

THE PRIVY COUNCIL (JCPC) HINDERS PROGRESS OF LGBTI+ RIGHTS IN THE CARIBBEAN REGION

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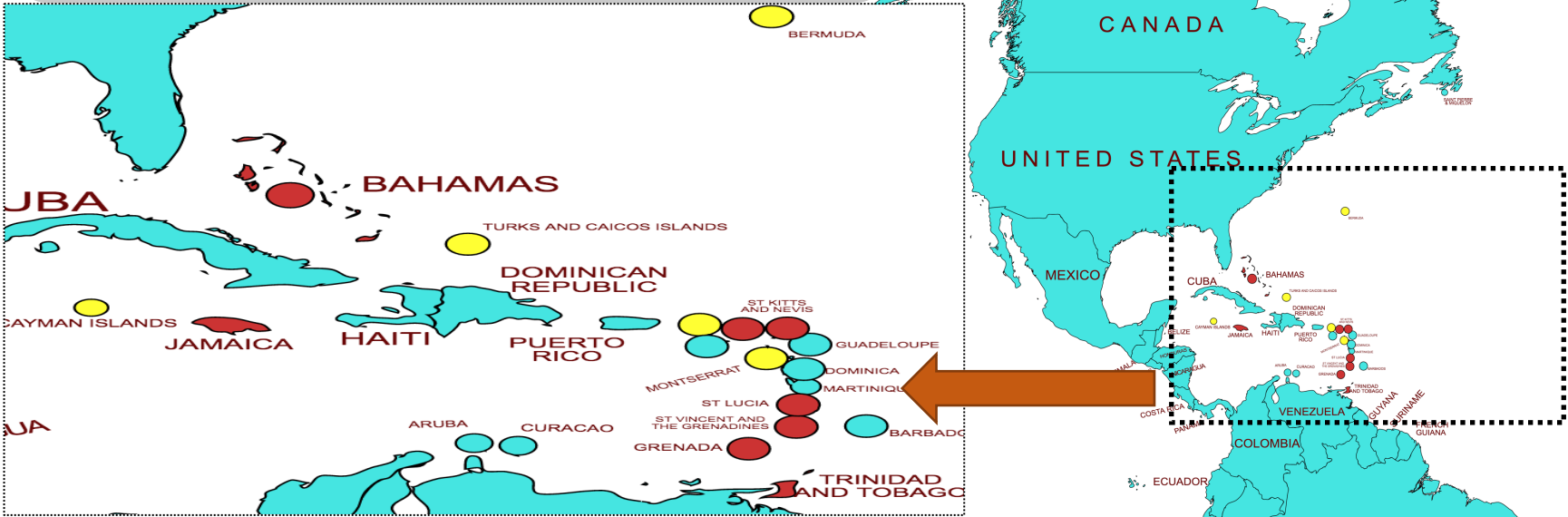
D.A.T.A.

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OVERVIEW

- Introduction: why and why now?
 - Research: LJ Raznovich and ER Zaffaroni *The human right to respect sexual orientation and gender identity in the Caribbean and Latin America - Current situation and perspectives* (IHR San José 2021). Available at: <[Report Human Right to Respect to SOGI Caribbean and Latam](#)> (March 2021)
- Cases Studied = JCPC hinders progress of LGBTI+ rights
- Why JCPC is wrong:
 - as a matter of principle; and
 - as a matter of law.
- Way forward out of this mess

AMERICAN HUMAN RIGHTS SYSTEM & LGBTI+ RIGHTS



Privy Council
 ■ Discrimination / Criminalisation
 ■ Segregation?

- IACHR
- USA and Canada
- Caribbean Court of Justice
- ECHR – colonial territories *
- JCPC?

Why and why now?

THE JCPC HINDERS PROGRESS OF LGBTI+ RIGHTS

Indirectly

- Endorse criminalisation and discrimination in perpetuity of LGBTI people – setting back laws to 1967



Directly

- Provides for discrimination SOGI



Segregation

- On grounds of sexual orientation – setting back laws to 1896!

- ***Chandler [2022] – C’ed Boyce, Matthew [2004] and Pinder [2002] – Saving clauses - constitution prohibits the court to rely on BoR to invalidate a colonial law but the enactment revokes colonial laws and reinstates their legal force subject to being modified to comply with the enactment***
 - Anti-sodomy laws (1533 by Henry VIII) would be immune from constitutional scrutiny by the judiciary of an independent nation in 2022 **at perpetuity.**
 - Many Anti-LGBTI laws – (AG OF T&T 27 laws) would fall into this category as well
 - *R’ed Roodal v T&T [2003] UKPC 78 / Contrary to CCJ’s decisions in Nervais and MacEwan [2018] and Bisram [2022]*
- ***Surratt [2007] : ‘sex’ cannot be construed to include sexual orientation –***
 - Contrary to *Egan v Canada [1995] 2 SCR 513 / McEwan v Guyana [2018] CCJ 30 / Bostock v. Clayton County (Georgia) 590 U.S. __ (2020)*
- ***Day and Boddin-Bush [2022] and AG of Bermuda [2022] provide for segregation in that LGBTI+ people are not entitled to equality***
 - Following *Plessy v Ferguson 163 US 537 (1896)* on grounds of race.

Why JCPC is wrong

Principle

- **Saving Clause**
 - Colonial Laws supra constitutional - *Boyce** and *Matthew* [2004] / *Chandler* [2022]
 - Colonial laws never die - *Pinder* [2002]
- **Equal Marriage - Day [2022] and AG Bermuda [2022]**
 - Cancel devolution / self-gov
 - Cancel equality for LGBTI+ people
 - Cancel secular principle of law

**Boyce:*

Per Lord Hoffmann: *"It does not matter how degrading or inhuman these laws are, their immunity is complete."*

**Day and AG Bermuda:*

LGBTQI+ people are not entitled to equality of treatment ... because these jurisdictions are different in that religious views and majoritarian ruling are to be elevated over and above values such as human dignity and equality.

Why JCPC is wrong

Law

- the “*living tree*”, which established that constitutions are organic and must be read and construed in a “*large and liberal*” manner to adapt to changing times - *Edwards* [1930] - Canada
- Generous and purposive interpretation of bills of rights ... Carefully focusing on the language rather than the intention of the drafter - *Reyes* [2002] - Belize
- Strict and narrow interpretation of derogations from human rights - *R v Hughes* [2002] St Lucia
- ***Surratt v T&T* [2007]** : ‘sex’ cannot be construed to include sexual orientation.
- ***AG Bermuda* [2022]**: “Board cannot discern any indication of any legislative intention that” the constitution of Bermuda should confer any greater right in any relevant respect than those conferred by the ECHR.
- ***Day* [2022]/ *Matthew* [2004] / *Chandler* [2022]**: Broad interpretation of derogations from HHR— in that by means of constitutional interpretation rewrites constitutional clauses with effect of oppressing minorities in perpetuity.

Summary

- The British judiciary - JCPC - has never delivered a decision to further LGBTI rights in the Caribbean
 - it did not refrain from interfering, but actively did intervene and stop in its tracks every local judicial progress regarding LGBTI rights delivered by Caribbean home-grown judges in the last 15 years.
- The JCPC endorsed in 2022 criminalisation and discrimination for the foreseeable future for Trinidad and Tobago and Jamaica
- The JCPC held in 2022 that the the UK Parliament intended to provide a constitution to Bermuda and the Cayman Islands with a defective equality principle
 - Allowing the territory to segregate in perpetuity a minority based on an immutable personal characteristic (i.e. sexual orientation) and yet protecting religious views or political ideas which are choices and are changeable.

WAY FORWARD OUT OF THIS MESS FOR LGBTI+ RIGHT

- **The JCPC is a creation of the UK Parliament - The Privy Council Act 1833 – UK government could amend the 1833 Act with the effect of restricting its competence**
- **The JCPC is a foreign/extra-continental court – Are Jamaica / T&T and the other 6 countries ‘independent nations’ when one of its three branches of government is outsourced to a foreign / extra continental power?**