Bedlington Chambers

From: Dr. Leonardo Javier Raznovich

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Subject: **The 'living tree doctrine' - Bermuda Domestic Partnership Act 2018**

1 Introduction

1.1 In May 2017, the Supreme Court of Bermuda established marriage equality for same-sex couples in the case of *Godwin-DeRoche v The Registrar General*. The Bermudian court did not use international law but relied on local Bermudian law to hold that the Human Rights Act of Bermuda (which supplements the rights and freedoms of the Bermudian Constitution, hereinafter referred to as the "**Constitution**") requires marriage equality. Furthermore, this was not a random decision but a careful culmination of a long road through which the Supreme Court had already granted to same-sex couples access to adoption in *A & B v Director of Child and Family Services* (3 February 2015) and immigration rights in *Bermuda Bred Company-v-Minister of Home Affairs et al* (27 November 2015).

1.2 The government could have appealed each of these decisions, but it did not. Most surprisingly, in relation to marriage equality, rather than appealing, the government decided to support a bill in order, in effect, to cancel the judgment. That bill was passed by the legislature and given assent by the Governor. The effect of this law (the Domestic Partnership Act 2018, hereinafter the "**Partnership Act**") is to withdraw the right to marry for same-sex couples and to implement in its place a so-called 'domestic partnership' in apparent defiance to the interpretation of the court.[1] The issue under consideration now is whether the Partnership Act is, or is not, contrary to the provisions of the Bermudian Constitutional.

2 The Constitution / Section 12

2.1 Section 12 of the Constitution prohibits vertical discrimination (i.e. discrimination by public officials) and it is drafted in a way that it is not linked to other rights in the Constitution (e.g. in the way in which Article 14 of the European Convention on Human Rights (the "**Convention**") is linked to the enjoyment of the other rights). The matter to determine, therefore, is simply the scope of the prohibition of discrimination. Subsection 3 states: "In this section, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description."

2.2 The language of subsection 3 on its face provides a ***finite*** list of grounds. The question therefore is whether, as a matter of constitutional interpretation, the Partnership Act could be found to have breached the prohibition of discrimination, notwithstanding that neither sex nor

[1] This in itself ought to be explored as a possible ground for challenging the validity of the Partnership Act. See *obiter Lendore and others v Attorney General of Trinidad and Tobago* [2017] UKPC 25 [16] (holding that "it is of course axiomatic that the Constitution assumes some separation of powers between the executive and the judiciary, and for that matter between both of them and the legislature and the President [and] … In the absence of explicit provision in a constitution …, it may be necessary to construe legislation in a manner which remains consistent with the separation of powers".

sexual orientation is listed therein amongst the prohibited grounds and that the list seems on its face to be finite.

2.3 The answer to this question is that "discriminatory" in subsection 3 must indeed include affording different treatment on the basis of sex or sexual orientation. In summary, this is so for the following reasons:

(a) Constitutional provisions, especially those protecting fundamental rights, generally must be interpreted in light of the developing values of the societies for which they were made (i.e. the living tree doctrine) unless it is clear otherwise on a proper interpretation of the constitution.

(b) For this purpose, the court must begin its task of constitutional interpretation by considering the language used in the Constitution, but a ***generous and purposive*** interpretation must be given to constitutional provisions protecting human rights without room for a court's moral values nor public opinion.

(c) It is accepted that this task to be a normative one, pursuant to which the court has to imply terms when it judges necessary to do so, but limited to situations which are, so to speak, within the spirit of the paradigm case, whose identification therefore assumes a considerable importance.

3 Living tree doctrine's origin and international adoption

3.1 The Privy Council introduced the so-called "living tree doctrine" in common law in *Edwards v Attorney General of Canada* [1930] A.C. 124. The case established that Canadian women were eligible to be appointed senators, regardless of the letter of the law, as a matter of Canadian constitutional law. Pursuant to the "living tree doctrine", the Board held the constitution is organic and must be read in a broad and liberal manner so as to adapt it to changing times. The effect of this doctrine has been since then that constitutional provisions, especially those protecting fundamental rights, generally fall to be interpreted in light of the developing values of the societies for which they were made.

3.2 In *Tyrer v United Kingdom*, the European Court of Human Rights (the "**ECtHR**") was confronted with the arguments advanced by the AG of the Isle of Man that, "having due regard to the local circumstances in the Island", the continued use of judicial corporal punishment on a limited scale was justified as a deterrent. The ECtHR rejected this argument and found that the judicial corporal punishment constituted a violation of the Convention. The ECtHR dealt with the argument advanced by the AG by adopting the "living tree doctrine" and holding "the Convention as a living instrument", whose interpretation has to take account of evolving norms of both national and international law.

4 Common law's development and constitutional interpretation

4.1 The Privy Council has developed further this doctrine in *Reyes v The Queen* [2002] 2 AC 235 in which it was concluded that mandatory death penalty for defendants found guilty of murder by shooting (thereby precluding any judicial consideration of the humanity of condemning the defendant to death) was unconstitutional in that it breached an individual's right not to be subjected to inhuman or degrading punishment or other treatment. Lord Bingham, delivering the advice of the Board, endorsed the "living tree doctrine" while clarifying that in common law systems with a codified constitution the starting point was the constitutional text. The Board set the following guidance on the approach to constitutional interpretation in paras [25]-[28]:

(a) <u>Deference to the will of the majority</u>

(i) The basic constitutional duty of the court in relation to enacted law is to interpret and apply it.

(ii) When an enacted law is said to be incompatible with a right protected by a constitution, the court's duty remains one of interpretation.

(iii) If there is an issue regarding the meaning of the enacted law, the court must first resolve that issue; having done so it must interpret the constitution to decide whether the enacted law is incompatible or not.

(b) Generous and purposive interpretation

(i) The court must begin its task of constitutional interpretation by considering the language used in the constitution, but a generous and purposive interpretation is to be given to constitutional provisions protecting human rights.

(ii) In considering what norms have been accepted as consistent with the fundamental standards of humanity, it is relevant to take into account the international instruments incorporating such international norms to which the jurisdiction has subscribed.

(iii) The courts will not be astute to find that a constitution fails to conform with international standards of humanity and individual right, unless it is clear, on a proper interpretation of the constitution, that it does.

(c) No room for court's moral values or public opinion

(i) The court has no licence to read its own predilections and moral values into the constitution, but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society.

(ii) In carrying out its task of constitutional interpretation the court is not concerned to evaluate and give effect to public opinion

5 Implied construction - limitations

5.1 Bill of rights are bound to be cast in general terms and so interpretation of the provisions therein is not just a linguistic exercise, but is accepted to be a normative one, pursuant to which the court has to imply terms when it judges necessary to do so.

5.2 In a series of cases dealing with seriously ill immigrants receiving treatment in the United Kingdom for serious medical conditions, a decision by the Secretary of State to remove or deport them to countries with inferior medical resources (where life expectancy would be drastically reduced on grounds that it was inhuman and degrading treatment and hence a breach of article 3 of the Convention) was challenged. In both instances, the court declined to accept that such a removal, or deportation, would amount to inhuman and degrading treatment.

5.3 In *N v Secretary of State for the Home Department* [2005] UKHL 31 [21], the House of Lords, although endorsing the "living tree doctrine" held in relation to the Convention (per Lord Hope) that: "The Convention, in keeping with so many other human rights instruments, is based on humanitarian principles. There is ample room, where the Convention allows, for the application of those principles. They may also be used to enlarge the scope of the Convention beyond its express terms. It is, of course, to be seen as a living instrument. But an

enlargement of its scope in its application to one contracting state is an enlargement for them all. The question must always be whether the enlargement is one which the contracting parties would have accepted and agreed to be bound by." More recently, In *GS (India) v Secretary of State for the Home Department* [2015] EWCA Civ 40 [38] the Court of Appeal highlighted an *unacknowledged* difficulty in this task: "How is the "living instrument" approach to be reconciled with the court's duty to be loyal to the founders' agreement?" The court then held that "the best one can do **is to confine any implication or enlargement to situations which have some affinity with the paradigm case**; situations which are, so to speak, within the spirit of the paradigm case, whose identification therefore assumes a considerable importance."

5.4 Is there affinity between sexual orientation discrimination and racial discrimination? The Supreme Court of Canada, whose decisions have persuasive authority in Bermuda, concluded so in 1995 in *Egan v Canada* (a case in which the Supreme Court held that the equality clause contained in the Canadian Charter would be interpreted in a manner that prohibited discrimination on the basis of "sexual orientation" even though it did not mention it). The court stated in this case:

> '…equality refers to each individual as unique and distinct. Because of the uniqueness of individuals, their tastes will vary infinitely from matters as prosaic as food and clothing to matters as fundamental as religious belief. … Religion has been described as being premised on a "fundamental choice" … [Conversely] Sexual orientation [similarly to race or gender] is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs. … Individuals, because of their uniqueness, are bound to vary in those personal characteristics which may be manifested by their sexual preferences whether heterosexual or homosexual. So long as those preferences do not infringe any laws, … however different they may appear to be to the majority, are all equally deserving of concern, respect and consideration.'

5.5 This implied construction is also established in ECtHR case-law (e.g. *Karner v Austria* (2003) 38 EHRR 24 in which it was held that the refusal to allow a same-sex partner to succeed to the lease of his deceased partner was in breach of articles 14 and 8) where it was decided that a difference of treatment based on sexual orientation is covered by Article 14 of the Convention (which guarantees enjoyment of the other rights without discrimination on certain grounds).

5.6 In *Ghaidan v Godin-Mendoza* [2004] UKHL 30, the House of Lords followed this implied construction in relation to the Human Rights Act 1998 holding (per Baroness Hale) [132]: "Democracy is founded on the principle that each individual has equal value. Treating some as automatically having less value than others not only causes pain and distress to that person but also violates his or her dignity as a human being. The essence of the Convention, as has often been said, is respect for human dignity and human freedom … Power must not be exercised arbitrarily. If distinctions are to be drawn, particularly upon a group basis, it is an important discipline to look for a rational basis for those distinctions."

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