

# Recent Legal Developments in the Caribbean

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- What are the priorities for action?
- Are Caribbean legislatures falling behind other organs of government
  - Development of anti-discrimination norms *outside* legislatures
  - Litigation, challenging laws based on higher order norms
  - Are referenda the answer to law reform on tough moral controversies?
- Some opportunities for legislatures

# Priorities for Action

Global Commission on HIV and the Law (2012)

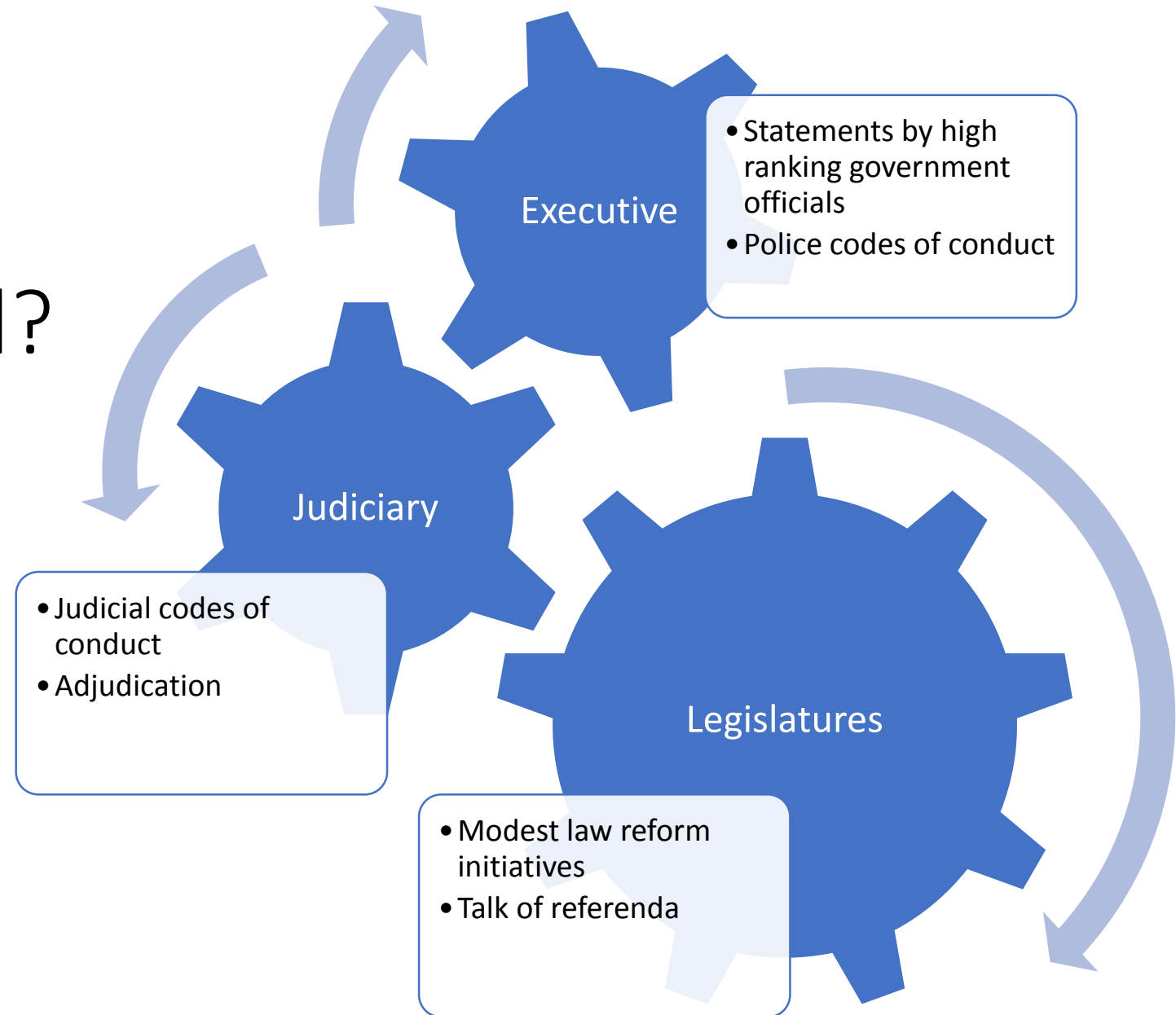


- HIV related discrimination
- Criminalisation of HIV transmission, exposure and non-disclosure of HIV status
- Key populations at increased risk of HIV (people who use drugs, sex workers, men who have sex with men, transgender people, prisoners, migrants)
- Gender-based violence and disempowerment of women
- Children and youth
- Intellectual property law and access to treatment

# Legislative developments

- Little development on HIV related discrimination
- Limited developments in key populations, particularly people who use drugs, but not wide-ranging
- Some developments on gender based violence (Barbados' recent reform to DV legislation, ongoing debate in Jamaica) with difficult issues such as marital rape, definition of rape and sexual intercourse
- Some developments on children and youth, especially in Trinidad and Tobago with reformed children's laws and establishment of Children's Authority

# Are legislatures falling behind?



More vibrant development in antidiscrimination norms and ‘justice for all’ *outside* parliaments

Only two or three Caribbean constitutions at independence even mention the word *equality*!

- Codes of judicial conduct based on ‘equality before the law’ and principles of diversity and difference in our societies
- Diversity codes for the police
- Equal Opportunities Commission recommends the expansion of discrimination grounds under the Equal Opportunities Act beyond race, ethnicity, religion, sex, marital status, origin and disability to include sexual orientation

# CCJ Code of Judicial Conduct

- A judge shall strive to be aware of, and to understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes (“irrelevant grounds”).
- 5.2. A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds.
- 5.3. A judge shall carry out his or her duties with appropriate consideration for all persons be they lawyers, parties, witnesses, lawyers, court staff or judicial colleagues while upholding the paramountcy of adjudication according to law.
- 5.4. A judge shall not knowingly permit court staff or others subject to the judge’s influence, direction or control to differentiate between persons concerned, in a matter which is before the judge, on any irrelevant ground.
- 5.5. A judge shall require lawyers in proceedings before his or her court to refrain from manifesting, by words or conduct, bias or prejudice based on irrelevant grounds. This requirement does not preclude legitimate advocacy where any such grounds are legally relevant to an issue in the proceedings.

# Jamaica Judicial Conduct Guidelines

- 6.2 Judges should strive to be aware of and to understand diversity in society and differences arising from various sources, including, but not limited to gender, race, colour, national origin, religious conviction, culture, ethnic background, social and economic status, marital status, age, sexual orientation, disability and other like causes.
- 6.3 Judges should not, by words or conduct, manifest bias or prejudice towards or against any person or group.
- 4) Judges should not be influenced by attitudes based on stereotype, myth or prejudice. They should, therefore, make every effort to recognise, demonstrate sensitivity to, and correct such attitudes.
- 5) Judges should not hold membership in any organisation that practices discrimination of any kind.
- 6) Judges shall not engage in speech, gestures, or other conduct that would reasonably be perceived as bias or prejudice, including bias or prejudice based upon ethnic or national origin, gender, age, disability, social status, health status, religion, opinions, preferences, marital status or any other discriminatory attitude or expression that violates human dignity or constitutes sexual harassment.



# Jamaica Constabulary Force Policy on Diversity, August 25 2011, Force Orders No 3351, Par 1 Sub No 1

- Diversity 'is a concept that recognizes individuals and groups from a broad spectrum of demographic and philosophical differences. It includes the acceptance of persons without prejudice and discrimination, irrespective of their religion, ethnicity, sexual orientation, class, colour, creed or political ideology.'
- An operating protocol is created as soon as it is established that any individual or group was victimized because of their religion, ethnicity, sexual orientation, class, colour, creed or political ideology.

# Litigation: Challenging laws based on higher order norms

- Tomlinson challenge in the CCJ to immigration laws restricting entry of 'homosexuals' using free movement treaty obligations
- Orozco claim that 'carnal intercourse against the order of nature' violates the constitution of Belize to the extent that it prohibits consensual sex between adults
- McEwan and others claim that the crime of cross-dressing for an improper purpose violates the Guyana Constitution

# Litigating laws criminalising consensual sex

- One group of researchers found that the number of countries that do *not* outlaw sodomy has almost doubled from 60 countries in 1975 to 103 countries today.
- Former British colonies disproportionately comprise the states that still have such laws.
  - If you had these laws as a colony, far more likely to retain those laws today
- Researchers found that in civil law countries, sodomy laws were revoked by parliaments/legislatures 97% of the time, while in common law (former British) countries, 6 of every 10 repeals of such laws were through the courts

# Caleb Orozco v Attorney General of Belize

- Orozco is the Executive Director of UNIBAM, an organisation with a mandate related to reducing stigma and discrimination related to HIV/AIDS
- Chief Justice cited the expert report of Prof. Chris Beyrer of the Centre for Public Health and Human Rights, John Hopkins University that criminalisation and stigmatisation ‘complicate the health needs of MSM and act as severe barriers to individual country and global responses to the HIV epidemic.’
- The Chief Justice cited the expert report provided by Prof Brendan Bain, that there has been no published data to support the hypothesis linking decriminalisation with reduction in infection rates among MSM.
- CJ concluded that ‘given the state of the evidence before the Court, it is more likely than not that the retention of section 53 as it relates to MSM hinders rather than aids testing and treatment as a matter of public health’

# Ruling of the Supreme Court of Belize

- S 53 of the Criminal Code violates the constitutional rights to dignity, equality, non-discrimination and privacy
- Neither public health nor public morality were sufficient reasons to limit these rights as s 53 does.
  - Though both were potentially good reasons to limit rights, they did not meet the high standards of being rationally connected to the restriction on the rights and proportionate in limiting the right no more than necessary to achieve the legitimate objective

# Litigation is counter-majoritarian in theory but can produce wide ranging participation

- Litigation is a process that can produce wide ranging participation by different actors in court and out of court
  - Courts facilitate a wide cross sector of parties to make submissions in court
- The standards used by the courts to evaluate rights and to protect the rights and freedoms of others are fairly transparent and produce parallel debates in court and in public
- Positions evolve over time, are not static
- Governments play an integral role (see eg decision of AG in Belize not to appeal the substance and outcome in Orozco)

Are referenda the answer to law reform on controversial public debates? Are referendum true reflections of the wishes of the people?

- Cost
- Voting along party lines
- Only two options, yes or no
- Many questions asked at the same time
- Low voter turnout
- Inadequate consultations

Laurence Morel concludes that the ‘prevailing orientation among democratic theorists is not very referendum orientated’ and tends more towards strengthening ‘participatory mechanisms ensuring deliberation’ to complement representative democracy.

- Laurence Morel, ‘Referendum’ in Michel Rosenfeld, Andras Sajó, *The Oxford Handbook of Comparative Constitutional Law* (OUP 2013) 501, 505-7.

# Low voter turn out, mixed views

- **St Vincent and the Grenadines in 2009** made an unsuccessful attempt to replace the 1979 independence constitution
  - A referendum vote with approval by at least two thirds of the voters was needed to introduce a new constitution
  - Only 43.13 per cent of voters approved the draft Constitution.
  - Only 54 per cent of voters participated in the referendum, while voter turnout in the 2005 and 2010 elections was between 62 and 64 per cent.
- **Bahamas June 2016**, vote on gender equality and other issues
  - Voter turnout 47%, yes ranging from 21.4% to 38.7%
- **Grenada Referendum on 24 November 2016** on 7 separate amendments, 2/3 majority required
  - 43% in favour of CCJ Appellate Jurisdiction
  - 23.6% in favour of the amendments to the Bill of Rights
  - Approximately 22 000 voted from a total of 70 000



# Public Opinion nuanced

Caribbean  
Development  
Research Services  
(CADRES) 2013  
Studies in Barbados,  
Guyana and Trinidad  
and Tobago

- 58.9% think the buggery/sodomy should be maintained as is, and a slightly higher portion want the laws enforced (61%).
- 10.2% of the sample wanted the laws changed and also desired the non-enforcement be continued.
- Only 15 – 22 per cent of interviewees thought discrimination on the basis of sexual orientation was ‘acceptable’.
- 55 to 71 per cent agreed that homophobia could be harmful

# How Barbados achieved the Barbados Family Law Act 1981

- The first English speaking Caribbean country to give wide recognition in family law to persons in heterosexual cohabiting relationships.
  - More comprehensive than any other law in the English speaking region
  - Encountered tough moral questions about 'living in sin'
- Creation of a National Commission on the Status of Women and Ad Hoc Committee on the Family in 1976
  - Civil society led, strong legal expertise but multidisciplinary
  - Headed by Norma Forde (UWI Law), Deputy, Patricia Symmonds, Headmistress St. Michael's School, included school teachers, sociologist, accountant, Anglican priest, NGO representation, probation officers
  - Consultations with experts, stakeholders and the public
  - Churches supported the reforms
- Had strong parliamentary leaders to lead debates in parliament

# Opportunities for legislatures

- Institute a process for reviewing colonial laws and enacting antidiscrimination laws, as a start
  - Constitutions give parliaments a special role in upholding its norms, especially where courts cant because of savings law clauses
- Strengthen participatory methods of law reform: process matters as much or more than outcome
  - Referenda isn't necessarily the strongest participatory method
- Institutional strengthening of human rights institutions and accountability frameworks for enforcement of existing human rights norms
  - Possible scaling up of ombuds offices to national human rights institutions (NHRIs)
- Deepen oversight of executive branch activities and budget allocations related to HIV and the law
  - Tabling parliamentary questions, questioning during committee hearings, sectoral debates