



Enduring Sexed and Gendered Criminal Laws in the Anglophone Caribbean

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Abstract

Arif Bulkan and Tracy Robinson provide a legal commentary that challenges modern-day public policy making in the Anglophone Caribbean to build more gender just societies by rejecting longstanding colonial criminal codes steeped in racial, sexual and gendered discrimination. The commentary presents the work of the UWI Rights Advocacy Project (U-RAP), an outreach activity of the Faculty of Law at the UWI, a project focussed on promoting social justice and human rights in the Anglophone Caribbean through the use of strategic litigation as an advocacy tool for gender justice. This paper explores the work of the project in the territories of Guyana and Belize to secure the rights of sexual minorities.

Keywords: Anglophone Caribbean, strategic litigation, LGBT rights

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A body of raced, gendered and sexed post-slavery criminal laws, and their legal constructions of deviance and conceptions of punishment, shadow the modern Caribbean. Colonial state racism always rested on “gender prescriptions ... [and] gendered assessments of perversion and subversion” (Stoler 1995, 93). Given criminal law’s normativity and its repetitive and coercive gestures and directives about order, legitimacy and what is normal (Garland 1990, 252), it is not surprising that criminalisation, and particularly enduring colonial criminalisation, has become a consistent site for contests about the meaning of race, sex and gender, morality, personhood and power in the Caribbean today.

Many core criminal law statutes dealing with both serious and summary offences in the Anglophone Caribbean today, like the Antigua and Barbuda Offences Against the Persons Act 1873 and the Jamaican Town and Communities Act 1843, are amended late nineteenth century or early twentieth legislation. A period of intense law-making followed the end of slavery aimed at governing and controlling the enlarged free population of blacks and indentured workers in the second half of the nineteenth century (Paton 2015, 122). Some were the result of concerted legislative exercises systematising, simplifying and reforming criminal laws through codification and consolidation (Tallon 1979, 3). These efforts to rationalise criminal laws tended to produce more “compendious new legal codes that extended the state’s reach” (Marcus 2011, 511). Law reform was set within the anxieties of colonial elites about freed blacks and Indian indentured workers and framed as concerns about the latter’s incivility (Hall 2002), sexual deviance (Dalby 2015, 136) and unwillingness to work on plantations (Munasinghe 2001, 10).

A small group of us, three public law teachers at The University of the West Indies (UWI), started a conversation about what we could do, beyond our teaching and writing, to question the normalisation of these enduring sexed and gendered criminal laws.¹ In 2009 we established the Faculty of Law, The UWI Rights Advocacy Project (U-RAP), an outreach activity of the Faculty of Law that aimed at promoting social justice and human rights in the Anglophone

Caribbean through strategic litigation, socio-legal research and legal education. The centrepiece of U-RAP's work is collaborative and strategic litigation that questions the constitutionality of two very different colonial criminal laws regulating sex and gender—one, an indictable offence which criminalises “unnatural” sex in Belize, and the other, a summary offence in Guyana criminalising cross-dressing in public for an “improper purpose”.²

The vagueness and imprecision of the Belize and Guyana laws anchor their durability and power as they are reclaimed and refashioned through layers of professional and lay interpretations and application over time. Both laws have produced what Nancy Fraser (1997, 279) calls “misrecognition” of out-groups based on gender and sexuality. Fraser says that

To be misrecognized ... is not simply to be thought ill of, looked down on, or devalued in others' conscious attitudes or mental beliefs. It is rather to be denied the status of a full partner in social interaction and prevented from participating as a peer in social life ... as a consequence of institutionalized patterns of interpretation and evaluation that constitute one as comparatively unworthy of respect or esteem. (Ibid, 280)

Strategic litigation has become one mode, even if a contested one, through which LGBT persons are seeking to deepen “participation parity” in the Caribbean. In this article, we provide an overview of and context for key pieces of strategic legislation that are underway in the Anglophone Caribbean, offering insight where appropriate to some of the constraints and possibilities of going to court. We further explore the socio-legal history that undergirds two of the laws that are presently being challenged - “the unnatural crime” in Belize and “the cross-dressing offence” in Guyana. The latter represents two enduring laws, whose power, we argue, is secured from the very uncertainties and opacity that characterize the laws.

Orozco v Attorney General and the “Unnatural” Crime in Belize

Most independent Anglophone Caribbean states retain a range of laws that criminalise “unnatural” sex—termed crimes of buggery, sodomy, and gross/serious indecency (Robinson 2009, 1). Although criminalization of “unnatural” sex existed during earlier colonial periods, the current versions of these laws in the Caribbean can be traced to the consolidated or codified criminal laws introduced in the late nineteenth century British colonial period. Some of these crimes are still found under headings such as “Offences against Morality,”³ “Outrages on Decency”⁴ and “Unnatural Offences”⁵ in criminal law statutes. Though sometimes described as “anti-gay”, most of these laws do not exclusively criminalise same-sex sex. Their origins are laws proscribing unnatural non-procreative sex between males and females, males and males and males and animals. The former British colonies disproportionately comprise the states that still retain such laws (Gupta 2008).

Unlike most Anglophone Caribbean countries, the Belize law does not use the terminology buggery or sodomy, which connotes anal sex.⁶ What is proscribed is the more amorphous “carnal intercourse against the order of nature”. Section 53 of the Criminal Code 1981, Cap 101, states that “every person who has carnal intercourse against the order of nature with any person or animal shall be liable to imprisonment for ten years.” The law conflates sex with animals with sex between persons, while also dispensing with any requirement of lack of consent to prove the latter offence.

Section 53 can be traced to the Criminal Code 1888. Its language is very similar to the well-known section 377 of the Indian Penal Code of 1860 which was drafted by Thomas Babington Macaulay (Skuy 1998, 513; Shing and Kher 2003, 209; Sanders 2009, 1). The Indian Code was the first criminal code introduced in the British colonies and its provisions, including that on unnatural offences, became a model law for other colonies, mostly in Asia and Africa. Section 377 reads, “Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or

with imprisonment of either description for a term which may extend to ten years, and shall be liable to fine." Some nineteenth century South Asian cases concluded that the "unnatural crime" covered anal sex alone.⁷ Some later cases took a broader view of the offence as including fellatio within its ambit, those cases have interpreted the unnatural crime as penalising penetration of an artificial cavity made between the thighs and mutual masturbation, with the hands functioning as an artificial orifice.⁸

Despite the similarities, the origins of the Belize law are distinct from the Indian Code. RS Wright, an English barrister and fellow of Oriel College, Oxford, drafted a model criminal code for Jamaica at the request of the Colonial Office (Friedland 1981, 302). His Code of Criminal Law and the Code of Procedure were finalized in 1877 (Ibid, 319). The Jamaica Legislative Council passed the model laws two years later but they were never brought into force and were ultimately repealed. What Martin Friedland describes as the "forgotten" Wright code was adopted not only in British Honduras, but also Tobago, St. Lucia and British Guiana (Ibid, 337-338). Wright's Code was a sharp departure from other 19th century codes on issues of law and morality. The latter heavily criminalised crimes against morality whereas Wright took a much more liberal view of issues like abortion, suicide and "unnatural" sex (Ibid, 327-328). Notably, Wright included buggery without consent in the section "Public Nuisances" with a maximum of two years (Ibid).

This background may partly explain why the 1888 Criminal Code for British Honduras only criminalized *non-consensual* carnal intercourse against the order of nature *with a person*. Section 65 of the Criminal Code 1888 provided that "Whosoever is convicted of unnatural carnal knowledge of any person, *with force or without the consent of such person*, shall be liable to imprisonment with hard labour for life, and in the discretion of the Court to flogging" (emphasis added). Ordinance 14 of 1944 repealed this requirement of proving force or a lack of consent and added bestiality to the definition of the unnatural crime. Another distinctive feature of the 1888 Criminal Code and later amendments in

Belize is that they never included the offence of gross indecency. In 1885 in England, what is often known as the Labouchere Amendment was enacted, criminalising “gross indecency” between males. This amendment represented a shift from “unnatural” sex in general, towards criminalising sex between men. Most colonies followed suit, but not British Honduras. There was virtually no change to the crime of carnal intercourse against the order of nature in the period after 1944 and prior to litigation in 2010.⁹

Orozco v Attorney General, filed in 2010, is the result of a collaboration between U-RAP, the United Belize Advocacy Movement (UNIBAM), its Executive Director, Caleb Orozco, and lawyers both in Belize and the wider Caribbean,¹⁰ which challenges the constitutionality of the said section 53. Before the case was filed, we spent approximately three years doing research and assessing whether and where litigation would be worthwhile. We participated in several dialogues with LGBT activists in the Caribbean, most hosted by the Coalition of Caribbean Vulnerable Communities (CVC), which also joined us as we consulted widely with stakeholders in Belize, including members of the LGBT community, civil society actors, HIV/AIDS activists, lawyers and faith-based leaders.

In August 2016, the Supreme Court of Belize accepted Orozco's claim that the continued existence of the unnatural crime is inconsistent with his rights to privacy, equality, non-discrimination and freedom of expression. The Court ruled that section 53 violated the Belize Constitution to the extent that it criminalised consensual sex, and the prohibition was accordingly “read down” to restrict its coverage to non-consensual sex between adults. Appeals against this decision have been filed by the Attorney General and the Roman Catholic Church and are expected to be heard in 2018.¹¹

McEwan v Attorney General and Cross-dressing for an Improper Purpose in Guyana

After the end of slavery, British Guiana consolidated all summary offences in a single statute. Another exercise in consolidation took place in 1893 as part of a

modernisation effort by the attorney general who wanted to create for the first time an official listing of all the laws then in force (Paton and Romain 2014). Part V of the Guyana Summary Jurisdiction (Offences) Act 1893 which covers “Offences Against Religion, Morality and Public Convenience”, and is further subdivided into sections dealing with police offences, nuisances, and other miscellaneous offences.

The “Police Offences” include vagrancy, roguery and practicing obeah and witchcraft. The Act explicitly includes as offences to be a “vagrant” or an “idle person”, a “rogue” or a “vagabond”, and an “incorrigible rogue”.¹² The defining features of vagrancy laws are their focus on “being a certain kind of person” and less what the person has done, and the wide discretion they entrust to law enforcement because of their breadth and ambiguity (Goluboff 2016, 2). Other vagrancy offences classified as “Police Offences” are assembling in a public way for disorderly purpose and not dispersing when required, loitering about a shop, loitering about in any street or public place for the purpose of prostitution, and lying or loitering in a highway, yard or other place and not being able to give a satisfactory account of yourself.¹³ Vagrancy laws targeted the former slaves and were used to curtail the mobility of Indian indentured workers and keep them close to the plantations (Munasinghe 2001, 10).

Section 153(1) of the Summary Jurisdiction (Offences) Act falls within the “Police Offences” section and covers 49 separate “minor offences, chiefly in Towns” that give rise to a fine of not less than G\$7,000 and not more than G\$15,000. The long list includes offences such as flying a kite in a public way, beating a mat in a public way and grooming an animal on a public way. Historians Diana Paton and Gemma Roman note that section 153 reproduced provisions from an ever-harsher British police law (Paton and Romain 2014). Like many laws dealing with small or minor charges in the post slavery period, this one targets the urban poor. Patrick Bryan (2000, 28) observes that such laws were “especially important in an urban setting, when employment opportunities are limited.”

The 47th offence, found in section 153(1) (xlvii), is that of “being a man, in any public way or public place, for any improper purpose, appears in female attire; or being a woman, in any public way or public place, for any improper purpose, appears in male attire”.¹⁴ Framed in less plain terms, the cross-dressing offence was also one of vagrancy. It was an entirely new offence in 1893. It was not uncommon to include new provisions in consolidation exercises. The reason for the introduction of this cross-dressing offence in 1893 is not clear, but it was added while the draft law was being reviewed by the Court of Policy; the requirement that the cross-dressing be “for an improper purpose” was added to the draft clause during the law-making process (Paton and Romain 2014). There has been little change to this provision since its 1893 enactment, except adjustments to the penalty. In a small 2012 study undertaken by Christopher Carrico¹⁵ in Guyana, all the trans and gender non-conforming persons he interviewed had been charged with summary offences, and all but one had been charged with the cross-dressing offence (Carrico 2012, 16).

McEwan and others v Attorney General, also filed in 2010, is a response to the convictions of litigants Gulliver McEwan, Angel Clarke, Peaches Fraser and Isabella Persaud in Georgetown Guyana. All trans women and working class Guyanese, they were arrested on Friday, 6 February 2009, in various parts of Georgetown and held at the Brickdam Police Station over the weekend. On Monday, 9 February, they were taken to the Georgetown Magistrates' Court where upon arraignment each pleaded guilty to violating section 153(1)(vii) and was fined \$7500 Guy (approximately \$40US). The presiding Magistrate told them that they were confused about their sexuality and should go to church. In their evidence in the constitutional case, four of the persons convicted stated that they were not told clearly at any time of the ‘improper purpose’ giving rise to the charges and convictions against them. The fine was not a heavy one, but the pre-trial detention in the police station over the entire weekend was itself a form of punishment, to which was added the humiliation in court and sensationalised publicity the case was given by the media (Staff writer 2009). These hardships were compounded by the fear that criminalisation could happen over and over again.

Following discussions between U-RAP, the Society Against Sexual Orientation Discrimination (SASOD), the persons convicted and Guyanese attorney-at-law Gino Persaud, in 2010 an action was filed challenging the constitutionality of section 153(1)(xlvii). It argued, among other things, that this law violated the rule of law and the rights of the litigants to equality, non-discrimination and freedom of expression. A case complicated by a savings law clause that gives colonial laws immunity from most constitutional litigation based on breaches of human rights,¹⁶ these litigants have failed in their claims before the Guyana High Court and Court of Appeal and are awaiting the hearing of their final appeal before the Caribbean Court of Justice (CCJ).

The Power of Uncertainty

Though very different, both the unnatural crime in Belize and the cross-dressing offence in Guyana share the quality of opacity. The durability of these sexed and gendered criminal laws is not distinct from their imprecision, rather it is aligned to it as criminalisation becomes a pliable domain that can be reshaped to target specific sexed and gendered bodies in different moments. Even as the meanings of these vague laws evolve over time, they many deepen in their panoptic effect and repute as laws grounded in the norms of the society (Goodman 2001, 702).

Chief Justice Benjamin, in his decision in *Orozco v Attorney General*,¹⁷ noted that there was no clear statutory or judicial definition of carnal intercourse against the order of nature.¹⁸ While all the parties accepted that the definition included consensual anal sex, it was less clear what beyond this fell within “unnatural” sex. This ambiguity engenders a flexibility in which the law can take one distinct social meaning, as targeting anal sex between males in the modern Caribbean. In Belize, vagueness extended to how the unnatural crime was recorded by the police. Although it was possible to identify that some males were arrested for having unnatural sex with females, the data collection methods of the police made it impossible to discern which of the arrests related to consensual sex and which to sex without consent.¹⁹

Examining vague sodomy laws in South Africa, Ryan Goodman identified as one of their harmful effects that they “create the sense of surveillance” (Goodman 2006, 704). He noted that they produce confusion and “help subject those individuals [gays and lesbians] to an abiding sense of their place and movements within the impersonal public realm (Ibid).” Carrico’s (2012, 4) study in Guyana also found that many LGBT persons spoke about how criminal laws affected where they lived and how they expressed themselves in public and private. The interpretations given by laypersons to the vague law layer meanings on it (Goodman 2001, 702). For example, Goodman spoke to persons who assumed displays of affection were prohibited by the sodomy laws, and even gays and lesbians who knew this was not the case felt that such displays would subject them to heightened surveillance (Ibid). Revealing how the male-centred sodomy laws impacted lesbians, one respondent told Goodman, “I know those laws are not as applicable to lesbians. But, besides my fear and my concern for gay male friends, I think that officials may find some way or another to apply certain laws against me (Ibid).”

Vague criminal laws such as vagrancy laws have always generated concerns “because they literally encompass so many innocent acts” (Roberts 1998, 775, 781). They are also treated as suspect because they “encourage arbitrary and discriminatory enforcement”.²⁰ This is evident in the findings of the Carrico Study (2012, 16), in which an LGBT respondent said that he and his friends were “hanging out” when they were arrested by the police. He said “It was “not like the police tried to round everybody up, but just these who were gay, and when they got to the station, they were told they being charged for loitering.”

In *McEwan and others v Attorney General*, the Guyana courts concluded that any uncertainty in the cross-dressing offence is not fatal and can be resolved on a case by case basis. Acting Chief Justice Ian Chang in 2013 affirmed that cross-dressing itself is not a crime, emphasising that it would only become so if done for an “improper purpose”. He said that “it is not criminally offensive for a person to wear the attire of the opposite sex as a matter of preference or to give

expression to or to reflect his or her sexual orientation (sic)".²¹ Rejecting the vagueness argument, Chang CJ (Ag) insisted that a court could determine in a given case whether an "improper purpose" had been proved and the meaning of "male" and "female" attire established. Neither Chang CJ (Ag), nor the Court of Appeal which upheld his conclusion,²² reflected on the *ex post facto* nature of any such determination, or to the discretionary power that such a vague provision transferred to police on the beat.

This aspect of the decision is not easily reconciled with the convicting magistrate's statements at the 2009 trial, which displayed an inordinate focus on the gender expression and identity of the litigants. Sitting in the Georgetown Magistrate Court, she told them that they were confused about their sexuality and that they were men, gratuitously advising them to go to church – all statements that could barely disguise the moral judgment of their gender expression at the heart of her decision (Staff writer 2009). After the 2013 ruling of Acting Chief Justice Chang, Gulliver McEwan, the first named litigant, maintained her concerns about the vagueness of the law. She justifiably said, "But the law really stifles us, because what could be an improper purpose? The trans community is very worried, and still fearful of arrests, in light of this decision (Press release 2016)."

Going to Court

The *Orozco* and *McEwan* cases filed in 2010, which are still before the courts, were hardly the first cases to challenge state disciplining and criminalisation of non-normative sexualities, genders and gender expressions. Amar Wahab describes the challenges a decade earlier in Trinidad made by Jowelle De Souza, a trans woman harassed and abused after arrest, and Kennty Mitchell, a young gay man who brought an action for wrongful arrest and false imprisonment (Wahab 2012, 481-3, 500). But within the last five years there has been a spurt in *strategic* litigation related to LGBT persons, that is, litigation focussed on having an impact beyond the named litigants and their goal of realising some broader long-term change.

In addition to the previously outlined challenges, LGBT activist, Maurice Tomlinson also initiated three important cases. He challenged the refusal of media outlets in Jamaica to air an advertisement encouraging tolerance towards gays and lesbians.²³ He invoked the principle of free movement of people in the Caribbean Community (CARICOM) articulated in the Revised Treaty of Chaguaramas to challenge immigration laws in Trinidad and Tobago and Belize that excluded “homosexuals” before the Caribbean Court of Justice (CCJ) in its original jurisdiction.²⁴ Most recently, he has challenged the constitutionality of provisions in the Jamaica Offences Against the Persons Act that criminalise buggery and gross indecency, a case that succeeds one brought earlier by Javed Jaghai and later discontinued (AIDS Free World and J-FLAG 2014). In Trinidad and Tobago, a challenge to the criminalisation of buggery has also been launched and awaits a hearing on the merits before the High Court of Trinidad and Tobago (Hunte 2017).

Strategic litigation is not a panacea and cannot be premised on romantic notions of Caribbean constitutions or courts. At its best, it is “a crucial “additive element” in the struggle for a better and more just society” (Cummings 2011, 506, 549). Strategic litigation achieves the most when careful thought is given to which issues to litigate and when it is used alongside multiple political strategies and undertaken collaboratively (Rhode 2008, 2027-8). It involves great expense, especially to civil society organisations who are involved in a range of important political work. Caribbean constitutions ushering in independence from the UK between 1962 and 1983 did not disrupt these longstanding criminal laws. They explicitly provided for their continuity, anchoring them as pillars of law and governance in new nation-states. The thrust of the modern Westminster-modelled Anglophone Caribbean constitution is the preservation of order through the continuity of law and governance (Robinson, Bulkan and Saunders 2015; Thame 2014, 1), and it was “surprisingly reticent on the subject of equality” (Bulkan 2013, 11-12). In addition, very constrained notions of gender, equality and citizenship are embedded in Caribbean constitutional structures (Robinson 2008, 735). The ambivalence in these constitutions about the very human rights protection they sought to provide is evident in “opaque redress

provisions, apparently unenforceable opening sections, generous savings of existing laws and copious limitations on the actual rights" (Bulkan 2013, 199, 220).

The risks of litigating not only in relation to imperfect constitutions, but in what are often conservative and inefficient courts, must be carefully weighed. Constitutional courts in the Caribbean have granted very limited access to LGBT organisations to bring claims on behalf of the communities they serve.²⁵ On issues of gender and sexuality, some Caribbean courts have had exceedingly limited interpretations of the equality and non-discrimination guarantees in the constitutions (Bulkan 2013, 11).²⁶ Sex/gender discrimination is comprehended primarily in terms of a comparison between males and females. When laws disadvantage both males and females because they are grounded in stereotypes about masculinity and femininity, they have registered as neutral to courts, rather than profoundly discriminatory.²⁷ The approaches of the Anglophone Caribbean's two highest appellate courts, the Judicial Committee of the Privy Council (JCPC) and the Caribbean Court of Justice (CCJ), have also been equivocal and restrained on questions of gender and sexuality.²⁸

More generally, the turn to constitutional courts is a global phenomenon that has been met with some scepticism. John Comaroff (2009, 193) associates it with modernity's excessive faith in law. Ran Hirschl (2004) argues that it displaces representational democracy in the resolution of fundamental political questions and in so doing short circuits important public debate. His worry about the "judicialization of politics" is not simply about overreaching judges but also the abdication by politicians of their responsibilities to make hard and unpopular decisions and transferring that responsibility to courts (Hirschl 2006). Constitutional litigation can also generate significant public and political backlash (Helfer 2002, 1832). Laurence Helfer argues that the death penalty litigation in the 1990s and early 2000s in the Anglophone Caribbean led to, among other things, the contraction in the international human rights commitments of Guyana, Jamaica and Trinidad and Tobago (Ibid).

Notwithstanding these critiques, and the limitations of Caribbean constitutions and courts, strategic litigation is not without value. Ralph Carnegie (1985, 43, 45), one of the earliest scholars of the modern Anglophone Caribbean constitution, warned that “we cannot do without a constitution, even if we can prove that it is theoretically impossible to produce a good one.” Scott Cummings (2012, 506, 522) argues that the power of strategic litigation derives from its assertion of ‘a vision (or multiple visions) of the good society, and frames the definitional question in historically grounded and institutionally specific terms’, like constitutions. He also observes that such litigation can provide an opening for constituencies that “face greater barriers to influencing political decision-making because of their less powerful status” to assert their claims (Ibid, 525).²⁹ Rather than sidestepping public debate by diverting matters to the court, strategic litigation can provide a locus for sustaining difficult conversations.

The *McEwan* litigation has provided an opening for one disadvantaged community, the trans community, to participate in political debates. The first named litigant, Gulliver McEwan, went on to co-found Guyana Trans United (GTU) in 2012 and to develop multidimensional social and political action to secure greater respect for the trans community. Recently, some trans women were excluded from the Georgetown Magistrates' Court because they were dressed in female clothing, notwithstanding the 2013 ruling of the Acting Chief Justice that cross-dressing in and of itself was not criminalised in Guyana. The social justice movement, led by GTU, picketed the courts in protest, and GTU sought audience with the Chancellor to make a complaint, which was accompanied by a letter by the attorneys involved in the *McEwan* case. In an interview at the protest in 2016, one of the persons excluded, Twinkle Bissoon, drawing on notions of respect, equality and access to justice, said,

... this is violation to my human rights, of course. And if I respect the magistrate on his bench, I do think the magistrate should also respect me as a human being. It does not matter how I am dressed, or my lifestyle is not the case, it is that I have matters there, and he should listen to my matters...We will stand up for who we are.” (HGPTV).

Ultimately they filed a complaint with the Judicial Service Commission, which ruled in June 2017 that the exclusions were a denial of access to justice, a signal that a community which is devalued was being heard in new public domains.

In the Anglophone Caribbean some public conversations about sexuality appear to be at an impasse because of presumed overwhelming majoritarian sentiments. In fact, public opinion on controversial criminal laws in the Caribbean is often nuanced and contextual. Roger Hood and Florence Seemungal (2011), who conducted a survey in 2011 in Trinidad on the mandatory death penalty, found that 89 per cent of Trinidadians supported the retention of the death penalty; when respondents were further questioned about certain circumstances in which the mandatory penalty applied in Trinidad, only 26 per cent favoured it as a penalty that is mandatory for all murders regardless of the circumstances.

Ryan Goodman (2001, 642, 732) in his empirical research in South Africa, concluded that sodomy laws “have a far-reaching and self-reinforcing effect”, observing that “they create the sense that criminal prohibition reflects widespread societal interests even though ... those interests may only represent a small minority”. In Belize, the participation of major church groupings in the Orozco litigation, the organised advocacy of religious groupings with ties to the United States (Southern Poverty Law Center 2013), and the conservatism of some major media interests, gave the impression of very strong intolerance towards LGBT persons in Belize. Yet at the height of the litigation in 2013, the year the case was argued at first instance, a survey of attitudes towards homosexuality conducted in Belize by Caribbean Development Research Services (CADRES) reported that 75 per cent of men and 86 per cent of women in Belize accept or tolerate homosexuals, the highest degree of acceptance/tolerance in the Anglophone Caribbean countries surveyed (Beck et al. 2017).³⁰ Those high levels of tolerance/acceptance may not necessarily translate to support for decriminalisation (Jackman 2016, 130). Nevertheless, the survey data suggests that the strong opposition by religious groups may occlude more nuanced public opinion on gays and lesbians. In 2016 after the Supreme Court gave judgment for Orozco, the strong coalition of churches opposing the

litigation fell apart. Of the three church groupings that had become involved in the litigation, only the Roman Catholic Church filed an appeal. Neither the Anglican Church nor the Belize Evangelical Association of Churches has signalled an interest in further involvement.

Conclusion

Despite the drawbacks of strategic litigation, real value lies in the opportunities it presents for communities to mobilise, organise and advocate on their own behalf. Lawson Williams, an LGBT activist in Jamaica writing under a pseudonym in *Small Axe* in 2000, echoed the “need for the legal and social framework to adjust to accommodate gay people as a legitimate constituency in the society (Williams 2000, 106, 111).” He also added that “gay people themselves must be proactive in making their concerns heard and understood. They must set their own agenda for self-improvement. The issues must not only be addressed on a personal level, but as gay community. Only then can there be acceptance of gay voices as credible” (Ibid). We recognise that appeals to the state for recognition, relying on imperfect Caribbean constitutions—a core part of what U-RAP does—is constrained political work. Yet it is work that can open up spaces for conversations that include communities “who do not have a voice in the political system” (Balakrishnan 2009, 1). The criminalisation of gender and sexuality has a long arc that transitions into the modern Caribbean and nation-building (Alexander 1994, 5; Gosine 2016, 551). Challenges to its resilience are but one way to continue to talk about power, personhood, sex, gender, class and race in the Caribbean today.

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¹ The group included the authors (Bulkan and Robinson) and Douglas Mendes SC, former lecturer at the Faculty of Law The UWI, St. Augustine. Mendes continues to be a part of U-RAP as its Advisor.

² Belize Criminal Code 1981, Cap 101, s 53; Guyana Criminal Law (Offences) Act 1894, Cap 8:01, s 153(1) (xlvii).

³ Guyana Criminal Law (Offences) Act 1894, Cap 8:01, Title 24, which is part of a larger Part V devoted to "Offences Against Religion, Morality and Public Convenience".

⁴ Jamaica Offences Against the Persons Act 1864, s 79.

⁵ Antigua and Barbuda Offences Against the Persons Act 1873, Cap 4:21, Part XII; Jamaica Offences Against the Persons Act 1864, ss 76-77.

⁶ *Wiseman* (1718) Fortes Rep 91 (Eng).

⁷ *Re Govindarajula* (1886) 1 Weir 382.

⁸ *Muhammad Ali v State* 1961 All Pakistan Law Decisions, High Court of Dacca 447; *Lohana Vasantlal Devchand v State* 1968 All India Report, High Court of Gujarat 252.

⁹ In 2013, amendments were made to other sections of the Criminal Code to better protect children and persons with mental disabilities from sexual violence, championed by Kim Simplis Barrow, in her criminal capacity as Special Envoy for Women and Children. There was public anxiety that the litigation would lead to children, boys especially, being left unprotected even though the litigation, if successful, would only have the effect of decriminalising certain consensual sex between adults. Notwithstanding that misapprehension, the 2013 reforms, made section 53 redundant in dealing with sexual violence against children.

¹⁰ Lead counsel is Christopher Hamel-Smith SC from Trinidad and Tobago, assisted by Lisa Shoman QC, a Belizean lawyer who has been involved from the beginning of the litigation in 2010, and Westmin James, a law lecturer and member of the U-RAP team.

¹¹ The Government of Belize has appealed on narrow grounds which even if successful should not disrupt the overall decision by the Chief Justice that section 53 is unconstitutional to the extent that it criminalises consensual sex between adults. The Roman Catholic Church has filed an extensive appeal against most aspects of the August 10, 2016 decision. It has done so as an "interested party" to the litigation and must prove that it is "aggrieved" by the ruling in order to have standing to bring the appeal. See U-RAP, "Orozco v AG Update: The Government of Belize ultimately appeals the Orozco case on two narrow grounds!", accessed at <http://www.u-rap.org/web2/index.php/2015-09-29-00-40-03/orozco-v-attorney-general-of-belize/item/59-orozco-v-ag-update-the-government-of-belize-ultimately-appeals-the-orozco-case-on-two-narrow-grounds>.

¹² Guyana Summary Jurisdiction (Offences) Act 1893, Cap 8:02, ss 143, 144, 147.

¹³ Guyana Summary Jurisdiction (Offences) Act 1893, Cap 8:02, ss 153, 166.

¹⁴ Guyana Summary Jurisdiction (Offences) Act 1893, Cap 8:02, s 153(1)(xlvii).

¹⁵ This study was commissioned by U-RAP.

¹⁶ Guyana Constitution 1981 art 152.

¹⁷ Transcript, Supreme Court, Belize, 10 August 2016.

¹⁸ See also Basheer, Mukherjee and Nair 2009.

¹⁹ *Orozco v Attorney General* Transcript (SC, Belize, 10 August 2016) [15] – [16].

²⁰ *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). For example, one of the critiques of the longstanding criminalisation of abortion is the lack of certainty about the application of exceptions, for example to protect the life and health of the woman. Notoriously, in the face of an uncertain law, health professionals in the public service often limit their discretion. Joanna Erdman, "The Procedural Turn: Abortion at the European Court of Human Rights" in Rebecca Cook, Joanna Erdman, Bernard Dickens, *Abortion Law in Transnational Perspective* (University of Pennsylvania Press 2014) 121, 121-22.

²¹ *McEwan and others v Attorney General* (High Court, Guyana, 6 September 2013) Transcript p 25.

²² *McEwan and others v Attorney General* (Court of Appeal, Guyana, 27 February 2017).

²³ *Tomlinson v Television Jamaica* (FC, Jamaica, 13 November 2013). At the time of writing, this case is awaiting a decision by the Jamaica Court of Appeal.

²⁴ *Tomlinson v Belize and Trinidad and Tobago* [2016] CCJ 1 (OJ).

²⁵ See Westmin James, "Redressing Supremacy: Challenging Traditional Notions of Standing in the Commonwealth Caribbean Bills of Rights." (2013) 39 *Commonwealth Law Bulletin* 305. In Jamaica the Public Defender, a commission of Parliament created to protect and enforce the rights of citizens, was excluded from the Tomlinson litigation in Jamaica, which challenges the criminalisation of same-sex sex (*Tomlinson v AG* [2016] JMSC Civ. 119 (Jamaica, Supreme Court, 6 July 2016)). This matter is on appeal.

²⁶ See also Robinson (2008).

²⁷ See *Attorney General v Jones* KN 2008 CA 3 (CA, St. Kitts-Nevis, 2 June 2008); *McEwan v Attorney General* (HC Guyana, 6 September 2013).

²⁸ When the Privy Council heard its first case in which a victim of domestic violence argued that the impact of the violence should be relevant to culpability for killing the abuser, the Privy Council allowed fresh psychiatric evidence to be adduced, but made no reference to constitutional guarantees of gender equality (*Ramjattan v R* (1999) 54 WIR 383 (PC Trinidad and Tobago)). In 2007 in its first consideration of an issue related to sexual orientation in the Caribbean, the majority decision of the Privy Council said it was ultimately a matter for Parliament to decide whether its anti-discrimination law should treat sexual orientation as a prohibited category of discrimination, even though the Trinidad and Tobago Court of Appeal had ruled that the equality provision in the Constitution guaranteed equal protection regardless of sexual orientation (*Suratt v Attorney General* [2007] UKPC 55 (PC Trinidad and Tobago)). In a recent ruling by the CCJ in its original jurisdiction, the court concluded that the Revised Treaty of Chaguaramas demanded free movement of gays and lesbians within the Caribbean Community, but failed to invalidate immigration laws that prohibit entry of homosexuals on the irrelevant ground that they were not being enforced (*Tomlinson v Belize and Trinidad and Tobago* [2016] CCJ 1 (OJ)).

²⁹ *Ibid*, 525.

³⁰ Belize's adoption of the abandoned Wright Code, the absence of criminalisation of gross indecency and its much shorter history of criminalising consensual carnal intercourse against the order of nature is a reminder of the distinct legal histories within the Caribbean. It is worth further investigation whether there is a relationship between this history and attitudes towards homosexuality in Belize.