

Constitutional challenge to Jamaica's anti-sodomy law: Questions & Answers

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Jamaican human rights activist Maurice Tomlinson has filed a claim in the Jamaican Supreme Court of Judicature, challenging the country's laws criminalizing "buggery" and other consensual sex between men as violating numerous rights guaranteed in Jamaica's constitution. This backgroundunder answers some key questions related to this constitutional challenge.

1. What is Jamaica's anti-sodomy law?

Jamaican law criminalizes consensual sexual conduct (actual or attempted) between men, as well as the "abominable crime of buggery" (i.e., anal sex) between any people of any sex. While the *Offences Against the Person Act* (OAPA) deals with all sorts of crimes, three of its provisions (sections 76, 77, and 79) specifically make sex between men and "buggery" illegal. This statute has existed since 1864, when Jamaica was under British colonial law, and has endured since then despite the fact that Jamaica achieved independence in 1962. In 2011 and 2012, the *Sexual Offences Act* and the *Sexual Offences (Registration of Sex Offenders) Regulations* came into effect, requiring anyone convicted of these specific offences to be registered as a sex offender and to always carry a pass or face 12 months in prison and a J\$1 million fine. We refer collectively to these provisions as Jamaica's "anti-sodomy law."

2. What is the punishment prescribed by the law?

Under the OAPA, anyone convicted of "buggery" will be sentenced to up to ten years of imprisonment with hard labour (section 76); those convicted of "attempted buggery" or "any indecent assault upon any male person" will be sentenced to up to seven years in prison, with or without hard labour (section 77); and any male person who commits or tries to commit an "act of gross indecency" with another male person will be sentenced to as much as two years in prison, with or without hard labour (section 79). As noted above, the *Sexual Offences Act* and its regulations have now made Jamaican law criminalizing sex between men even harsher, such that conviction for any of these offences also means mandatory registration, and potential additional punishment, as a sex offender. While few cases have been documented in which the police or prosecutors in Jamaica have tried to charge individuals with these crimes, so long as the law exists, so, too, does the possibility of prosecution — and the broader, harmful effects of the law persist, including the potential for its use as a pretext for harassment by police and the stigma, discrimination and violence that criminalization perpetuates and encourages.

3. Why is the law unconstitutional?

The anti-sodomy law violates numerous rights guaranteed by Jamaica's 2011 *Charter of Fundamental Rights and Freedoms*. By unreasonably and arbitrarily criminalizing the private intimate acts of consenting adult men (which acts the law also equates with bestiality), and by

inviting and inciting violence and discrimination against people who are gay or perceived to be gay, the law violates, both directly and indirectly, the rights of Jamaicans to:

- liberty and freedom of the person;
- security of the person (i.e., physical and mental integrity);
- freedom of expression;
- equality before the law;
- non-discrimination on the ground of being male or female (in the case of the “gross indecency” offence);
- privacy and family life; and
- freedom from inhuman or degrading punishment or other treatment.

Jamaica has recognized these human rights both in its own constitution and in international human rights treaties it has ratified. The infringement of these rights is not defensible in a free and democratic society.

4. How does the law fuel homophobia and HIV in Jamaica?

As has been widely and repeatedly recognized, including by bodies such as UNAIDS, the UN Development Programme (UNDP), the Inter-American Commission on Human Rights, and the Global Commission on HIV and the Law, a legal environment that directly or indirectly criminalizes and stigmatizes gay men and other men who have consensual sex with other men (MSM) undermines effective responses to HIV.

Such laws create apprehension among gay men and other MSM, who fear that even the mundane activities of daily life will lead to accusations that they are involved in criminal acts or provoke discriminatory or other abusive treatment. For example, a gay man seeking HIV testing or visiting the doctor for a health check-up is likely to be asked if he is sexually active. If he answers truthfully, he has just confessed to a crime. If he lies and says he is not sexually active, or says he has sex with women, he will be depriving the doctor of accurate information about risks to his health.

The law also hinders HIV prevention, treatment and care in other ways. Because the anti-sodomy law is perceived to criminalize homosexuality as a whole, men who are known or perceived to be gay face widespread homophobic stigma. In a climate where sex between men is a crime, and being identified as gay means risking discrimination, violence or possible prosecution, open and non-judgmental discussion about sex between men, including safer sex education for purposes of HIV prevention, is more difficult. Furthermore, the government does not wish to be seen as providing “special” services to a population that is criminal. Consequently, the anti-sodomy law complicates and undermines adequate HIV-related programs (outreach, testing, support, treatment, care) by government agencies that target MSM. The result is the creation of significant barriers to effective HIV and AIDS health programs. Partly as an outcome of this criminalized environment, Jamaica is in the midst of an HIV crisis: about 33% of all MSM are living with HIV, according to most recent estimates from the Ministry of Health (in 2013).

5. Why is the law being challenged?

As described above, as long as the anti-sodomy law exists, it will hinder a truly effective HIV response in Jamaica. The law sanctions and encourages the treatment of gay men and other MSM as criminals, contributing to and entrenching an atmosphere of profound stigmatization and discrimination. This climate makes the country a hostile place for gay Jamaicans, including

those who seek any kind of health services. It drives underground gay men and other MSM, and is a deterrent to their seeking critical HIV and AIDS prevention, testing, treatment, care, and support services. Changing the law is a public health imperative.

It is also a matter of principle: fundamental rights and freedoms are the birthright of all Jamaicans. The anti-sodomy law amounts to the state's approval of discrimination and violence against anyone in Jamaica who does not fit mainstream notions about sexual orientation and/or gender identity. Because the anti-sodomy law turns gay men into "unapprehended criminals," it sends a powerful message that people — whether state representatives such as the police or private individuals — are entitled to discriminate and commit other human rights abuses against gay Jamaicans (and those perceived to be gay). Furthermore, while the law itself is specifically or primarily aimed at sex between men, because it contributes to and reinforces a more general stigma against homosexuality, it plays a role in encouraging discrimination and violence against women who are or are perceived to be lesbians. And because notions of sexual orientation and gender identity and expression are often conflated in public consciousness, the hostile legal environment criminalizing consensual sex between men also contributes to discrimination and violence directed toward transgender people who are identified as differing from traditional gender norms.

As a well-known gay Jamaican human rights defender, Maurice Tomlinson, the claimant in the constitutional challenge, has faced multiple death threats and Jamaican police have failed to effectively assist. The link between such hostility and the law criminalizing gay men is confirmed regularly by instances of harassment and violence. Indeed, one senior police officer has acknowledged outright what is obvious — the kinds of homophobic attitudes that led to the threats faced by Tomlinson and by many others will not change until the law changes. Tomlinson also has an adult male partner; their acts of private intimacy could result in prosecution and imprisonment. Tomlinson has therefore filed a case in the Supreme Court of Judicature asking for a review of the law as in breach of various constitutional rights and freedoms.

6. How can the law be challenged?

The Jamaican *Charter* provides that any person whose constitutional rights have been, are being or are likely to be violated, may bring a claim for the law to be reviewed. According to a "savings" clause in the *Charter*, laws relating to sexual offences are protected from such constitutional review by the courts if they were in force immediately before the *Charter* came into effect. However, according to well-settled rulings from Jamaica's highest appellate court, if the law is "changed, adapted or modified in any respect" *after* the introduction of the *Charter*, then it is no longer insulated from such constitutional review and must conform to the *Charter's* guarantees of fundamental rights and freedoms. After the adoption of the 2011 *Charter*, the *Sexual Offences Act* and its regulations changed Jamaica's criminal law regarding sexual activity between men to make it even harsher. It is the claimant's position that this means the law applicable to gay men's consensual sexual activity is no longer the law that existed immediately before the *Charter*; therefore, it must now comply with the constitution's human rights provisions, which it currently does not.

7. What is the ultimate goal of the legal challenge?

The goal of the challenge is to have the court bring the law into conformity with the *Charter*. The claimant is asking the court to "read down" the provisions of the law on "buggery" or attempted buggery, so as to exclude the consensual activities of adults, including gay men. The claimant is also asking the court to strike out entirely the "gross indecency" section of the law, which criminalizes virtually any consensual sexual activity between men. By granting such remedies,

the court would respect and protect the rights of adults to engage in consensual sexual activity. The law would continue to criminalize non-consensual anal sex and sex with those under the age of consent, which is an appropriate limit on the use of the criminal law in a free and democratic society.

8. What is the likely timeline for the legal challenge?

Constitutional claims are given priority by the court as they concern fundamental rights and freedoms. Therefore, a hearing could be held within six months. However, it is very likely that any decision of the court of first instance would be appealed. Currently, Jamaica has two levels of appeal, first to the Court of Appeal of Jamaica and then to the Judicial Committee of the Privy Council of the House of Lords (based in the United Kingdom). These appeals can take years before there is a final resolution of this matter.

9. Why was an earlier court challenge withdrawn?

A previous constitutional challenge to the laws criminalizing consensual sex between men was filed a couple of years ago. However, the claimant in that case began to receive multiple death threats as a result. Therefore, out of fear for his own life and that of his family, he was compelled to withdraw. Tomlinson is able to more safely bring this claim: he works on advancing human rights around the Caribbean, but is based in Canada, where he has a home and resident status, meaning he can avoid some of the most negative backlash associated with being the claimant in this new challenge.

10. Why is a legal challenge necessary?

For many years, the evidence has been mounting of the harms caused to Jamaicans by criminalizing consensual sex between men, including the stigma, discrimination and violence the state encourages with such laws. In the last three decades, the role of state-sanctioned homophobia in fuelling an HIV epidemic among MSM has also emerged, adding to the grim toll. The continued criminalization of consensual sex between men, and the broader abuses against gay, lesbian, bisexual, transgender and intersex Jamaicans to which it contributes, have damaged too many lives — and continue to do so every day. These are the lives not only of LGBTI Jamaicans, but of their family members and friends who are also affected by such stigma and who have lost loved ones to violence or AIDS, or when those facing persecution have had to seek asylum elsewhere.

Despite promises years ago by some political leaders that these laws will be reviewed and possibly amended, and despite ongoing calls for reform in line with those promises, there is no credible indication that this will happen. Furthermore, there is no reasonable prospect that, within any reasonable period of time, a sufficient number of Parliamentarians will support legislative reforms abolishing these provisions. Any such proposal for decriminalization already encounters substantial backlash and hostility — as indicated in a 2014 poll, in which 91% of respondents indicated their support for the anti-sodomy law.

But it is the mark of a free and democratic society that fundamental rights and freedoms are to be universally enjoyed by all persons. Respect for human rights cannot be contingent upon the approval of a majority, or else the rights of any person or community is profoundly at risk. The *Charter* is an essential manifestation of Jamaica's commitment to basic democratic principles, and the rights it protects must be guaranteed for all Jamaicans.

11. What does such a challenge mean for people of faith? What about marriage rights for same-sex couples?

It is regrettable that proposals for repealing Jamaica's discriminatory laws have encountered

opposition from some vocal, organized religious leaders who continue to foment misinformation, widespread homophobia and support for maintaining these criminal laws on the books. Fortunately, a growing number of leaders, from various religious traditions, have begun to speak out against such discrimination and to challenge the misinterpretation and misuse of religious teachings to “justify” criminalization and discrimination. They have begun to articulate a vision of a more tolerant, inclusive, respectful society, based as well on the core values of their own faith tradition.

Some religious leaders have often attempted to conflate calls for decriminalizing consensual sex between men with legislating same-sex marriage. This position is misguided and illogical. This court case challenges the unjustifiable criminalization and punishment of consensual sex between adults. Nothing before the court addresses the question of granting marriage rights to same-sex couples. Decriminalizing consensual sex between adults does not mean legalizing same-sex marriage in Jamaica, or compelling religious leaders or organizations to perform or recognize such marriages. In fact, other provisions in Jamaica’s constitution preclude legal recognition of same-sex marriages. This obstruction is discriminatory and unjust, but is a different issue not before the courts.

Nor does decriminalizing consensual sex between adults interfere with other persons’ freedom of opinion or belief — in a free and democratic society, people are free to hold their own views, religious or otherwise. This case is about whether the state has a place in the bedrooms of the nation — a matter of respect for privacy, dignity and equality that is important not just for LGBTI people, but for all Jamaicans. Giving effect to the human rights guarantees in the *Charter* is of benefit to all and is part of the larger project of ensuring fundamental human rights are indeed universally respected and protected.

12. Who is supporting this legal challenge?

Widespread homophobia makes it very difficult to find local support to pay lawyers, and to provide technical assistance for a case challenging the anti-sodomy law. This case is being brought by a Jamaican human rights defender, with support from groups and advocates both inside and outside of Jamaica. This support includes that of the Canadian HIV/AIDS Legal Network and AIDS-Free World, organizations committed to advancing human rights as a matter of basic principle and as an essential aspect of responding effectively to the HIV epidemic.