the CCJ, it was held that section 153(1)(xlvii) should no longer be regarded as saved from being declared inconsistent with the Constitution. There had been various amendments to that law relating to cross-dressing since Guyana’s independence in 1966 (admittedly primarily in relation to penalties) so that applying a restrictive approach to the savings clause, the law was no longer in its original state to be “saved” by the clause.¹⁴ It was therefore amendable to evaluation for conflict with the Constitution and when so evaluated, it was found to be inconsistent with the fundamental rights guaranteed under the Constitution.

As it relates to the discriminatory nature of section 153(1)(xlvii), the substantive approach taken in *Roches v Wade* was applied. *Roches* concerned a school’s policy of dismissing teachers who had children out of wedlock.¹⁵ The stance taken by the school stating that the policy was applied equally to both male and female teachers was struck down by Conteh, CJ. He highlighted that the policy necessarily had a disproportionate impact female on unmarried teachers more who would inevitably be visibly pregnant as opposed the men who were biologically incapable of being pregnant and therefore being visibly pregnant. This case was used to show that although it

¹¹ [2018] CCJ 30 (AJ)

¹² S.153 (1)(xlvii) Summary Jurisdiction Offences Act, Cap. 8:02

¹³ [2018] CCJ 30 (AJ)

¹⁴ On this issue, see also *Watson v R* (Jamaica) [2004] UKPC 34.

¹⁵ Action No. 132 of 2004 (Belize).

theoretically applied to equally to men and women, “section 153(1)(xlvii) has a disproportionately adverse impact on transgendered persons, particularly those who identify with the female gender.” The section reinforced the stereotype and stigmatization attached to those who do not conform to traditional gendered clothing. Lastly, the choice of attire was found to be an act of expression. The court highlighted that “a person’s choice of attire is inextricably bound up with the expression of his or her gender identity, autonomy and individual liberty.” Section 153(1)(xlvii) was found to pose a direct threat to transgendered persons and those who express themselves differently. Arguably, this approach was made easier in *McEwan* because the court under the directive in Section 39(2) of the Constitution of Guyana to “pay due regard to international law, international conventions, covenants and charters bearing on human rights.”¹⁶ In other words, the decision depended heavily on international human rights to interpret the Constitution to protect the interests of the LGBTI community.

Conclusion

The constitutional rights to equality, respect and dignity belong to the LGBTI community as to any other in the society. Courts strive to uphold the rights of the community within the context of the wording of the constitution and laws they are sworn to uphold. But even after the making of judicial decisions that are favorable to the community, there have been reports that these judicially declared rights have not always been respected by members of the society. This could suggest that while an important source for the declaration of rights, the issue of ensuring the equality, respect and dignity of the community is more deep-seated than can be accessed by isolated judicial decisions. Legislation can provide more generalized standards and facilitate education of the rights of the various sectors in the society. That may be a more challenging method of law-making, involving as it does democratic engagement and discourse, but in the end, it may be the most efficient and legitimate method of achieving the objectives of the LGBTI community.

¹⁶ S.39(2), *Constitution of Guyana*, Cap. 1:01