

## Discrimination on the ground of language

The question of protection from discrimination on the ground of language was raised and Professor Hubert Devonish of the Department of Language, Linguistics and Philosophy of the University of the West Indies was invited to address the Committee on the matter.

Professor Devonish presented to the Committee a paper entitled "Language Rights in the Draft Charter of Rights in the Jamaican Constitution: A Proposal", dated 21st May, 2001 and revised 29th May, 2001, and made an oral presentation to the Committee. The paper is attached as Appendix 4.

In these presentations, it was proposed that the Constitution should guarantee freedom from discrimination on the ground of language.

Professor Devonish suggested that, for the purpose of his proposal, the reference to language should be a reference to a language used by at least 10% of the population. On this basis, he pointed out, it could be said that there were two languages in use in Jamaica: English and Jamaican. He indicated, however, that he was not proposing that Jamaican patois be made an official language in Jamaica.

Professor Devonish proposed that a small agency, modelled on the Antillean Linguistic Institute of the Netherland Antilles, be created to standardize, popularize and formalize an already existing standard system for writing Jamaican patois and to assist the Public Defender in establishing standards to be met by public agencies in terms of their ability to communicate in both Jamaican and standard English. Sign language, it was said, could be dealt with on the same basis.

An important matter for consideration by the Committee was the matter of the implications of including in the Constitution a guarantee of protection from discrimination on the ground of language and what would constitute a contravention of that guarantee.

The Professor mentioned, in his presentation to the Committee, what he regarded as a direct form of discrimination on the ground of language, namely, the less favourable treatment rendered to persons who spoke the Jamaican patois compared with the treatment of persons who spoke standard English. He illustrated this by reference to the treatment of a researcher who paid two visits to each of six financial institutions, speaking standard English on one occasion and Jamaican patois on the other, and who was treated courteously and helpfully by four of those institutions when he spoke standard English, but indifferently, rudely and in an unfriendly manner when he spoke in Jamaican patois.

Professor Devonish also mentioned, however, a less direct form of discrimination

on the ground of language, namely, the use of standard English by agencies of the State in imparting information to the public although sections of the population who spoke the Jamaican patois had only a limited comprehension, approximately only 50% comprehension, of the information provided in English.

The Committee does not have much difficulty with the matter of constitutional protection against the direct form of discrimination on the ground of language mentioned by Professor Devonish.

The likelihood of various problems arising in relation to the less direct form of discrimination outlined, was however, discussed. One of the factors mentioned was the inability of those who could not speak standard English, and who spoke the Jamaican patois, to read the Jamaican patois, whatever the form used for writing it. Another issue related to the question whether all public communications would have to be made in both standard English and Jamaican patois.

The general consensus of the Committee, after discussion of the matter, is that the establishment of an agency of the type mentioned by Professor Devonish would be a pre-requisite to any constitutional guarantee of protection from discrimination on the ground of language and that such an agency should be established. Such an institution would assist in educating and enlightening people on the issue of discrimination on the ground of language so that, eventually, a guarantee of protection from such discrimination would find its place in the Constitution.

The Committee is, therefore, strongly of the view that Parliament should encourage the Department of Language, Linguistics and Philosophy of the University of the West Indies to pursue the work mentioned by Professor Devonish and to report appropriately on that work as it progresses.

### **Discrimination on the grounds of sexual orientation**

Another issue raised was whether the Constitution should also guarantee freedom from discrimination on the ground of sexual orientation. This issue was raised, in written presentation and by oral address to the Committee, by a group called the Jamaican Forum for Lesbians, All-Sexuals and Gays (J. Flag). The written presentation is attached as Appendix 5.

Representatives of J. Flag quoted what was said to be a statement by Professor Edwin Cameron, now a Judge of the South African Constitutional Court, at page 450 of the 1993 volume of the South African Law Times, that “sexual orientation is defined by reference to erotic attraction: in the case of heterosexuals, to members of the opposite sex; in the case of gays and lesbians, to members of the same sex”.

They argued that the Constitutional Bill of Rights and Freedoms should seek to protect the inherent human identity from abuse and that what was included in human identity were those features of a person, or characteristics, that that person was born with. Sexual orientation, they said, was one of those features or characteristics of human identity, in the sense that everyone has a sexual orientation and that that sexual orientation was largely, if not entirely, outside the individual's control.

Homosexuality, they said, was, to the homosexual, as natural and unchangeable as heterosexuality was to the heterosexual. The balance of scientific opinion, they argued, was weighted in favour of the view that sexuality, including sexual expression, was indivisible from individual identity, and was in the same category as race, gender, or brown or blue eyes. Furthermore, they said, there was no credible evidence or convincing argument that sexual orientation could be changed.

On that basis, the representatives of J. Flag argued that sexual orientation should not form the basis of discrimination against, or abuse of, any human being and proposed that the best way to achieve this was to include, in the Constitution, provision for protection against discrimination on that ground. That proposal, they added, was consistent with current international trends. The Constitution of South Africa, it is to be noted, includes sexual orientation among the grounds on which the state and persons are prohibited from unfairly discriminating directly or indirectly against anyone.

The Committee is concerned, however, as to the effect which implementation of that proposal would have in relation to the Marriage Act and the institution of marriage and on parenting. The representatives of J. Flag had themselves conceded that the Marriage Act would be inconsistent with such a constitutional provision.

Other matters which the Committee has taken into account include the view of some of its members that the proposal by J. Flag challenges Christian society, and that, as heterosexuality is what assures the perpetuation of the human race, homosexuality could be regarded as a challenge to the existence of the human race. These views, of course, are not shared by the representatives of J. Flag.

It is important to record that the representatives of J. Flag have stated that they regard the legislation which criminalizes buggery between persons as the essence of discrimination against homosexuals, particularly in relation to its enforcement against male homosexuals, and, therefore, that if a recommendation for the repeal of that legislation in relation to consenting adults in private is as far as the Committee would be prepared to go, they would be grateful for that concession.

The Committee urges J. Flag to carry out further research as to (i) the

Constitutions which guarantee protection against discrimination on the ground of sexual orientation; (ii) the laws which would be inconsistent with such a constitutional provision; (iii) scientific data as to the causes of homosexuality; and (iv) whether there has been an increase in homosexuality following on such a liberalization of the law in other countries.

The Committee is not at present disposed, however, to include in the Charter of Rights a guarantee of protection from discrimination on the ground of sexual orientation, because of the implications which this would have, in particular, its implications in relation to the institution of marriage and questions of parenting. It would, however, bring to the attention of the Government, as a matter for consideration, the issue of the repeal of the provisions of the Offences Against the Person Act in so far as it relates to the offence of buggery between consenting adults in private.

### **Discrimination on the Ground of Disability**

The Report of the Constitutional Commission did not raise any issue in relation to, or recommend, the inclusion in the Charter of Rights of a guarantee of protection against discrimination on the ground of disability. Accordingly, no provision is made in the Bill for protection against discrimination on that ground. Nor was the matter touched on by the Advisory Group.

The issue of constitutional protection against discrimination on the ground of disability was raised, however, during the deliberations of the Joint Select Committee concerning the constitutional protection against discrimination. It was stated, initially, that the reference made was to physical disability, but this was subsequently widened to include mental disability, and, finally, the term disability was used.

Reference was made, in the discussions of this issue, to a policy document published in September 2000 by the Ministry of Labour and Social Security, entitled National Policy for Persons with Disabilities. Members of the Committee were also supplied with a document entitled, "An Overview of the Policy Regarding Persons with Disabilities".

The definition of "disability" given in that document is as follows:

In the context of health experience, a disability is any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being.

The document points out that it is clear that, included in the concept and the definition of "disability", is mental as well as physical disability. The paper lists a number of functional limitations which are summarized in the term "disability" and points out that such functional limitations may be permanent or transitory.

The Committee was informed that the national policy for persons with disabilities was being developed with a view to the enactment of a National Disability Act.

On the invitation of the Committee, Senator Floyd Morris made written and oral presentations on behalf of the disabled, a group estimated as including approximately 250,000 individuals. The disabled, Senator Morris said, had been exposed to the greatest levels of discrimination in the Jamaican society. His written presentation is attached as Appendix 6.

Senator Morris advocated the inclusion in the Constitution of an entrenched provision to protect the disabled from discrimination and the enactment of a National Disability Act to deal with the specific issues of the disabled in Jamaica. He expressed the firm belief that there was a need for such legislation and constitutional protection in various areas, for example, in the areas of education, transportation and employment. Of the estimated 250,000 disabled in Jamaica, he said, only approximately 250 or 0.1% or less were employed.

This, he said, would be in keeping with the direction in which Jamaicans, as a society ought to go, to provide and care for the dispossessed, and will set the stage for a moving away from a welfarist notion of how we treat the disabled to a more pragmatic/developmental approach in catering to the needs of the disabled.

The Committee examined provisions in the Constitutions of South Africa, Uganda and Canada which guarantee protection against discrimination on the ground of disability. Section 9 of the South African Constitution prohibits unfair discrimination by the State or by any person, directly or indirectly on the ground, inter alia, of disability and goes on to provide that national legislation must be enacted to prevent unfair discrimination.

Section 15 of the Canadian Constitution deals with protection against discrimination on various grounds in the context of equality before and under the law and equal protection and benefit of law. It provides as follows:

15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability;

(2) Subsection (1) does not preclude any law, program or activity that has, as its object, the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Article 21 of the Constitution of Uganda protects persons from being discriminated against on the ground, inter alia, of disability.

The Committee is extremely pleased that policies are being developed, with a view to the enactment of legislation, for the protection of the disabled. It is noted that this will have implications in a number of areas as to the measures, legislative and otherwise, for example, a new building code, which would be required to support those policies.

It is, therefore, a matter of profound regret that the Committee feels unable, at this time, pending the development of these issues and the adoption of the necessary support measures, to recommend the inclusion in the Constitution, as in the Constitutions referred to, of a guarantee of protection against discrimination on the ground of disability. The Committee wishes, however, to bring to the attention of Parliament its deep concern in relation to these issues and urges vigorous action towards the development of the protective policies and the implementation of support measures in this regard.

### **The Committee recommends:**

(i) that the grounds of discrimination specified in paragraph (j) of the proposed new section 13(2) of the Constitution remain unchanged, save for the replacement of the word “gender” in subparagraph (i) of that paragraph by the word “sex”, with an indication that that word is there used as meaning male or female.

(ii) that, as a preparatory measure, to pave the way toward the eventual inclusion in the Constitution of a guarantee of the protection against discrimination on the ground of language, an agency modelled on the Antillean Linguistic Institute of the Netherland Antilles be established to standardize, popularize and formalize the already existing standard system for writing patois, to assist the Public Defender in establishing standards to be met by public agencies in terms of their ability to communicate in both Jamaican and standard English and to deal also with sign language.

(iii) that the Department of Language, Linguistics and Philosophy of the University of the West Indies be encouraged to pursue its work on standardization, popularization and formalization of the Jamaican patois and to report appropriately on that work as it progresses.

(iv) that the Government be invited to consider the matter of the repeal of the provisions of the Offences Against the Person Act which relate to the offence of buggery, in so far as those provisions relate, to the acts of consenting adults in private.

(v) that the Government vigorously pursue the development of policies for the protection of the disabled and the implementation of legislative and other measures in support of those protective policies.

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