Conflict of Dignities - Discrimination at God's Will

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Introduction

All human beings are born free and equal in dignity and rights. Equality amongst them is a principle that has pervaded Western moral thought for centuries, influencing both international and regional human rights instruments. Every instrument, whether international or regional, requires the State to respect and to ensure to all individuals within its territory and subject to its jurisdiction the "guaranteed" rights, without distinction of any kind such as race colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[2]

In November 2005, the Catholic Church published the Instruction Concerning the Criteria for the Discernment of Vocations with regard to Persons with Homosexual Tendencies in view of their Admission to the Seminary and to Holy Orders ("the Instruction").[3] The question that the Instruction addresses 'is whether to admit to the seminary and to holy orders candidates who have deep-seated homosexual tendencies'.[4] The Church plainly answers that 'while profoundly respecting the persons in question, [it] cannot admit to the seminary or to holy orders those who practice homosexuality, present deep seated homosexual tendencies or support the so called gay culture.'[5] It appears that at face value the Church is discriminating on the basis of sexual orientation, but is this a constitutionally prohibited form of discrimination, as opposed to a mere distinction, or rather difference in treatment and more importantly, do the courts have the power to make such a distinction?

Discrimination on the Basis of Sexual Orientation & the Bahamian Constitution

In an Advisory Opinion of the Inter – American Court of Human Rights it was established that for the purposes of the case before them, discrimination could be broken down into distinction in treatment and discrimination. The phrase distinction in treatment will be used to

mean acts that are legal because they are proportionate, reasonable and objective while discrimination will be reserved for the opposite, acts which violate ones constitutionally protected human rights acts that exclude, restrict or privilege acts that are unreasonable and subjective.[6]

The connection between protection of human rights and freedom from discrimination are inseparable. Individuals who fall into the category of persons with deep rooted homosexual tendencies could present a rebuttable presumption that the church is, within the stated definition of the word, discriminating. Discrimination on the basis of sexual orientation has come to be accepted, in legal systems around the world, as a prohibited ground of discrimination. In *Ghaidan* v *Godin-Mendoza*,[7] the House of Lords was asked to decided the rights of cohabiting same sex couples in respect of statutory tenancies. It held that there was no justification for the difference in treatment between heterosexual couples and homosexual couples and consequently the difference in treatment should be eliminated. Speaking on discrimination, Lord Nicholls of Birkenhead acknowledged that:

> *In many circumstances opinions can differ on whether a suggested ground of distinction justifies a difference in legal treatment. But there are certain grounds of factual difference which by common accord are not acceptable, without more, as a basis for different legal treatment. Differences of race or sex or religion are obvious examples. Sexual orientation is another. Unless good reason exists, difference such as these are properly stigmatised as discriminatory.*[8]

This view that discrimination based on sexual orientation is a distinction that can not be relied upon is one also shared by Caribbean judges. In the recent case of *Suratt and Others* v *The Attorney General of Trinidad and Tobago*,[9] the court was asked to asses the constitutionality of the Equal Opportunities Act, ("EOA") of Trinidad and Tobago. One of points at issue was whether,

> *By specifically excluding sexual preference or orientation from the definition of 'sex', persons who allege discrimination on these grounds are denied the equality of treatment under the law that is guaranteed by sections 4(b) and 4(d) of the Constitution.*[10]

The EOA had interchangeably used sex and gender, while only according sex a definition; this definition excluded any complaints

based on sexual orientation. Archie J came to the conclusion that it was the word gender that in its societal context included sexual orientation, while sex was merely the biologically based separation of the species into males and females. He then expressly stated that being a homosexual, one's sexual orientation, was not a crime. There is no evidence given in the case at hand towards the rebuttable presumption that orientation is something that is a matter of preference or choice.[11] Only on the basis of a compelling justification can a decisions maker make a decision that would be in breach of an individuals human rights, any law or decision that does this 'has to be justified on the basis of some reasonable distinction between those who are differently treated'. Archie J continues by coming to the conclusion that sexual orientation *cannot* by itself, afford such a distinction as, 'it is a subjective distinction based on prejudice and stereotyping with no countervailing factors to justify it.'[12] To exclude a certain group of people based on such subjective criteria, from relying on an anti-discrimination act is in itself discriminatory and does not accord these individuals equal protection under or rather before the law. It is a breach of their fundamental right to protection of the law.[13] We are accorded these rights not because we are homo or heterosexual but simply because of our inherent dignity as human beings.

Treating an individual differently based solely on their sexual orientation is discriminatory, rather than a simple case of distinction in treatment. What could be a bit problematic in this scenario is that Commonwealth Caribbean constitutions do not expressly include sexual orientation within their Bill of Rights. Of greater significance is that the older constitutions, those of Barbados, Jamaica and the Bahamas, do not expressly include sex, through which sexual orientation can be derived, in their specific discrimination provisions. Sex is included in the pre-amble to the Bill of Rights, which until recently had been considered to contain no justicible rights; it had been considered only declaratory in nature.[14]

The preamble to the Bill of Rights section, of the Bahamian Constitution reads,

> *Whereas every person in The Bahamas is entitled to the fundamental rights and freedoms of the individual, that is to say, has 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

(c) protection for the privacy of his home and other property and from deprivation of property without compensation, the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms.'[15]

The recent *Boyce and Joseph* judgment,[16] delivered by the Caribbean Court of Justice, seems to have blown the idea that preambles are declaratory out of the water. The issue addressed by the court was that of the nature and extent of a condemned man's rights, most notably his right to protection of the law. The right to protection of the law is enshrined in sec 11 of the Barbados constitution, which is analogous to sec 15 of the Bahamian constitution; both clauses are considered to be preambles to the Bills of Rights within these jurisdictions.

The court began by establishing an interesting link between what they called the 'detailed provisions' and the rights mentioned in the preamble. They provided that the 'detailed rights' that followed the preamble were connected to the rights mentioned in the preamble, either expressly or through implication. For example, even though the right to freedom from slavery of any kind is not expressly provided for in sec 15, it can be derived from the mention of everyone being guaranteed the right to liberty and security of the person, rights which are found in the preamble. Here is where the right to protection of the law becomes problematic.

The only express connection between the right to protection of the law mentioned in the preamble and in the detailed right is the wording of a marginal note in sec 18 of the Barbados constitution, which corresponds with sec 20 of the Bahamian Constitution. As redress is only available for rights found in sec 12 – 23 (the detailed provisions) the question the court must then answer is,

> *whether the court's power to enforce the right to protection of the law, and to grant a remedy for its breach, is limited to contraventions of section 18, that being the only one of the detailed sections which by its subject matter and its marginal note is linked to the protection of the law.*'[17]

Section 18 of the Barbados Constitution is not like any other rights provision included within sections 12-23. It provides no points of clarity as to the scope of the right to protection of the law, neither are there any discussions as to the limitations that are afforded this right. Unlike the other rights found within that section it does not attempt to give a definition of what protection of the law means. It describes the impact that protection of the law would have, on well, the law, and how protection of the law would affect civil and criminal proceedings. Consequently, section 18 can not be considered as detailing an exhaustive list as to the meaning and scope of the right to protection of the law. As the court notes,

> *Indeed, the right to the protection of the law is so broad and pervasive that it would be well nigh impossible to encapsulate in a section of a constitution all the ways in which it may be invoked or can be infringed.*[18]

It is because of these very points that the court feels that to leave the right to the protection of the law to only be challengeable in the purview of section 18, 'would be a very poor thing indeed.'[19]

The right to due process of law found in the constitution of Trinidad and Tobago and the right to secure protection of the law are, in the eyes of the court, one and the same. Procedural fairness in the eyes of the court is a rudimentary principal that is a pervasive element of both due process of law and protection of the law. Consequently, a condemned man has the fundamental right to procedural fairness as part of the right to protection of the law and therefore has a right to apply and receive constitutional redress on the matter, placing a duty on the court to deliver an appropriate means of remedy should this right be breached. The court defined law to mean 'the concept of law itself and the universally accepted standards of justice observed by civilized nations which observe the rule of law. The clause [due process of law] thus gives constitutional protection to the concept of procedural fairness....'.[20] As discrimination based on the grounds of sex is found only in the preamble to the Bill of Rights, it is argued here that in the same way that, 'the protection of the law is so broad and persuasive'[21] that to leave it out of the prevue of the redress clause, 'would be a very poor thing indeed,'[22] so too discrimination on the basis of sex is of paramount importance.

'The principle of equality and non-discrimination is fundamental for the safeguard of human rights in both international and domestic law... There is an inseparable connection between the obligation to respect and guarantee human rights and the principle of equality and non-discrimination...'[23] In the words of Lord Styn,

> *Discrimination is an insidious practice. Discriminatory law undermines the rule of law because it is the antithesis of fairness. It brings the law into disrepute. It breeds resentment. It fosters an inequality of outlook which is demeaning alike to those unfairly benefited and those unfairly prejudiced.*[24]

Freedom from Discrimination, it is argued, is as fundamental to the workings of the constitution and the efficacy of Bills of Rights as protection of the law and procedural fairness. Discriminating on the basis of sex is discriminating on the basis of something over which an individual has no choice, discriminating on the basis of sexual orientation is but a mere derivative of this point. Ones sexuality is an important part of human development and, by default, human dignity. The principle of anti-discrimination is an all pervasive, necessary aspect of democracy. Really, what point is there in having human rights, if the ability to be arbitrarily and unreasonably excluded from the exercise of such rights, based on an aspect that one arguable cannot choose exists?

The Catholic Church's primary reason for disbarring persons with homosexual tendencies from ordination is because of their inability to achieve affective maturity. Affective maturity in the eyes of the church allows an individual to, 'correctly relate to both men and women, developing in him a true sense of spiritual fatherhood towards the Church community that will be entrusted to him.'[25] Those with deep seated homosexual tendencies,[26] in the eyes of the Church, are objectively disordered and once again they repeat the idea that, 'such persons, in fact, find themselves in a situation that gravely hinders them from relating correctly to men and women.' The Instruction continues by saying that, 'One must in no way overlook the negative consequences that can derive from the ordination of persons with deep seated homosexual tendencies.' Nowhere in the edict is there any description of these negative consequences and why the Church believes these persons to be objectively disordered. There is no indication of objectivity. What seems to be contradictory is that the Church acknowledges that these persons 'must be accepted with respect and sensitivity. Every sign of

unjust discrimination in their regard should be avoided. They are called to fulfill God's will in their lives.'[27] It seems this principle works as long as God's will does not manifest itself in these individuals wanting to become priests.

Discriminatory acts are arbitrary in nature. The Church is of the opinion that situations where one's homosexual tendencies are, 'only a transitory problem' should be accorded different treatment than tendencies of a more permanent nature. In the case of transitory homosexual tendencies, once they have been clearly overcome for a period of three years then the individual will be allowed to be ordained.

As with most discussions there are two sides to every story, all differences in treatment do not automatically equal discrimination. Differences in treatment that amount to exclusionary acts which are reasonably based on objective and justifiable criteria will not be accorded the label of discriminatory. The Church would be of the opinion that their actions are not discriminatory, but rather a difference in treatment. Freedom of Conscience and Expression, two constitutionally provided rights allow for the church to relegate its faith, 'to organize and carry out worship, teaching, practice and observance, and [the ability] to act out and enforce uniformity in these matters.'[28] In Western constitutional democracies, freedom of expression, along with freedom of religion are fundamental constitutional rights 'which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order.'[29]

Freedom of Expression

An essential attribute of human autonomy is the liberty to express the thoughts and beliefs that are perceived to be true. The right of free speech is thought to be protective of some of our most basic human rights, most notably the right of conscience.[30] Freedom of expression finds its value in being the fundamental mechanism of the search for truth at both an individualistic and societal level.[31] The ability to participate in the uncensored reading and listening that freedom of expression aspires to attain allows us to create this liberty. A free people, created with the help of freedom of speech, are a fundamental aspect of a democracy; it is in essence the definition of 'democratic' when speaking about a democratic society.

The ability of a citizen of a country to make unhindered and educated choices is an indispensable prerequisite for the efficacy, acceptability, and legitimacy of democratic self – governance.[32] Freedom of expression ensures the candor of the public forum, or as it is oft referred to, the public sphere.[33] The public forum can therefore be considered the centre of rational debate within a society, the metaphysical space, in the words of Prof. McIntosh, in which issues of general concern are thrashed out. Freedom of expression strives to ensure that this discussion of the concerns, complaints and at times the illogically biased conclusions (often aired via talk shows) of the community are vented publicly without state interference.

Freedom of Conscience

The history of freedom of conscience in the Bahamas, and indeed the greater Caribbean, has been disturbingly quiet. Rarely contested, a definition, or rather a judicial interpretation of the right, and how it interacts with other constitutional rights is difficult to locate. Accordingly, a look at other jurisdictions and how they have interpreted similar freedom of conscience clauses may offer some insight into how Commonwealth Caribbean courts could choose to interpret their own. However, before delving into the jurisprudence of another legal system, a brief analysis of Caribbean jurisprudence is required.

Forsythe v the Director of Public Prosecutions et al,[34] which discussed the constitutionality of the Jamaican Dangerous Drug Act, is one of the few. The applicant, a Mr. Dennis Forsythe, alleged that the Act contravened his right under section 21 (1) of the Jamaica Constitution. Mr. Forsythe also alleged that he was being hindered in his enjoyment of his freedom of conscience. Mr. Forsythe contended that marijuana and the chillum pipe are integral elements of his Rastafarian faith, used for the unlocking of the "power within" and thereby allowing the user to find Jah God. He likened the use of ganja by Rastafarians to the taking of the Eurachrist by Christians.

The court commenced its discussion by briefly restating the law in question and summarizing the arguments of the applicant. Following this the court immediately jumped into a discussion, albeit a brief one, about the constitutional limitations on the freedom of conscience in Jamaica, namely a limitation made in the interest of public health. After this short discussion on that aspect of the limitation the court then

moved to the application of the savings law provision on the laws in question, holding, in essence, that even if the limitation was of an illegal nature, the statute was still protected by the savings law clause of Jamaica because the Dangerous Drugs Act was enacted in 1924, making it a law that existed before the creation of the constitution. Within the *Forsythe* case the judges referred to the decision of *R v Big M Drug Mart*,[35] the first Canadian case to adjudicate on the extent of the freedom of conscience clause in the Canadian Charter of Rights and Freedoms. What seemed to be lacking is the in-depth analysis that should be accorded to a case of such stature before them. They particularly failed to examine the nexus between the freedom to believe and the freedom to express said beliefs.

In the courts examination of the right to freedom of conscience, they began their discussion with an exploration of what it means to live within a free society. Dickson J, writing for the majority, mentioned that a truly free society should be able to accommodate a wide diversity if tastes, beliefs and cultures. Freedom really then is a synonym for the absence of coercion or constraint. A person compelled by the action of the state or another person to choose a course of action or a lifestyle that without this interference they would not have chosen is not really free. The court explicitly said that 'the essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal and the right to manifest religious belief by worship and practice or by teaching and dissemination.'[36]

After establishing what freedom of conscience and religion meant, the court went into an analysis of how the Charter should be interpreted. The correct approach to interpretation of fundamental rights and freedoms is a purposive one. An analysis of the purpose of the right must be taken in light of the interest it is meant to protect. In scrutinizing the purpose of the right reference must be made 'to the character and the larger objects of the Charter itself to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms, with which it is associated within the text of the Charter.'[37]

When the court is weighing a right against a piece of legislation, the court must pay attention to the purpose and effect of the legislation

because '[both] an unconstitutional purpose [and] an unconstitutional effect can invalidate legislation.'[38] Every piece of legislation has a purpose. This purpose is accomplished through the implementation and operation of the Act, in essence its effect. Purpose and effect are not mutually exclusive. If the purpose of the Act is found unconstitutional, there is no need to examine its effects, for even if the effects were found *intra vires* by the court it would still not be sufficient to save the legislation in question. In the words of the court '[it would be very] difficult to conceive of legislation with an unconstitutional purpose, where the effects would not also be unconstitutional.'[39]

Consideration of the purpose of the legislation is important in according rights their full weight and protection, as 'the assessment by the courts of legislative purposes focuses scrutiny upon the aim and objectives of the legislature and ensures they are consonant with the guarantees enshrined in the Charter.'[40] If the legislation fails the purpose test, there is no need to consider further its effects, since it has already been demonstrated to be invalid. In short, the effects test will only be necessary to defeat legislation with a valid purpose; effects can never be relied upon to save legislation with an invalid aim.

Within this process of scrutinizing, a generous as opposed to a legalistic interpretation should be accorded the right, so that the individual to whom the right is afforded would be allotted the full benefit of the Charter. A judge, though, does of course have to be careful not to overshoot its boundaries, coming to conclusions that are beyond the correct, philosophical, linguistic and historical contexts of the Charter. The court, in discussing the historical basis of freedom of conscience in Canada, pointed out that the right was a fundamental aspect of a democratic society and essential to the ability of a free people to exercise her autonomy.

With the implementation of the Charter, it has become the right of every Canadian to work out for himself or herself what his or her religious obligations should be (if any) and it is not for the State to dictate. Along with these rights, comes the ability to enforce these rights, the ability to apply for judicial review of a decision made by a body.

Judicial Review

Judicial review can be defined as the power of the judiciary to, 'review laws decisions, acts and omissions of public authorities in order to ensure that they act within their given powers'.[41] While the power of judicial review may not be expressly provided for in Commonwealth Caribbean Constitution outside of the redress clause, it can be implied from the various supreme law clauses of respective Caribbean Constitutions.[42] They declare that the constitution is the supreme law of the land and any law found inconsistent with the constitution either in whole or in part will be held to be *ultra vires* the constitution to the extent of the inconsistency.[43] In essence, it is the duty of the judiciary to make sure that parliament makes law for the good governance of the people in accord with the constitution. But if we look closely at the stated definition of judicial review, it is said to be a review of the decisions, acts and omissions of a public authority; leading to the question that has been the primary focus of most judicial review cases, the apparent dichotomy that exists between private and public law, that of whether the entity in question is a public authority amenable to judicial review, or a private body whose decisions are not.

In *LJ Williams* v *Smith and Att Gen* the court was asked to decide whether the Chief Immigration officer was for the purposes of judicial review a public authority,[44] in answering the question Justice Bernard proscribed the factors that in his opinion should be noted when considering whether an entity is a public authority, he first acknowledged that there has never been a definitive meaning given for public authority in Caribbean Constitutions. Traditionally it was considered to be an entity that was statute based or rather of statute origin, even with this traditional approach the definition still has been accorded to natural persons. Bernard J continues by establishing that in deciding whether the description of public authority can be given to an entity, in this case the Chief Immigration Officer, he must:

> take into account his duties , powers and functions under the law and more particularly whether there under he is endowed with coercive powers, for these are the attributes which to my mind determine whether or not the particular individual is a public authority for the purpose of the constitutional guarantee.[45]

Bernard J within his judgment concluded that his opinions were supported by the decisions of the Privy Council in *Thornhill* v *Attorney General of Trinidad and Tobago,*[46] where they quoted Lord Diplock speaking in *Maharaj* v *Att Gen Trinidad and Tobago,*[47] who was of the opinion that when examining the notion of public authority what must be taken into consideration is that it encompasses, ' local as well as central authorities and including any individual officer who exercises executive functions of a public nature.' Bernard J's addition of an element of coercion adds a new criteria, so to speak, to what should be considered when examining whether an entity can be subscribed as a public authority. It has been argued that the addition of this element of coercion is unnecessary and leads to manifest absurdities in case law, allowing for decisions as seen in *Rambachan* v *Trinidad and Tobago Television*[48] where it was decided that a television company has coercive powers simply because it was a state owned monopoly and therefore its actions were open to judicial review.

The real challenge to the doctrine or rather the definition of what is a public authority arises when the actor in question does not lie clearly within the realm of state action. Professor Demerieux expounded on two concepts used by the courts to solve this dilemma, 'public function analysis whereby the private actor is seen as fulfilling a public function and the 'nexus analysis' in which the state is deemed to be involved in or to encourage private activity.'[49] A case that falls within the scope of 'public function' analysis is that of *Regina* v *Panel on Take Over and Mergers Ex Parte Datafan PLC and another.*[50] *("Datafan")* Here the courts seemed to substantially widen the limits as to what constitutes a public authority. The applicants in this case were attempting to quash, by way of an order of certiorari, the decision of the Panel on Take Overs and Merges to dismiss their complaint that N.Plc had acted in breach of the City Code on Take Overs and Mergers. The applicants also hoped to attain an order of mandamus to compel the Panel to review its complaint once again.

What makes the *Datafan* case one of such interest is that, 'the panel [was] an unincorporated association without legal personality ... it ha[d] no statutory, prerogative or common law powers and it [was] not in contractual relationship with the financial market or with those who deal in that market. .... Its code d[id] not have the force of law.'[51]In the realm where some form of public function or connection to the state is believed to be paramount in according an entity the definition

of public authority, the *ratio* of this case is intriguing. For the courts did hold that the decisions of the panel were amenable to judicial review. They were of the opinion that:

> the supervisory jurisdiction of the High Court was adaptable and could be extended to any body which performed or operated as an integral part of a system which performed public law duties, ... [the panel] was in fact operating as an integral part of a government frame work for the regulation of financial activity in the City of London.[52]

The fact that the Panel was a self-regulating body was of no serious concern to the courts, what was of import to them was the extent or rather the effect of the power exercised by the Panel, as opposed to the origin of their power. The court acknowledged that even though the panel may be lacking any *de jure* authority it possessed enormous *de facto* power. This *de facto* power was displayed in their ability to, devise, promulgate, amend, and interpret the City Code on Take-overs and Mergers, waive or modify the application of the Code in particular circumstances, investigate and report upon alleged breaches of the Code and by the application or threat of sanctions. Despite the fact that these sanctions have no legal bases, they are no less effective.[53] Even though, the courts found that they have the ability to review the decisions of the Panel, they chose not to exercise this power because in their view it is not their place to decide appeals of the decisions of the Panel. Rather, the role of the court is to decide whether there has been illegality, irrationality or procedural impropriety.[54]

The actor of importance for the purposes of this paper is the Catholic Church. In order for its decisions to be amenable to judicial review it must first be accorded the definition of a public authority; the case of note is that of *Clement Wade* v *Maria Roches.*[55] Maria Roches was an unmarried teacher, employed at the Santa Cruz Roman Catholic Church. The school was operated by the Roman Catholic Church. Ms.Roches became pregnant during her tenure at the school, while unmarried, and was fired because she was not living in accord with the teachings of Jesus Christ on marriage and sex. Ms. Roches alleged that her dismissal was a contravention of her fundamental human right to not be discriminated against on the basis of sex. It was concluded that the circumstances of her dismissal were in contravention of her

constitutionally rights under section 16(2) of the Belizean constitution and was $150,000 in damages.

The first issue that the court decided was the question as to whether the appellant was amenable to judicial review. The Court of Appeal agreed with the judge at first instance that the appellant acting on behalf of the Catholic Church was amenable to judicial review because of its close connection with the Government of Belize. Within Belize, religious organizations have been primarily the entities responsible for the control of education within the country. A partnership existed between the Government of Belize and the Church that in the words of the court, 'span[ed] every administration of Belize, from its colonial governance, to its successive independent administration, regardless of the hue of the political parties or the political divide. *Every Government had subscribed to this partnership*.[56] (emphasis added).

What is of note is that the partnership that existed between the Government and the entities responsible for education was acknowledged by the Education Act Cap.36 ("Act")[57]. The schools that were subject to the Education Act were called 'grant-in-aid schools'. These schools received monetary support from the Government and were required to appoint a manger or a managing authority who would have the power to hire, transfer, fire and discipline members of staff in accordance with the rules provided in the Act.[59] The court was of the opinion that the existence of the Act and the rules and procedures providing how a managing authority should conduct itself show a close knit connection, an inextricably woven link, a closely interwoven relationship between the Government and the Church. These points led the court to decide that:

> The extensive control by the Ministry of Education over the Grant in Aid Schools is set out under the provision of the Act and Rules. For the reasons set out in this judgement it is my view the Roman Catholic Church Schools of Belize are brought into the public domain.

Once again the court was concerned with the effect that the power accorded to the church. The church because of its enormous role in the education sphere of the country was, in the eyes of the court, playing an important role in an area 'vital the nation's well being'.[60]

Valuable though *Roches* is, it can be distinguished. The court in that case was, in essence, deciding whether the Managing Authority the entity hired by the Catholic Church to manage its schools was amenable to judicial review; it was not a direct case as to whether the decisions of the Church were amenable to judicial review. The case nevertheless is useful, as throughout, the court mentions what would bring the church into the arena of public authority, and consequently, amenable to judicial review. The courts in *LJ Williams, Datafan,* and *Roches* were all enamoured with the power of the entity , whether it was of a coercive nature , whether it held *de jure* or *de facto* power, whether the exercise of this power was effective. The courts seem to wonder how much control does the entity have over the actions of the public or, for lack of a better phrase, how much power?

Which brings us to the case at hand; the question of whether the church will be amenable to judicial review. How much power or clout does it carry, for the purposes of this paper? In analysing the situation what needs to be considered are the duties, functions and powers accorded the church, whether it is possible to show that the church, a private body in this case, is performing a public function - is it exercising immense *de facto* power? What of the connection between Church and State, is it 'inextricably woven' so as to bring the Church into the realm of public law within the Bahamas? Is its actions of such national importance, to demand that its decisions be open to judicial review?

The importance of the Church in Bahamian society can first be seen in its implied inclusion in the preamble of the Bahamian Constitution. The preamble asserts:

> we the Inheritors of and Successors to this Family of Islands [recognize] the supremacy of God ... DO HEREBY PROCLAIM IN SOLEMN PRAISE the establishment of a free and democratic sovereign nation founded on spiritual values ... and do hereby provide by these articles for the indivisible Unity and Creation under God [of] the Commonwealth of the Bahamas.[61]

The character of a constitution is in its preamble. It is the beginning of the tale, the first step so to speak on the road to freedom. It should

not be regarded as a paragraph full of empty rhetoric or meaningless verbiage rather,[62] it declares what a people stand for and believes and establishes the values upon which a nation hopes to be founded and recognized. Bahamian society then, is one founded on spiritual values. The Church is considered to be the leader, the managing authority so to speak, when it comes to the moral education of a society; its purpose is to teach and expound upon these spiritual values, the apparent cornerstone of Bahamian society. So even though the Church may be a self-regulating, unincorporated non legal personality, like the Panel in *Datafan* it is argued that it wields immense *de facto* power in Bahamian society.

The Bahamas Christian Council is a powerful lobbying force within the country. They have demonstrated the extent of their coercive powers by successfully preventing legislation that allows Bahamians to gamble within their own country from being passed, they have succeeded in banning movies such as the recent Brokeback Mountain from being viewed in the country because it contains nudity and extreme homosexuality, amongst other things, and threw a " hissy fit" when gay cruise ships were allowed to dock in the Bahamas; all in pursuit of maintaining the ethos of a Christian nation. Politicians visit churches and receive endorsement from various influential pastors in the country during election times. This close connection between church and state is one that has permeated every government from the time of independence. Prime Minister Hubert Ingraham who was in power from 1992- 2002 said,

> The Bahamas' Constitution establishes that we are a nation based upon Christian principles. Those principles passed down to us through the ages are those on which the early Christian communities were established. They include the virtues exemplified in Jesus' life on earth—a life guided by faith, love, peace, patience, gentleness, kindness, and forgiveness; a life which demonstrated light and hope ... My government shares the concern of the church community in The Bahamas in protecting the moral integrity of our society and respects and appreciates the role which the church plays in facilitating the moral education of our nation.

All the factors come together to display the integral role that the

church plays in Bahamian societies - the church is exercising a public function, the effects of it's power are publicly felt, effectively bringing the church into the public domain and increasing the likely hood of the courts finding the Catholic Church amenable to judicial review.

Concluding Remarks

I was raised to cherish the fact that I was living in a "free" country, amidst a people with respect for the individual and for the power that one's voice in a democratic and liberated society can hold. My ability to speak, feel and desire what I want were often taken for granted, for I have always been in the majority. My power to choose the course of life desirable to me and mine has always been understood to be my right, something accorded to me out of respect for my humanity. The rights granted to me by my fore fathers guaranteed my ability to create me, to embrace the things that define me, the power to create my own truth. Who would I be if these rights were denied me? What if I was required by law and society to deny who I am? What shell of a life would I live? What meaning would life have for me? Who would I be? To remove my ability to choose would be tantamount to a flaying of my spirit, an attack on the essence of my dignity. The society that we would create, would be one full of the proverbial Oliver Twists constantly in need, always asking, 'Please Sir, may I have some more?'

We are all theoretically accorded the right to live as we desire, herein lies the 'catch 22' - we exercise this right with respect for the rights of others. We are all accorded the right to be free from discrimination and the right to freedom of conscience and freedom of expression. It is where my choice, the way I choose to exercise my rights, conflicts with your choice that the true nature of mankind emerges, the flexibility of a legal system tested and the idea of freedom for all is defined. In a world innately fascinated with the notion of equality, engorged on the concept of anti-discrimination, where do we draw the balancing line? Where does the right to freedom from discrimination based on sexual orientation surpass ones right to freedom of conscience and vice versa?

Each and every exclusionary act by an entity or individual is not at first instance discriminatory. Discrimination as opposed to a difference in treatment is unreasonable, arbitrary, unjustified and subjective. It is actions without a legitimate objective that cannot be

proven to be reasonable in a democratic society. Discrimination based solely on an individual's sexual orientation falls squarely into all these categories. Catholic priest are celibate! Regardless of whether a priest is homosexual or heterosexual a priest should not act upon his sexual desires. Furthermore, the individuals who would be most affected by this edict are those with homosexual tendencies who want to become priests. They feel a deep connection to their faith and would like to manifest that belief by dedicating their lives to the God they believe in. It is not inconceivable to realize that these individuals could and would believe the tenets of the Catholic church, that homosexual tendencies are wrong and sinful, the likelihood that they consider their inclination as their 'cross to bear' so to speak is very high. To blatantly disallow these individuals from ordination, in order to avoid the negative consequences, the church associates with homosexuality is unreasonable.

What makes the decision arbitrary is the clause in the edict which indicates that should these deep-rooted homosexual tendencies be transitory, then after three years of being tendency-free they can become ordained priest. There seems to be no reason for this change of mind. No reason for the choice of a three year span as opposed to a five or 10 year period. If the purpose of the edict is to exclude those with deep rooted homosexual tendencies from becoming ordained priest then this clause is truly random. Nothing in the Instruction provides for or rather indicates who determines whether these tendencies have been overcome. There are no measures in place to determine the impartiality of the person, there is nothing to guarantee fairness in the decisions making process.

Our right to Freedom of Conscience and Freedom of Religion is the justification by the Church for what it would accord to be differences in treatment. The Church considers itself the keeper of the faith, the liaison between God and Man, and it is therefore within their power and within their rights to determine who does what in the running of the Church and the spreading of the Gospel. These arguments though strong, weaken in the face of scrutiny. If people are allowed to simply claim that what they believe, 'requires them to discriminate against homosexuals without objective scrutiny, there would be no protection at all from discrimination for gays and lesbians ... because everyone who wished to discriminate against them could make that assertion.' [63]This objective scrutiny comes in the form of the Church's decisions, as a public

authority being open to judicial review and it is in their hands that this balancing act must take place. The courts in deciding, should take into consideration that Commonwealth Caribbean Constitutions have been described as *sui generis* documents, living beings created in the hopes of protecting the rights of a people from the power a government, or any public authority which wields any substantial power in the public domain and that, 'Religious protection should be interpreted in light of other factors in society today...'[65] Per Lord Nicholls of Birkenhead in his dissenting opinion, 'A supreme court of a country which adopts a literal approach [to constitutional interpretation] is failing in its responsibilities to the citizens of the country. A constitution should be interpreted as an evolving statement of a country's supreme law.'[66]

At the end of the day it is the interest of justice and fairness that the courts hope to reign supreme. Cases, of this nature can, this balance of rights, can only really be decided on a case by case basis, endeavouring as much as possible to accommodate all parties, in the pursuit of enforcing human rights for all.

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1. *Universal Declaration of Human Rights, Article 1 , G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948)*
2. *Nihal Jayawickrama, 'The Judicial Application of Human Rights Law: National Regional and International Hurisprudence' 2002, 174 .*
3. *The Supreme Pontiff Benedict XVI, 'Instruction Concerning the Criteria for the Discernment of Vocations with regard to Persons with Homosexual Tendencies in view of their Admission to the Seminary and to Holy Orders (Congregation for Catholic Education 2005) at*
4. *http://www.vatican.va/roman_curia/congregations/ccatheduc/documents/rc_con_ccatheduc_doc_20051104 _istruzione_en.html (last accessed 18 Oct 2006).*
5. *ibid: Introduction .*
6. *ibid sec 2.*
7. *Advisory Opinion OC-18/03, September 17, 2003, Inter-Am. Ct. H.R. (Ser. A) No. 18 (2003) Available at http:// www1.umn.edu/humanrts/iachr/series_A_OC-18.html (last accessed 23 Nov. 2006) para 84.*
8. *[2004] 3 WLR 113.*
9. *ibid 118-119.*
10. *(unrep) 26. 1. 06, CA, T&T, (No.64 of 2004).*
11. *ibid 9.*
12. *ibid 18.*
13. *ibid 19.*
14. *ibid.*
15. *Girad and the St. Lucia Teachers Union v The Attorney General of St. Lucia (unrep) 17.12.86, HC, St. Lucia.*
16. *The Constitution of the Bahamas 1973 – sec 15.*
17. *AG and others v Boyce and Joseph CCJ Appeal 8. 11. 06 No CV 2 of 2005.*
18. *ibid 28.*
19. *ibid 29.*
20. *ibid.*
21. *Thomas v Baptiste [2000] 2 AC 1, 22.*
22. *N 16 above.*
23. *ibid.*
24. *n 6 above, paras 85 and 88.*
25. *n 7 above, 118.*
26. *n 1 above, para 7.*
27. *ibid, para 10.*
28. *ibid, para 8.*
29. *Leslie Samuels, 'Sexual Orientation Discrimination and the Church: Balancing Competing Human Rights' Ecclesiastical Law Joumal v. 8 no. 36 (January 2005) 74.*
30. *Saumur v Quebec City [1953] 2. S.C.R. 299, 326*
31. *Simeon McIntosh, 'Fundamental Rights and Democratic Governance – Essays in Caribbean Jurisprudence.' (The Caribbean Law Publishing Company Ltd, Kingston 2005) 92.*
32. *Vincent Blasi, ' Free Speech and Good Character: From Milton to Brandes to the Present' in Eternally Vigilant Free Speech in the Modern Era 61 (Lee C Bollinger and Geoff R Stone eds 2002)*
33. *R v Big M Drug Mart Ltd [1986] LRC (Const) 364.*
34. *n 30 above,*

35. (unrep) 27.10.97 SC of Jamaica.
36. [1986] LRC (Const) 332.
37. n 7 above, 359.
38. Ibid 364.
39. ibid 356.
40. ibid 357.
41. ibid 356.
42. Professor Albert Fiadjoe, 'Commonwealth Caribbean Public Law' (Commonwealth Caribbean Law 1999).
43. Collymore v Att Gen [1970] AC 538.
44. ' This Constitution is the supreme law of the Commonwealth of The Bahamas and, subject to the provisions of this Constitution, if any other law is inconsistent with this Constitution, this Constitution, shall prevail and the other law shall, to the extent of the inconsistency, be void.' - Art 2 Constitution of the Bahamas 1973.
45. (1980) 32 WIR 395.
46. ibid 412.
47. [1981] AC 61.
48. [1979] 2 AC 385.
49. Suit No. 4789 of 1982, H Ct Trinidad and Tobago.
50. Margaret Demerieux, 'Fundamental Rights in Commonwealth Caribbean Constitutions' (Faculty of Law Library University of the West Indies, 1992).
51. (1987) 2 WLR 699.
52. ibid 702.
53. ibid 698.
54. ibid 702.
55. ibid 703.
56. (unrep) 9.3.05 CA. Belize (Civil Appeal No.5 of 2004).
57. ibid 4.
58. sec 3(1) – The Ministry of Education, under the general direction of the Minister, shall work in partnership, consultation and cooperation with churches, communities, voluntary organizations, private organizations and such other organizations and bodies which the Ministry may identify and recognize as education partners for the sufficient and efficient provisions of education in Belize.
59. sec 7(1) - There shall be and is hereby establishes in and for Belize a Council to be called the National Council for Education embodying the partnership between the sate an its partners in education, such as Churches, communities, voluntary organizations an other partners in education. the partnership was recognised by statute.
60. n 18 above, 5.
61. sec 16 – The manager or managing authority of a government or government-aided school or institution shall have the authority to appoint, release, suspend or dismiss members of staff of their respective schools or institutions subject to the following conditions in so far as same are applicable.
62. ibid 12.
63. Preamble of the Constitution of the Commonwealth of the Bahamas 1973.
64. Charles Matthew v State [2004] UKPC 33 per Lord Bingham of Comhill, Lord Nicholls of Birkenhead, Lord Steyn and Lord Walker of Gestingthorpe dissenting.
65. Hall (Litigation Guardian of) v Powers 213 DLR. (4th) 308, 319.
66. Minister of Home Affairs v Fisher [1986] AC 319.
67. Bruce MacDougal, 'Separation of Church and Date: Destabilizing Traditional Religion Based Legal Norms on Sexuality' University of British Columbia Law Review 2003 Vol 36 1, 16.
68. n 62 above, 32.