REDEFINING MARRIAGE – US SUPREME COURT AND OTHER RELATED LGBT DECISIONS

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On 26th June 2015, in the case of **Obergefell et al v Hodges, Director, Ohio Department of Health et al**[1]**,** the Supreme Court of the United States ruled, by a majority of 5 to 4, that the Fourteenth Amendment required a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licenced and performed out of State. There were 16 petitioners before the Court, comprising seven same sex couples, male and female, and two men whose same sex partners had died. The respondents were State officials of the States of Ohio, Tennessee, Michigan and Kentucky. Some of the petitioners claimed the right to marry, and some had been married in other States and sought legal recognition of their marriages. The laws of the respondent States defined marriage as a union between one man and one woman. The petitioners had succeeded in each of the District Courts, but the Court of Appeals had reversed their decisions.

The legal basis of the claims was the Due Process Clause of the Fourteenth Amendment, which states that no State "shall deprive any person of life, liberty, or property, without due process of law". The Amendment has a wide reach: the majority noted that "the fundamental liberties protected by this clause include most of the rights enumerated in the Bill of Rights.. In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." [2] The cases cited included **Eisenstadt v Baird**[3]**,** in which the Court upheld the right of unmarried people to have access to contraceptives; and **Griswold v Connecticut**[4]**,** where it held that the Constitution protected a "right to privacy", and struck down a State law which prevented any person from using any instrument for the purpose of preventing conception**.**

These two precedents also related to an issue on which strong religious opinions were held. The Massachusetts statute which was struck down in the **Eisenstadt** case included the criminalization of the provision of contraceptives to unmarried people in a chapter headed "Crimes against Chastity, morality, decency and good order''. The US Supreme Court's approach in such cases

[1] 576 US (2015)
[2] Ibid, page 10
[3] 405 US 438
[4] 381 US 470

was to "exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them respect".[5]

The Constitutions of the Caribbean countries have a different form of expression of fundamental from the Constitution of the US. They set out specific rights which are guaranteed and which supersede Parliament's laws, subject to limits: "save only as may be demonstrably justified in a free and democratic society", in the language used in the Jamaican Charter.[6] In all of these jurisdictions the Court is called upon to make a judgment, or strike a balance, as between the rights of the individual and the legitimate needs of a democratic society. The essence of the courts' role is similar in both US and Caribbean jurisdictions.

The Court in **Obergefell** was deeply divided as to where the balance should be struck. The majority judgment, delivered by Justice Kennedy, started by examining the nature and history of the institution of marriage:

> "From their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage. The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life. Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations.[7]

After references to Confucius and Cicero, the court noted that all the writing about marriage was based on the understanding that marriage is a union between two persons of the opposite sex. "That history is the beginning of these cases. The respondents say that it should be the end as well." "The petitioners acknowledge the history but contend that these cases cannot end there". "Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect – and need – for its privileges and responsibilities".

The court referred to some of the cases before it. James Obergefell himself had lived with his partner John Arthur in Ohio for two decades. John had a debilitating disease, and the partners resolved to marry before he died. They married in Maryland, where same sex marriage was legal, but he died three months later in Ohio. Because of the Ohio laws, James could not be named as his surviving spouse. "By statute, they must remain strangers even in death, a state-imposed separation John deems "hurtful for the rest of time".

[55] Obergefell, page 10
[6] Constitution of Jamaica, section 13(2)
[7] Obergefell, page 3

The court referred to the changing interpretation of marriage over history, from marriages arranged by parents based on financial concerns, to the doctrine of coverture which treated man and woman as a single male dominated legal entity, to the recognition that women have their own equal dignity.

> "New dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process."[8]

The court then looked at the history of attitudes in the US towards the rights of gays and lesbians. It noted that while for much of the 20th century homosexuality was treated as an illness, in recent years psychiatrists and others have recognized that sexual orientation is "both a normal expression of human sexuality and immutable". The court itself had changed its view, from **Bowers v Hardwick** in 1986[9] which upheld the constitutionality of the criminal laws against sodomy, to **Lawrence v Texas** in 2003, holding that laws making same-sex intimacy a crime "demean the lives of homosexual persons"[10]

The **Lawrence** case brought US law into line with that of many respected courts whose judgments carry huge weight in the analysis of constitutional rights in the Caribbean courts. In **Dudgeon v United Kingdom**[11] the applicant Jeff Dudgeon, a gay man living in Belfast, claimed that the laws against buggery and gross indecency violated his right to "respect for his private and family life" under Article 8 of the European Convention on Human Rights. In that time, 1981, when Northern Ireland had its own Parliament, there was intense strife between Protestants and Roman Catholics. But one thing they could agree upon was that gay men offended against God's law. So the Northern Ireland Parliament refused to follow the rest of the UK which had decriminalized homosexual acts in 1967.

I was proud to have taken Jeff's case to the European Court of Human Rights in Strasbourg. The court of 19 judges found by a majority of 14 to 5 that his right under Article 8 was indeed violated. The UK Government was obliged to intervene and override the Northern Ireland Parliament. It was a classic example of the primacy of the human rights of a despised minority, over the will of the majority expressed in Parliament. It is this tension, between what is for the courts as the guardians of the Constitution, and what is for the legislature as the elected representatives of the people, which is at the heart of the **Obergefell** judgments, and which remains at the heart of the debate over the buggery laws in the Caribbean.

The essence of the ECHR's decision in **Dudgeon** was:

[8] Ibid, page 7
[9] (1986) 478 US 186
[10] (2003) 539 US 558 at 575
[11] Application no. 7525/76, 22 October 1981

> "The maintenance in force of the impugned legislation constitutes a continuing interference with the applicant's right to respect for his private life (which includes his sexual life) within the meaning of Article 8.1. In the personal circumstances of the applicant, the very existence of this legislation continuously and directly affects his private life… Either he respects the law and refrains from engaging – even in private with consenting male partners - in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution."

In South Africa in 1998, the new Constitutional Court gave the same issue an in-depth investigation, in **National Coalition for Gay and Lesbian Equality v Minister of Justice**[12], and unanimously decided that the common law offence of sodomy was inconsistent with the Constitution of South Africa, and was invalid. The court relied on the inclusion of "sexual orientation" in the list of grounds on which unfair discrimination was prohibited.[13] But it also relied on the rights to dignity and privacy which are embedded by the Constitutions of the Caribbean. As to dignity, the court looked at the history of South Africa and said:[14]

> "Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity."

As to privacy, the court made an eloquent analysis of the centrality of private relationships in our lives:[15]

> "Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy."

In India, in the case of **Naz Foundation v Government of Delhi**[16] the High Court of Delhi held in 2009 that the law introduced by the British rulers of India prohibiting "carnal intercourse against the order of nature" was a violation of the rights to dignity and privacy, and were

[12] (1998) CCT 11/98, 9 October 1998

[13] Section 9 of the Constitution of South Africa . The full list is wider than any known to me: "race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth" It reflects the inclusive ideals of the post apartheid South Africa..

[14] National Coalition case, supra, para 27.

[15] Ibid, para 32

[16] Case No 7455/2001

discriminatory against homosexuals as a class. But in December 2013 the Supreme Court of India overruled the decision[17], holding that it was constitutionally unsustainable. It was for Parliament to change the law, not the courts. The same tension about the roles of the two branches of government emerged again. The Supreme Court, consisting of two judges, was dismissive of the jurisprudence of other countries:[18]

> "In its anxiety to protect the so-called rights of LGBT persons and to declare that Section 377 IPC violates the right to privacy, autonomy and dignity, the High Court has extensively relied upon the judgments of other jurisdictions. Though these judgments shed considerable light on various aspects of this right and are informative in relation to the plight of sexual minorities, we feel that they cannot be applied blindfolded for deciding the constitutionality of the law enacted by the Indian legislature."

So we have the US, Europe, South Africa going one way; India another. What about our Caribbean? On 10th August 2016 Benjamin J in the Supreme Court of Belize delivered judgment in the case of **Caleb Orozco v Attorney General of Belize[19].** The relevant statute provided 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". Benjamin J held that the provision contravened the constitutional rights of the applicant to dignity, privacy and equality. He struck out the words "with any person or" in the statute. His judgment on the role of the court as against the National Assembly was clear:[20]

> "It needs to be made pellucid that this Claim stands to be decided on the provisions of the Belize Constitution and in this regard, the Court stands aloof from adjudicating on any moral issue. The source of the Court's remit is firmly grounded in the Constitution itself which reflects the separation of powers. The Claimant has approached the Court on the basis of alleged violations of stated fundamental rights provisions in Part II of the Constitution and the Court is tasked by section 20(1) to inquire into same. The Supreme Court is the designated guardian of the rights conferred under the Constitution. It cannot shirk from such responsibility by asserting that any change to legislation is matter best left to the legislature. To do so would be to act in defiance of the mandate of the Constitution itself."

No doubt there will be appeals which may last years. It worries me how long it all takes in countries with limited resources. The case in India was filed in 2001 and finally determined in 2013. The Belize case took from 2010 to 2016 to reach a first instance judgment. A similar case

[17] Koushal v Naz Foundation, Civil Appeal No 10972 of 2013, and other cases, December 2013
[18] Ibid, at paragraph 52
[19] Claim No 688 of 2010, 10 August 2016.
[20] Ibid, paragraph 53

in Jamaica was filed on behalf of Maurice Tomlinson in 2015. I hope I live long enough to read the first judgment of the CCJ on the issue.

Coming back to **Obergefell**, the court cited a case which resonated with me, because it ruled that a ban on interracial marriages was unconstitutional. In the aptly named case of **Loving v Virginia**[21], Richard Loving and Mildred Jeter had married in the District of Colombia and set up home in Virginia, only to be charged and convicted under a law entitled "Punishment for Marriage":

> "If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years."

The trial judge justified the law as being in accordance with God's will:[22]

> "Almighty God created the races white, black, yellow, malay and red, and He placed them on separate continents. And, but for the interference with His arrangement, there would be no cause for such marriage. The fact that He separated the races shows that He did not intend for the races to mix."

The court in **Obergefell** commented that "the nature of injustice is that we may not always see it in our own times".[23] The majority discussed four principles in holding that same sex couples may exercise the right to marry:

(1) The right to personal choice regarding marriage is inherent in the concept of individual autonomy.
(2) The right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals.
(3) The right to marry safeguards children and families and thus draws meaning from related rights of childrearing, procreation and education. The majority noted that many same-sex couples provide loving and nurturing homes for their children, both biological and adopted.
(4) Marriage is a keystone to our social order, "the foundation of the family and society, without which there would be neither civilisation nor progress"[24]

The Court accepted that democracy was the appropriate process for change, so long as the process does not abridge fundamental rights:[25]

[21] (1967) 388 US 1
[22] Ibid, at page 3
[23] Obergefell, supra, page 11
[24] Ibid, page 16
[25] Ibid, page 24

> "The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act."

In conclusion the majority said:[26]

> "No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right."

The dissenting judges were trenchant in their defence of the rights of the legislature. Chief Justice Roberts began by saying[27] that "this court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have the power to say what the law is, not what it should be." He described the majority judges' four principles as having no basis in principle or tradition, except for "the unprincipled tradition of judicial policy-making". The late Justice Scalia talked about "the hubris reflected in today's judicial putsch". The majority opinion was "couched in a style that is as pretentious as its content is egoistic." But even he accepted that the power of the legislature was qualified:[28]

> "Except as limited by a constitutional prohibition agreed to by the People, the States are free to adopt whatever laws they like, even those which offence the esteemed Justices "reasoned judgment".

For those who try to find a sure path through this judicial storm, I commend the approach and language of the South African Constitutional Court in **Minister of Home Affairs v Fourie.**[29] Marie Fourie and Cecilia Bonthuys were two women who had lived together in a loving relationship for more than a decade, and wanted to get married. The Minister claimed that marriage in South Africa was "a union of one man with one woman, to the exclusion, while it lasts, of all others".

[26] Ibid, page 26
[27] Ibid, dissent, page 2
[28] Ibid, dissent, page 8
[29] Case No CCT 60/04, 1st December 2005.

The Court held that the common law definition of marriage was inconsistent with the Constitution, and gave the South African parliament one year to amend the various statutes on marriage. The judgment of Sachs J, with which all the justices agreed, is striking in its statements about the right to be different, and about the relevance of the right to freedom of religion".[30]

> "A democratic, universalistic, caring and aspirationally egalitarian society embraces everyone and accepts people for who they are. To penalise people for being who and what they are is profoundly disrespectful of the human personality and violatory of equality. Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgement and acceptance of difference….The acknowledgement and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. South Africans come in all shapes and sizes…. Accordingly, what is at stake is not simply a question of removing an injustice experienced by a particular section of the community. At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting."

In the **Fourie** case, as in **Orozco** in Belize and in the pending case in Jamaica, church organisations had interested party status and argued that to alter the institution of marriage would violate religious freedom. Sachs J recognized the important role of religious bodies and the sincerity of their beliefs on the issue, and continued:[31]

> "It is one thing for the Court to acknowledge the important role that religion plays in our public life. It is quite another to use religious doctrine as a source for interpreting the Constitution. It would be out of order to employ the religious sentiments of some as a guide to the constitutional rights of others. Between and within religions there are vastly different and at times highly disputed views on how to respond to the fact that members of their congregations and clergy are themselves homosexual. Judges would be placed in

[30] Ibid, paragraph 60
[31] Ibid, paragraph 92

> an intolerable situation if they were called upon to construe religious texts and take sides on issues which have caused deep schisms within religious bodies."

And a little later[32]

> "In the open and democratic society contemplated by the Constitution there must be mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognise the sphere which each inhabits, not to force the one into the sphere of the other. Provided there is no prejudice to the fundamental rights of any person or group, the law will legitimately acknowledge a diversity of strongly-held opinions on matters of great public controversy. I stress the qualification that there must be no prejudice to basic rights. Majoritarian opinion can often be harsh to minorities that exist outside the mainstream. It is precisely the function of the Constitution and the law to step in and counteract rather than reinforce unfair discrimination against a minority. The test, whether majoritarian or minoritarian positions are involved, must always be whether the measure under scrutiny promotes or retards the achievement of human dignity, equality and freedom."

I have cited from many authorities at length because I admire the eloquence, the sincerity, and the application of intellectual rigour to human situations, which is to be found in the leading judgments in this field. I believe that the scale tips heavily in favour of recognizing the rights of the minority and not leaving it to Parliament. In principle, the decisions in the cases of **Lawrence, Dudgeon, National Coalition, Orozco, Fourie,** and **Obergefell** should be followed in the Caribbean.

However if I were to bring a case in the Caribbean on behalf of a gay man who was charged with buggery or gross indecency with his adult consensual partner, or a lesbian couple who wanted to marry, I would have added problems, in some countries at least. Trinidad and Tobago, Guyana, Barbados and the Bahamas have still retained a general savings clause in their constitutions, which precludes judicial scrutiny of acts done under the authority of laws in force at the time that the constitutions came into force. The laws against sexual activity between men were introduced by the British long before independence. These clauses have been criticized by the Privy Council. "Savings clauses were intended to smooth the transition, not to freeze standards for ever."[33]

The Privy Council in the mandatory death penalty cases showed ingenuity in circumventing them, finding that in Jamaica the relevant law in force had been amended so that it was not covered by the savings clause: **Watson v R.**[34] Indeed a minority of four judges would have

[32] Ibid. para 94
[33] **Matthew v State** [2004] UKPC 33 at [69]
[34] [2004] UKPC 34

found a broader way round the savings clause by relying on the power given in our constitutions to modify existing laws.[35]

I find it shocking that some countries still retain a provision which was designed to prevent Caribbean jurists from challenging laws passed in the colonial era, and limits the free development of our human rights jurisprudence. I hope that the CCJ will find a way round them. It is anomalous that a gay man in Belize could freely challenge the law, whereas in Barbados he would have to leap the savings clause hurdle.

In Jamaica, the general savings clause was left out of the Charter on Fundamental Rights and Freedoms passed in 2011; but specific savings clauses were included in order to preclude any challenge to laws in force relating to sexual offences, obscene publications or offences regarding the life of the unborn.[36] The new Charter also saved any law restricting marriage to one man and one woman, and declared[37]:

> "No form of marriage or other relationship… other than the voluntary union of one man and one woman may be contracted or legally recognized in Jamaica."

In the recent leading work on "Fundamentals of Caribbean Constitutional Law"[38], the authors (who included Justice Saunders of the CCJ) described these as "targeted shut-out provisions", and criticized them in strong words:

> "These clauses are the antithesis of fundamental rights' protection, and disrupt the coherence or integrity expected of a fundamental constitutive instrument. Their disabling effect is heightened in that some of these provisions do not merely save old laws, but speak to the future as well. The modified general savings law clause in section 13(12) covers only a handful of laws dealing with three topics – as opposed with its predecessor which covered the whole corpus of pre-1962 laws – yet it is more sinister because if targets or disproportionately targets or disproportionately impacts identifiable persons and groups."

Despite the many obstacles to the recognition of same-sex relationships in the Caribbean, I remain confident that change for the better will come. The compassionate logic of the judgments from around the world, including South Africa and Belize where the cruelties of the past still leave their scars, are beacon lights to a more accepting Caribbean society and to a more caring judicial philosophy. In the end it boils down to a recognition of the right to love, and to express that love through sexual attraction and marriage. As we all claim it for ourselves, and Richard Loving claimed it for himself and Mildred Jeter, and John Obergefell claimed it for himself and

[35] **Matthew v State**, supra, and **Boyce v R** [2004] UKPC 32
[36] Constitution of Jamaica, section 13(12)
[37] Ibid, section 18(2)
[38] Fundamentals of Caribbean Constitutional Law, by Tracy Robinson, Arif Bulkan, and Adrian Saunders (2015), Sweet & Maxwell, page 245-6

his deceased partner, we will I believe grant it to the men and women of the Caribbean who are also in love with someone of their own gender.