



SELINUS UNIVERSITY
OF SCIENCES AND LITERATURE

**THE POSSIBLE IMPACT OF THE GLOBAL
OBSERVANCE OF EMERGING RIGHTS RELATING TO
THE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER
(LGBT) COMMUNITY ON THE BARBADIAN SOCIETY**

Michael A. Sabazan

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ABSTRACT

THE HUMAN RIGHTS PARADIGM SHIFT IN AN EVOLVING WORLD:

WHAT IS THE POSSIBLE IMPACT OF THE GLOBAL OBSERVANCE OF EMERGING RIGHTS RELATING TO THE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER (LGBT) COMMUNITY ON THE BARBADIAN SOCIETY

Michael Anderson Sabazan

This research was conducted in the wake of ongoing concerns being raised by the LGBT community regarding what they perceived as discriminatory actions towards that community. Barbados, a Caribbean island in the West Indies, has maintained a state of human freedom based on a broad measure that encompasses personal, civil, and economic freedom. This claim is supported by Barbados' ranking as a free society in Freedom House's Freedom in the World Reports, the latest Report being January 2020. Freedom House rates people's access to political rights and civil liberties in 210 countries and territories through its annual Freedom in the World Report. The broad measure of human freedom is understood to mean the absence of coercive constraint.

The main questions included but were not limited to, whether there exists in Barbados any legislative or social challenges facing the LGBT community and if so, what were those challenges. What was the likelihood that Barbados might be pressured into repealing its buggery laws by the international community and what difficulties were currently being experienced by the LGBT community living in Barbados? Further, what would be the possible impact on the Barbadian

society should Barbados adopt the position taken by much of the international community regarding positive observance of the rights sought after by the LGBT community. Also, whether what is referred to as LGBT rights are in fact human rights.

The discussion in this paper as it pertained to Barbados' possible observance of LGBT rights has remained rather fluid as those issues continued to be considered at a national level during the time of the compilation of this work. For example, in the January 27, 2020 edition of the Barbados Daily Nation newspaper, the Anglican Bishop Michael Maxwell in response to national discussion on the issue stressed that based on the Scriptures, marriage was between a man and a woman and therefore, the Anglican Church in Barbados would not be endorsing same-sex unions. Barbados has boasted over the years of being a predominantly Christian society.

The methodology for the research for the most part was by way of literature review which involved the reviewing of caselaw from primarily the Caribbean, the United States of America, the European Union, and such other jurisdictions as the research dictated, as well as a review of relevant texts, documents and related international agreements. Originally, structured interviews with the relevant stakeholders including members of the religious community, the political directorate, and members of the LGBT Community formed part of the planned methodology, but the restrictions related to the coronavirus pandemic resulted in that approach being drastically altered.

This study has revealed that both local and regional policy makers would be faced with the challenge of making definitive determinations on issues surrounding the observance of the emerging rights pertaining to the LGBT community. Regional Governments might find themselves

having to begin the process of enacting the required provisions in their national laws which would guarantee that the LGBT community enjoy rights hitherto only enjoyed by members of the heterosexual community. It is expected that such a move by regional lawmakers would be met with some resistance from those who hold more traditional and conservative views.

Policy makers in Barbados would therefore have to formulate a possible course of action which balances the understanding relating to human rights issues affecting the LGBT community with the need to ensure the religious sect which accounts for the majority of the Barbadian population that the Barbadian society was not, by observing those emerging rights, plummeting into moral chaos.

I have approached discussion on this subject from a neutral perspective, advancing the various arguments as such arguments have historically unfolded.

Keywords: Michael Anderson Sabazan; Human Rights Paradigm Shift in an Evolving World.

INTRODUCTION

Barbados' Historical Observance of Rights

The experience of the Second World War outraged many nations worldwide and as a direct consequence, the international community vowed never again to allow that type of carnage to occur. What resulted was a decision by world leaders to craft a mechanism which would guarantee the rights of every individual in every territory worldwide. The document which they jointly developed became known as the Universal Declaration of Human Rights¹. On December 10, 1948, 48 countries came together at the United Nations in Paris to sign what became known as the Universal Declaration of Human Rights. The United Kingdom (UK) was among those countries and Barbados, being then a colony of the UK, would have by extension, adopted the laws of the colonizing country.

This work will examine, inter alia, how Barbadians understand human rights and the extent to which they view these rights as being applicable to the lesbian, gay, bisexual, and transgender (LGBT) community in Barbados. The main focus will be on the Barbadian society, but comparisons will be made by reference to both regional and international territories when deemed necessary. It is without doubt that the movement towards observance and acceptance of these emerging rights is being driven by the international community.

There will also be an examination of the local laws which govern the Barbadian society as a whole relating to fundamental human rights and the impact of those laws on the LGBT community. I am firmly of the opinion that failure to understand how society could be impacted by the decisions which govern how citizens should entreat with the issue of emerging rights of the LGBT community has the potential to beget social discontent. Based on news reports coming out of the regional and international press, efforts to effect a non-traditional approach to dealing with human rights issues related to the LGBT community have oftentimes been met with resistance from members of the wider society.

¹ United Nations Website – <https://www.un.org/en>

Recognition of the rights of the LGBT community as recommended by the international lobbyists quite possibly would not be supported by the Christian Church, or the minority religions in Barbados. The fear held by the church as expressed by many denominations was that recognition of such emerging rights had the potential to damage the morality of the whole society and in particular, encourage the abuse of young males.

In Barbados, religious organizations can undoubtedly embrace responsibility for shaping much of the negative narrative on LGBT issues. This narrative is usually based on what the church refers to as morality. Dworkin posited that morality was not the prerogative of any particular group of society - let alone the majority - but rather a limited number of basic principles shared by all members of the community. Initially he suggested that these were “legal principles,” which bind judges in deciding “hard cases,” but their nature and weight remained unspecified².

As recent as the year 2004, the Lambeth Commission was requested to examine the implications of the actions of Churches which were considered detrimental to the Unity of the Anglican Communion and to recommend a way forward for the Communion. The Lambeth Commission on Communion was established by the Archbishop of Canterbury in October 2003, following the special Primates' Meeting called that month in Lambeth Palace to discuss developments in the Anglican Episcopal churches of North America, which were of a controversial nature. The Report examined, inter alia, the legal and theological implications flowing from the decisions of the Episcopal Church (USA) to appoint a priest who was in a committed same sex relationship as one of its bishops. The Commission reported to the Archbishop of Canterbury in October 2004 and issued its findings in what became known as the Windsor Report 2004³.

The 36th Session of the Synod of the Church in the Province of the West Indies (CPWI) was held in Belize City, Belize, November 12-19, 2004 to consider the said Report and concluded as follows:

² R. Dworkin, "Freedom's Law: the Moral Reading of the Constitution" (1996)

³ The Windsor Report - <https://www.anglicancommunion.org/media/68225/windsor2004full>

‘We commend the members of the Commission for the tremendous effort which they have exerted in accomplishing the task given them. Their report provides a framework for the Communion to move forward as a Communion.

We reaffirm our position that no Province/Diocese has the authority to unilaterally alter the teaching of the Anglican Communion. We believe that the Windsor Report shares this view where it states that the Episcopal Church (USA) and the Diocese of New Westminster (within the Anglican Church of Canada) did not "attach sufficient importance to the impact of their decisions on the Communion"⁴ and "acted in ways incompatible with the Communion principle of interdependence, and our fellowship together has suffered immensely as a result of these developments"⁵.

We support the call of the Windsor Report for a moratorium on the election and consecration of any candidate to the Episcopate who is living in a same sex union, and the use of rites for the blessing of same sex unions. We feel that, in compliance with this, Provinces/Dioceses ought to cease and desist from such activities.

We recognize the authority of the instruments of unity, as listed in the Report, namely, the Archbishop of Canterbury, Anglican Consultative Council, the Lambeth Conference, and the Primates Meeting and we support the call for their strengthening. We believe that mechanisms ought to be put in place for the resolution of situations where provinces refuse to adhere to the decisions of these instruments, and we recommend the acceptance of the proposal for the establishment of an Anglican Covenant.

We continue to recognize and support the ministry of the Bishops, Clergy and Laity in the Episcopal Church (USA) and the Anglican Church of Canada who adhere to the historic teaching of the church. We support the call of the Primates for the provision of Episcopal Oversight "for congregations alienated from their diocesan Bishops". We note the endorsement of the Report for the Delegated Episcopal Pastoral Oversight authorized by the Episcopal Church (USA). We propose that a mechanism be put in place to verify claims of Episcopal deprivation and the necessity for Episcopal care/oversight. In this regard, we recommend that the Council of Advice proposed in the Windsor Report⁶ be that body.

⁴ The Windsor Report, section 121

⁵ Ibid, section 122

⁶ Ibid, section 111

We reiterate our commitment to the official teaching of historic Christianity and of this Communion as stated in Lambeth 1:0 in which homosexual practice is described as contrary to scriptural teachings.

We also acknowledge the enormous contribution which the Anglican Communion has made to the proclamation of the Good News in Jesus Christ. While recognizing the importance of the subject of human sexuality for members of the Communion, we believe that the Church's mission to proclaim the Gospel of Jesus Christ cannot be reduced to the contemporary preoccupation with human sexuality, while ignoring the many urgent and pressing issues which confront the peoples of the Caribbean Region and the rest of the world.

We hope and pray that the authorities in the Episcopal Church (USA) and the Diocese of New Westminster will heed the call of the Commission and comply with the recommendations of the Windsor Report. Failure to comply will lead to a serious situation in the Communion. The Primates at their meeting in February 2005 will assess the situation.

We pledge ourselves to work for the preservation of the unity of the Communion and will continue to walk with those who share this vision’.

The situation faced by the Church necessitating the compilation of the Windsor Report continues to be a source of divide. However, it is clearly without dispute that much of the Church’s teachings condemn the homosexual lifestyle, an influence which makes the recognition of LGBT rights difficult to gain internal acceptance by the average Barbadian citizen.

On the issue of same-sex marriage, as was mentioned earlier, Barbados’ Anglican Bishop Michael Maxwell stressed that based on the Scriptures, marriage was between a man and a woman and therefore, the Anglican Church in Barbados would not be endorsing same-sex unions⁷.

On December 15, 2011, the Office of the High Commissioner for Human Rights (OHCHR) released its first report on the human rights of LGBT persons. That report detailed the worldwide manifestations of discrimination based on sexual orientation, noting that violence against Lesbian,

⁷ Barbados Daily Nation Newspaper, January 27, 2020

Gay, Bisexual, Transgender and Queer (LGBTQ) persons had a history of hate-motivated violence, such as discrimination in work, health care, education, detention and torture.

Concurrent with the OHCHR report, Ms. Navanethem 'Navi' Pillay of South Africa, the then United Nations High Commissioner for Human Rights, appealed to United Nations Member States, of which Barbados is a member, to decriminalize homosexuality and enact comprehensive anti-discrimination laws.

During the year 2012, Miss Navanethem 'Navi' Pillay visited Barbados and in particular, my workplace at the Office of the Ombudsman of Barbados to, inter alia, demonstrate the OHCHR's continued commitment to expanding its presence in the Caribbean region, and to reaffirm the OHCHR's commitment to assisting the Barbados Government in fulfilling its human rights obligations and commitments under the various signed and ratified treaties.

During that meeting, Ms. Pillay again made the appeal that Barbados should decriminalize homosexuality on its statute books, and enact comprehensive anti-discrimination laws. She requested the development of public information campaigns to educate citizens about ensuring the rights of LGBT persons. Ms. Pillay specifically indicated that those sworn to protect individual rights, such as Police, other law enforcement officers and public officials, should receive appropriate training in this subject. Barbados was further requested to:

- 1) repeal laws that criminalize homosexuality,
- 2) abolish the death penalty for offenses involving consensual sexual relations,
- 3) enact comprehensive anti-discrimination laws,
- 4) standardize the age of consent for homosexual and heterosexual conduct,
- 5) investigate all killings or serious violence against sexual orientation or gender identity,
- 6) ensure that asylum laws recognize sexual orientation and gender identity as a basis for claiming persecution,
- 7) not to persecute LGBTQ persons, and
- 8) enable LGBTQ persons fleeing persecution to avoid returning to countries or territories where their freedom is threatened.

One of the primary remaining challenges has been the extent to which those who oppose and hold a negative attitude towards the homosexual lifestyle within the Caribbean region, continue to question the entitlement of the LGBT community to enjoy rights historically enjoyed only by members of the heterosexual community.

Attitude is defined as “a predisposition or a tendency to respond positively or negatively to a certain idea, object, person, or situation”⁸.

Men and women have various attitudes towards the LGBT community. Attitudes toward lesbians, gay men, bisexual women, and bisexual men were assessed in a national representative sample of 2,006 self-identified heterosexual women and men living in Germany. That research found that men’s attitudes toward homosexuals tend to be more negative than those of women. Women were found to have more favourable attitudes than men towards male homosexuality while men were found to have more favourable attitudes toward female rather than male homosexuality. Women were found not to differentiate⁹.

The Government of Barbados does not at this time of writing recognize same-sex marriages. In Barbados, as well as within other regional territories, the question of same-sex marriage compared to the traditional concept of marriage, which is the union between a man and a woman, continues to be an issue. It is expected that Barbados would be called upon to deal with this issue on a national basis in the near future. In a few regional island states, members of the LGBT community have been attacked and assaulted on sight. Some have had their homes and property vandalized.

Broadly speaking, sexual prejudice refers to negative attitudes based on sexual orientation, whether their target is homosexual, bisexual, transgender or even heterosexual¹⁰. Thus, the term can be used to characterize not only anti-gay and anti-bisexual hostility, but also the negative attitudes that some members of sexual minorities hold toward heterosexuals.

⁸ Dictionary.com

⁹ Melanie C Steffens, Attitudes toward Lesbians, Gay men, Bisexual women, and Bisexual men in Germany

¹⁰ G. M. Herek (2000) The Psychology of Sexual prejudice. *Current Directions in Psychological Science*, 9, 19 -22.

Given the power relations in contemporary society, however, prejudice is most commonly directed at people who engage in homosexual behavior or label themselves gay, lesbian, or bisexual. In this work, sexual prejudice is used to refer to heterosexuals' negative attitudes toward homosexual behaviour, people who engage in homosexual behavior or who identify as gay, lesbian, bisexual or transgender.

This research might assist in identifying whether there exist inherent LGBT rights, whether there is in fact a failure by regional governments to observe the fundamental rights of that section of the society, as well as the possible impact the observance of rights well established in the international arena relating to the LGBT community might have on a Barbadian society.

It is also my intention to briefly examine human rights affecting the LGBT community in relation to the free movement of persons within the Caribbean diaspora. Under the Revised Treaty of Chaguaramas establishing the Caribbean Community including the Caribbean Single Market and Economy (CSME), an agreement has been signed among the CARICOM Member States for the creation of a single enlarged economic space through the removal of restrictions, resulting in the free movement of goods, services, persons, capital and technology throughout the region. It also confers the right of CARICOM Nationals to establish a business in any participating CARICOM Member State.

The CSME creates the possibility of free movement of persons across the region, abolishing discrimination on grounds of nationality in all member states. Free Movement of People encompasses the right of CARICOM nationals to take up and pursue an economic activity either as an employer or employee, or to provide a service anywhere within the Member States. In addition, it also allows all nationals to take up residence or temporary stay in any of the Caribbean Member States.

The concern which arises is that persons within individual territories may be requested to recognize the customs and practices of others from outside their jurisdictions. The follow-up question which arises would be whether there are inherent rights to have ones' customs and practices observed in other peoples' territories as it relates to the LGBT community.

As the requirement to make definitive determinations on some of the more complex issues surrounding the observance of the emerging rights pertaining to the LGBT community constantly confront policy makers, this research might prove useful when said policy makers are faced with the inevitable challenge of deciding whether or not to give recognition to those emerging rights.

Chapter 1

ARE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER (LGBT) RIGHTS HUMAN RIGHTS?

There are several actors discussing, or rather arguing about, the rights of sexual and gender minorities, and many countries within the Caribbean diaspora have come to the fore in opposing the notion that LGBT rights should be protected legally. “Rights are entitlements (not) to perform certain actions, or (not) to be in certain states; or entitlements that others (not) perform certain actions or (not) be in certain states. Rights dominate modern understandings of what actions are permissible and which institutions are just. Rights structure the form of governments, the content of laws, and the shape of morality as many now see it. To accept a set of rights is to approve a distribution of freedom and authority, and so to endorse a certain view of what may, must, and must not be done”¹¹.

Carlos Andres Pagan in his article ‘The Emergence of LGBT Rights in International Human Rights Law’ asked the question “Are lesbian, gay, bisexual and transgender (LGBT) rights “human rights”? Louis Henkin et al., Human Rights 1208 in 2009 asserted that “the major Human Rights Treaties and most National Constitutions were adopted prior to the emergence of LGBT rights consciousness or advocacy movements” and partly due to this “the treaties do not expressly mention homosexuality, sexual orientation, or gender identity and some provisions (such as the right to marry) refer to the union of men and women.”

I think it might prove useful to explain certain defining terminologies associated with this work. A person’s sexual orientation refers to who they are attracted to and with whom they form relationships, whether these relationships be bisexual, heterosexual or homosexual¹². Sexual orientations include **lesbian** (women who are attracted to women), **gay** (usually men who are attracted to other men), **bisexual** (attracted to men and women), **pansexual** (attracted to individuals, regardless of gender), **asexual** (not sexually attracted to anyone)¹³.

¹¹ Stanford Encyclopedia of Philosophy

¹² Merriam-Webster Dictionary

¹³ Wikipedia - https://en.wikipedia.org/wiki/Sexual_orientation

Transgender (or trans) people are individuals whose gender identity or gender expression is different from typical expectations of the gender they were assigned at birth. Not all transgender people identify as male or female. Some identify as more than one gender or no gender at all. Being transgender has nothing to do with a person's sexual orientation. It has been noted that a trans man can be gay – or a trans woman be a lesbian¹⁴.

According to some scholars, human rights describe moral norms or moral standards which are understood as inalienable fundamental rights of every human person. Human rights encompass a wide variety of rights, including but not limited to protection from inhuman treatment, protection of physical integrity, freedom of assembly and association, freedom of expression, and the right to personal liberty.

The protection of human rights therefore is certainly one of the most important aspects of development. Nevertheless, it receives much less attention than other aspects, presumably in part because it is so very hard to measure. If one is interested in empirically studying the protection of human rights, it is not enough to count countries that ratify human rights treaties; instead, the quantitative study of human rights aims to determine whether or not certain human rights are protected in practice.

The English utilitarian political philosopher and lawyer Jeremy Bentham (1748-1832) dismissed the notion of “natural” rights as nonsense and argued that all rights were the creation of the state.

Bentham states that “Rights are, then, the fruits of the law, and of the law alone. There are no rights without law – no rights contrary to the law – no rights anterior to the law. Before the existence of laws there may be reasons for wishing that there were laws – and doubtless such reasons cannot be wanting, and those of the strongest kind – but a reason for wishing that we possessed a right, does not constitute a right. To confound the existence of a reason for wishing that we possessed a right, with the existence of the right itself, is to confound the existence of a want with the means of relieving it. It is the same as if one should say, everybody is subject to hunger, therefore

¹⁴ Human Rights Campaign – Understanding the Transgender Community; www.hrc.org/resources/transgender

everybody has something to eat”¹⁵. He considered that the concept of natural rights was “nonsense upon stilts”¹⁶. The government to Bentham is the source of law, and rights are created by the law made by the government.

Based on Bentham’s philosophy, the LGBT community does not have any inherent rights other than those which a Government may bestow.

Bentham posited further that “Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other chain of causes and effects, are fastened to their throne. They govern us in all we do, in all we say, in all we think: every effort we can make to throw off our subjection, will serve but to demonstrate and confirm it. In words a man may pretend to abjure their empire: but in reality he will remain subject to it all the while. The principle of utility recognizes this subjection, and assumes it for the foundation of that system, the object of which is to rear the fabric of felicity by the hands of reason and of law”¹⁷.

While not wanting to enter into the exhaustive critique of Bentham’s position, I would agree that Government legislatures do enact law which confers rights on citizens. I do not agree that all laws emanate from the legislative process. Laws governed by Custom and natural laws do not exist via the agency of any legislature. For example, it was noted that laws such as Newton’s laws of motion exist independent of Government’s involvement.

Support for the Bentham’s position has also come from Katherine O’Donovan in her book “**Equality and Sex Discrimination Law**”. She advanced the position that ‘the State, through anti-discrimination legislation, affirms its interest in the quality of citizens. It recognizes individuals as members of the polity and the wider social interest in social solidarity. It makes a legal statement prohibiting discrimination as wrong. That the statement may be limited, that the means may be

¹⁵ J. Bentham, *Anarchical Fallacies*, in 2 Works 501

¹⁶ *Ibid* 2 Works 501

¹⁷ J. Bentham, *Introduction to the Principles of Morals and Legislation*, in 1 Works 1

ineffective, should not cause us to overlook the importance of such a statement in official discourse.’

The Philosopher John Stuart Mill thinks that utility or the general happiness is the ultimate standard for moral assessment, but he also recognizes individual rights to important interests and liberties. As he stated in the introduction to ‘On Liberty’, “It is proper to state that I forego any advantage which could be derived to my argument from the ideas of abstract right, as a thing independent of utility. I regard utility as the ultimate appeal on all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being¹⁸.”

The more recent rights theorists treat certain fundamental interests and liberties as protected by rights.

In the work ‘Utilitarianism’, Mill links the idea of justice and rights insofar as all injustices are not only wrong but violate rights. He stated “While I dispute the pretensions of any theory which sets up an imaginary standard of justice not grounded on utility, I account the justice which is grounded on utility to be the chief part, and incomparably the most sacred and binding part, of all morality. Justice is a name for certain classes of moral rules, which concern the essentials of human well-being more nearly, and are therefore of more absolute obligation, than any other rules for the guidance of life; and the notion which we have found to be of the essence of the idea of justice, that of a right residing in an individual, implies and testifies to this more binding obligation¹⁹.”

It may be necessary at this point to speak a little to the concept of Utilitarianism. In particular, I think that it is necessary to distinguish between direct and indirect utilitarianism.

- Direct Utilitarianism: Any object of moral assessment (e.g., action, motive, policy, or institution) should be assessed by and in proportion to the value of its consequences for the general happiness.

¹⁸ John Stuart Mill, *On Liberty*, in xviii collected works of John Stuart Mill, Ch. I, para. 11, 224

¹⁹ John Stuart Mill, *Utilitarianism*, Ch. V, 255

- Indirect Utilitarianism: Any object of moral assessment should be assessed, not by the value of its consequences for the general happiness, but by its conformity to something else (e.g., norms, motives, or responses) that has good or optimal acceptance value²⁰.

Mill describes that doctrine this way: “The creed which accepts as the foundations of morals, Utility or the Greatest Happiness Principle, holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure, and the absence of pain; by unhappiness, pain and the privation of pleasure²¹.”

He posited that one must always consciously employ the utilitarian principle in making decisions as follows: “(to do otherwise) is to mistake the very meaning of a standard of morals, and to confound the rule of action with the motive of it. It is the business of ethics to tell us what are our duties, or by what test we may know them; but no system of ethics requires that the sole motive of all we do shall be a feeling of duty; on the contrary, ninety-nine hundredths of all our actions are done from other motives, and rightly so done, if the rule of duty does not condemn them²².”

Therefore, in simple language, according to Mill, any rights which have been established are to be honored, except in cases of conflict of rights, in which case the conflict is to be resolved by appeal to overall good, in other words, people should be free to do that which they wish unless those actions harm others. He also holds the view that the Government should only encroach upon the liberty of individuals for the protection of society.

Note should however be taken of Mill’s position when he says the following: “For the truth is, that the idea of penal sanction, which is the essence of law, enters not only into the conception of injustice, but into that of any kind of wrong. We do not call anything wrong, unless we mean to imply that a person ought to be punished in some way or other for doing it; if not by law, by the opinion of his fellow creatures; if not by opinion, by the reproaches of his own conscience. This seems the real turning point of the distinction between morality and simple expediency²³.”

²⁰ Boston University Law Review Vol. 90, 1671

²¹ John Stuart Mill, Utilitarianism, Ch. II, 210

²² Ibid, para. 19, at 219

²³ John Stuart Mill, Utilitarianism, Ch. V, para. 14, 246

Mill appears to be stating that one is under an obligation or duty to do something just in case failure to do it is wrong and that an action is wrong if and only if some kind of external or internal sanction – punishment, social censure, or self-reproach – ought to be applied to its performance. This conception has been referred to as the sanction-utilitarian theory of rights.

Therefore, Mill does recognize individual rights, but these rights as stated above are based in some way on considerations of utility.

The question which immediately presents itself is whether any conflict of rights exist as a direct consequence of observing the existence of LGBT rights. Using Mill's theory, just as a marriage between a man and a woman does not harm society, a marriage between two people of the same sex should not harm the community either. Thus, according to Mill, there is no justification to limit the liberty of homosexuals by prohibiting same-sex marriage, unless by so doing, there is actual harm to society.

Placing the debate on LGBT rights in a theoretical framework may be a beneficial exercise for the academic like myself. Indeed, the debate around gay rights has brought to bear in this work a cursory look at two popular legal theories, natural law and liberalism. These are huge topics to which an entire work may be devoted.

Considered by many to be the most prominent natural lawyer of our time is John Finnis. In "*Law, Morality, and 'Sexual Orientation'*", Finnis aims to defend the natural law vision of homosexuality as wrong and immoral in the new legal and social setting following the decriminalization of sodomy²⁴.

Natural law theory asserts that positive, or man-made law should be formulated and evaluated according to a higher moral law (natural law) that is not made by humans, but is inherent in the nature of the universe. The fundamental principle is therefore that laws must be essentially grounded in morality. Finnis opposes the idea of adopting laws prohibiting discrimination on grounds of sexual orientation because such laws, he claims, "would work significant discrimination and injustice against (and would indeed damage) families, associations and

²⁴ J.M. Finnis, "Law, Morality, and 'Sexual Orientation'" (1994) 69 Notre Dame L. Rev. 1049.

institutions, which have organized themselves to live out and transmit ideals of family life that place a high value on the worth of truly conjugal sexual intercourse”²⁵. This type of reasoning would undoubtedly find favour with the religious sect in most societies.

Furthermore, according to natural law theorists, law must be respected by ordinary judges who are limited in their ability to rely on their own morals - that is - they should follow the original meaning (or intent) of a given law.

However, most critics of natural law theory argue that neither human nature nor morality is universal. Rather, various scholars maintain that apart from some very basic elements, both human nature and morality are largely dependent upon history and culture, which are far from being universal. Some of the most of-cited examples of changes in moral values are objections to slavery (which was long thought to be moral) and interracial marriages (which at one time were categorically opposed by natural lawyers and prohibited by positive law).

This highlights the point that perceptions on what constitutes morality can and have changed overtime. It is evident that the international perception of homosexuality has shifted to the extent that there has been a merge of gay rights and human rights. The question now becomes to what extent, if at all, is the maintenance in force of anti-homosexuality legislation necessary in a democratic society.

According to many, the right to engage in relationships with same-sex partners conflicts with the doctrine of the Church. Pope Benedict XVI in his 2013 New Year address to the diplomatic corps accredited to the Vatican said that gay marriage was one of several threats to the traditional family that undermined “the future of humanity itself”. He told diplomats from nearly 180 countries that the education of children needed proper “settings” and that “pride of place goes to the family, based on the marriage of a man and a woman”. He continued that “policies which undermine the family threaten human dignity and the future of humanity itself”²⁶.

²⁵ Ibid. at 1054

²⁶ Vatican City, January 9, 2012

Pope Benedict XVI in his reasoning for the condemnation of gay marriage has stated that such a union “threaten human dignity and the future of humanity itself”. This is clearly the opinion of the Pope and one can surmise that this would not constitute actual harm as required by Mill.

On the other hand, the Philosopher Ronald Dworkin’s views on rights conceives of individual rights as fundamental and as being derived from an abstract right to equality. Ronald Dworkin, one of the most influential legal scholars of contemporary liberalism, argues in favour of greater equality for sexual minorities and therefore praises “famously tolerant political communities”²⁷. The core argument of Dworkinian liberalism has always been equality, an underlying principle of any democratic society where individual morality is not linked to positive law²⁸.

According to Dworkin, being fundamental, it cannot be overridden by Governments, except in extraordinary circumstances and as such, they are worthy of great respect. Respect as stated by Dworkin, is gleaned by comparing individual rights over collective interests. Dworkin viewed that individual rights ought to trump collective interests. He did not think that the principle of utilitarianism, the greater good for the greatest number of people, ought to trump individual rights. Therefore, even if society was of the view that a particular lifestyle was offensive, society ought not to override a person’s individual right to the lifestyle of the individual’s choice²⁹.

In particular, Dworkin commented “It follows from the definition of a right that it cannot be outweighed by all social goals. We might, for simplicity, stipulate not to call any political aim a right unless it has a certain threshold weight against collective goals in general; unless, for example, it cannot be defeated by appeal to any of the ordinary routine goals of political administration, but only by a goal of special urgency³⁰.”

As far as the determination of these rights by the courts are concerned, Dworkin posited that there was a sharp distinction between principles and policies: “I call a ‘policy’ that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community, though some goals are negative, in that they stipulate that some present

²⁷ R. Dworkin, "Liberal Community" (1989) 77 Calif. L. Rev. 479, at 487.

²⁸ R. Dworkin, *Taking Rights Seriously*. (London: Duckworth, 1977)

²⁹ R. Dworkin, *Taking Rights Seriously* (1977)

³⁰ R. Dworkin, *Taking Rights Seriously* (1977) pg. 92

feature is to be protected from adverse change. I call a ‘principle’ a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality³¹.”

He thought that a Court should prefer arguments of principle to arguments of policy when considering and giving reasons for a decision, explaining the differences as follows: “What are arguments of principle and arguments of policy, and what is the difference? Arguments of principle attempt to justify a political decision that benefits some person or group by showing that the person or group has a right to the benefit. Arguments of policy attempt to justify a decision by showing that, in spite of the fact that those who are benefited do not have a right to the benefit, providing the benefit will advance a collective goal of the political community. It is important not to confuse this distinction, between arguments of principle and arguments of policy, with a different distinction, which is the distinction between the consequentialist and non-consequentialist theories of rights³².”

Based on the above theories posited by Dworkin, one can surmise that his rights thesis involves the general claim that within legal practice and a proper understanding of the nature of law, rights are more fundamental than rules. He contends that arguments of principle are arguments intended to establish an individual right, while arguments of policy are arguments intended to establish collective goals. Principles he said are propositions that describe rights, while policies are propositions that describe goals. What ought to be remembered at this point is that there is the distinction between rights against the state and rights against fellow citizens. The former justifies a political decision that requires some agency of the Government to act in a particular way while the latter concerns the enforcement of rights against fellow citizens.

What is clear is that there exists a need to provide a balance of understanding relating to human rights issues affecting the LGBT community in Barbados, thereby promoting better harmony between persons on opposite sides of the moral divide. It is possible that a better understanding of what constitutes a right from a general standpoint could assist in a better understanding of the

³¹ R. Dworkin, *Taking Rights Seriously* (1977) pg. 22

³² R. Dworkin, *Taking Rights Seriously* (1977) pg. 294

issues related to the LGBT community, thereby becoming a determining factor in eliminating the uncertainty held by both sides of that divide.

The question descends to whether sociological and/or political theory on the subject of individual rights can in fact outweigh religious belief in the Barbadian context. What is undoubtable is that reliance on rights theory as expounded by the various scholars may be an insufficient guide, failing to have enough persuasive effect in determining the question whether LGBT rights are in fact human rights.

Chapter 2

SOCIAL AND RELIGIOUS CHALLENGES TO RIGHTS OBSERVANCE

The Bible is a collection of religious texts or scriptures sacred to Christians, Jews, Samaritans, and others. It appears in the form of an anthology, a compilation of texts of a variety of forms that are all linked by the belief that they are collectively the revelations of God. These texts include theologically-focused historical accounts, hymns, prayers, proverbs, parables, didactic letters, erotica, poetry, and prophecies. Believers also generally consider the Bible to be a product of divine inspiration³³. The Bible itself states that the one true God is the **sovereign, self-existent Creator of the universe**³⁴, that He is spirit³⁵, eternal³⁶, personal³⁷, and the one true God who possesses all knowledge³⁸ and all power³⁹.

I have opted for this brief discourse on the Bible to outline the fundamental understanding of persons of the Christian faith regarding certain issues, independent of their respective denomination. There are a number of passages in the Bible which have been interpreted as involving same-sex sexual acts and desires. These interpretations form the basis of the Christian attitudes and teachings regarding homosexuality. There are two oft-cited verses commonly used as support for the argument by those making the claim that homosexuality is against the will of God. These are, “You shall not lie with a male as with a woman; it is an abomination”⁴⁰, and, “If a man lies with a male as with a woman, both of them have committed an abomination; they shall surely be put to death; their blood is upon them”⁴¹. For the purpose of this work, I will not proffer any argument for or against the correctness of the assertions as contained in those bible verses.

³³ Wikipedia - <https://en.wikipedia.org/wiki/Bible>

³⁴ Isaiah 42:5; Ephesians 1:11

³⁵ John 4:24

³⁶ Psalm 90:2

³⁷ Deuteronomy 34:10

³⁸ Isaiah 46:10

³⁹ Matthew 19:26

⁴⁰ Leviticus Chapter 18, verse 22

⁴¹ Ibid, Chapter 20, verse 13

These factors are being projected as the baseline of understanding of the Christian faith on the subject matter at issue. As was mentioned earlier, the Pope Benedict XVI himself added support to this position in his statement that homosexuality “threaten human dignity and the future of humanity itself.”

Approximately 95% of the population of Barbados are Christians. Most of the Barbadians of African and European ethnicity adhere to this religion. The large majority of these practice Protestant and Anglicanism with Roman Catholics accounting for a small part of the Christian population⁴².

In Barbados, using American nomenclature, baby boomers - persons born during the years from 1946 to 1964⁴³, generation x - persons born during the years from 1965 to 1980⁴⁴, and millenials - persons born during the years from 1981 to 2000⁴⁵ for the most part, received their primary and secondary education at schools which were at some point in their history, owned or managed by the established church, the Anglican church. In Barbados, primary school education begins at age 4, and at age 11, the children write what is known as their common entrance examination in order to gain entry into a secondary school. Secondary school follows through to age 18. It should be noted that a substantial amount of religious education formed part of the educational system in early Barbados⁴⁶.

The Anglican Church originally referred to as the Church of England has been in Barbados for over three hundred years. It is one of the oldest institutions in Barbados. The Anglican Church was brought to the West Indies with the original English settlers in the early part of the 17th century. It was the Church of the Englishmen who resided in the colony, the clergy for the most part being persons who came largely on their own to minister to the settlers.

⁴² WorldAtlas - <https://www.worldatlas.com/articles/religious/beliefs/in/barbados.html>

⁴³ United States Census Bureau

⁴⁴ Ibid.

⁴⁵ Ibid

⁴⁶ Barbados Pocket Guide - <https://www.barbadospocketguide.com>

The Anglican Church of Barbados became an institution which sought to carry out its mandate in a society that was far from ideal, and whose leaders exercised tremendous control over the island's affairs. The Anglican Church was regarded as the state church and had its place alongside the Parliament, the Judiciary and the Executive. Members of the clergy were paid from the treasury and were pensionable. Later on, they were elected chairmen of the Vestries, themselves elected bodies, which looked after the affairs of the parishes and functioned as the local government arm of the island.

The Anglican Church has made a significant contribution to education in Barbados, its involvement in education and the administration of schools going back a long way. Its contribution started with the early parish schools, administered by the vestries, but with the church playing a minimal role in the execution of the education offered. Earliest education offered in these schools was restricted to reading, writing and arithmetic, but writing was not extended to the slaves, except those on the Codrington estates in the parish of St. John. Schools for slaves were few at first, though this improved during the early episcopate of Bishop Coleridge.

The first Bishop of Barbados, William Hart Coleridge, contributed immensely to the development of education in Barbados. The promotion of education was his special concern, with the number of schools increasing from eight to eighty-three during his episcopate. The number of children receiving education in them increased from five hundred (500) to seven thousand (7000). Coleridge also reorganized the Codrington Grammar School so that it became in 1830 a training establishment for clergy and others as had been intended by its founder, Christopher Codrington. The Grammar School was transferred to the Chaplain's Lodge, from which the School later took its name. Bishop Coleridge's action assisted in the increase in numbers of clergy from fifteen (15) to thirty-one (31) during his tenure.

Bishop Coleridge was succeeded in 1842 by Bishop Thomas Parry, who sought to continue Coleridge's work in general and in education in particular. The Coleridge and Parry Secondary School in Barbados is a memorial to their collective efforts.

The third Bishop of Barbados, John Mitchinson, was enthroned in 1873. By that time the Diocese had forty-two (42) clergy, though smaller in size because of the creation of the Missions of Antigua and British Guyana in 1842. Bishop Mitchinson headed a Commission on Education in 1875 which resulted in the 1878 enactment of the Education Act. That Act laid the foundations of a more coordinated approach to education in Barbados, particularly secondary education. Bishop Mitchinson was appointed the first President of the Education Board in 1878. He assisted in bringing about the affiliation of Codrington College with Durham University, thus promoting higher Education for the clergy and the wider community.

The work of the Church in education was even more extensive than this. It involved the introduction of the first programme of teacher education in the Caribbean, under Richard Rawle, a Principal of Codrington College, who in 1847 undertook to organize lectures during the College vacations for persons engaged in teaching. This continued until he demitted office in 1864. The Rawle Institute, established in 1912 by the Rev A.H Antsey, a principal of Codrington College and named after Richard Rawle, remained the training institution for teachers in the Eastern Caribbean until it was replaced by the opening of Erdiston Teachers Training College, Barbados, in 1948⁴⁷.

What is being emphasized here is the fact that the church historically has had opportunity and inclination to convey at both school and church level, throughout the Caribbean diaspora over the many centuries, the position that homosexuality was against the will of God, and that participation therein would result in the punishment of eternal damnation and hell. Having that belief firmly entrenched in the minds of so many has resulted in the argument for the recognition of LGBT rights in Barbados and much of the Caribbean being totally ignored by the many who believe that to do such would be contrary to the will of God. There are no positions more strongly held than those taken in the name of religion.

⁴⁷ History of the Anglican Diocese of Barbados - www.anglican.bb/hist

What has also infuriated many Christians is aspects of the rhetoric which has been published by some of those who promote LGBT rights. For example, the following document, printed below in its entirety, appeared in the February 15, 1987 issue of the homosexual newspaper Gay Community News:

“We shall sodomize your sons, emblems of your feeble masculinity, of your shallow dreams and vulgar lies. We shall seduce them in your schools, in your dormitories, in your gymnasiums, in your locker rooms, in your sports arenas, in your seminaries, in your youth groups, in your movie theatre bathrooms, in your army bunkhouses, in your truck stops, in your all-male clubs, in your houses of Congress, wherever men are with men together. Your sons shall become our minions and do our bidding. They will be recast in our image. They will come to crave and adore us. Women, you cry for freedom. You say you are no longer satisfied with men; they make you unhappy. We, connoisseurs of the masculine face, the masculine physique, shall take your men from you then. We will amuse them; we will instruct them; we will embrace them when they weep.

Women, you say you wish to live with each other instead of with men. Then go and be with each other. We shall give your men pleasures they have never known because we are foremost men too and only man knows how to truly please another man; only one man can understand with depth and feeling the mind and body of another man.

All laws banning homosexual activity will be revoked. Instead, legislation shall be passed which engenders love between men.

All homosexuals must stand together as brothers; we must be united artistically, philosophically, socially, politically, and financially. We will triumph only when we present a common face to the vicious heterosexual enemy.

If you dare to cry faggot, fairy, queer, at us, we will stab you in your cowardly hearts and defile your dead, puny bodies.

We shall write poems of the love between men; we shall stage plays in which man openly caresses man; we shall make films about the love between heroic men which will replace the cheap,

superficial, sentimental, insipid, juvenile, heterosexual infatuations presently dominating your cinema screens.

We shall sculpt statues of beautiful young men, of bold athletes which will be placed in your parks, your squares, your plazas. The museums of the world will be filled only with paintings of graceful, naked lads.

Our writers and artists will make love between men fashionable and de rigueur, and we will succeed because we are adept at setting styles. We will eliminate heterosexual liaisons through the devices of wit and ridicule, devices which we are skilled in employing.

We will unmask the powerful homosexuals who masquerade as heterosexuals. You will be shocked and frightened when you find that your presidents and their sons, your industrialists, your senators, your mayors, your generals, your athletes, your film stars, your television personalities, your civic leaders, your priests are not the safe, familiar, bourgeois, heterosexual figures you assumed them to be. We are everywhere; we have infiltrated your ranks. Be careful when you speak of homosexuals because we are always among you; we may be sleeping in the same bed with you.

There will be no compromises. We are not middle-class weaklings. Highly intelligent, we are the natural aristocrats of the human race, and steely-minded aristocrats never settle for less. Those who oppose us will be exiled. We shall raise vast, private armies, as Mishima did, to defeat you.

We shall conquer the world because warriors inspired by and banded together by homosexual love and honor are as invincible as were the ancient Greek soldiers. The family unit spawning ground of lies, betrayals, mediocrity, hypocrisy, and violence will be abolished. The family unit, which only dampens imagination and curbs free will, must be eliminated. Perfect boys will be conceived and grown in the genetic laboratory. They will be bonded together in a communal setting, under the control and instruction of homosexual savants.

All churches who condemn us will be closed. Our only gods are handsome young men. We adhere to a cult of beauty, moral and aesthetic. All that is ugly and vulgar and banal will be annihilated.

Since we are alienated from middle-class heterosexual conventions, we are free to live our lives according to the dictates of the pure imagination. For us too much is not enough.

The exquisite society to emerge will be governed by an elite comprised of gay poets. One of the major requirements for a position of power in the new society of homoeroticism will be indulgence in the Greek passion. Any man contaminated with heterosexual lust will be automatically barred from a position of influence. All males who insist on remaining stupidly heterosexual will be tried in homosexual courts of justice and will become invisible men. We shall rewrite history, history filled and debased with your heterosexual lies and distortions.

We shall portray the homosexuality of the great leaders and thinkers who have shaped the world. We will demonstrate that homosexuality and intelligence and imagination are inextricably linked, and that homosexuality is a requirement for true nobility, true beauty in a man.

We shall be victorious because we are fueled with the ferocious bitterness of the oppressed who have been forced to play seemingly bit parts in your dumb, heterosexual shows throughout the ages. We too are capable of firing guns and manning the barricades of the ultimate revolution. Tremble, hetero swine, when we appear before you without our masks!⁴⁸

There is no evidence that this threatening approach in anyway advanced the cause of the LGBT movement. In fact, this article was used by those in the church as support for their argument that there was a real reason to fear acceptance by the wider society of LGBT rights.

Despite the aggressive tone taken by some of the early lobbyists for gay rights in the latter half of the twentieth century, the early twenty-first century saw what can be deemed as the softening of the position taken by some church leaders.

Archbishop Desmond Tutu, Nobel Laureate, hero in the fight against Apartheid and Chairman of the post-apartheid Reconciliation Commission, had this to say in a Sermon in 2003: *“The Jesus I worship is not likely to collaborate with those who vilify and persecute an already oppressed minority. I myself could not have opposed the injustice of penalizing people for something about*

⁴⁸ An Essay on the Homosexual Revolution – Michael Swift 1987

which they could do nothing - their race - and then have kept quiet as women were being penalized for something they could do nothing about - their gender, and hence my support inter alia, for the ordination of women to the priesthood and the episcopate. And equally, I could not myself keep quiet whilst people were being penalized for something about which they could do nothing, their sexuality. For it is so improbable that any sane, normal person would deliberately choose a lifestyle exposing him or her to so much vilification, opprobrium and physical abuse, even death. To discriminate against our sisters and brothers who are lesbian or gay on grounds of their sexual orientation for me is as totally unacceptable and unjust as Apartheid ever was.”

The Bishop of Cork in a sermon in 2003 stated:

“The present controversy about homosexuality within Anglicanism is now calling the Church's bluff about this professed preference to be, like Christ, among those on that edge. We have claimed to be on the side of those who were oppressed by society and consigned to its margins. This edge place is where most homosexuals were forced to live prior to decriminalization and the arrival of equality legislation, but where, in spite of immense changes in society, many still find themselves - especially those within the Church. The Church has been complicit in the resulting injustice and immense human suffering. Part of our responsibility centres on our acquiescence in the misuse of Scripture, caused by our inertia on the one hand and by our fear on the other of giving intelligent people of faith the tools for handling God's word rationally.”

The Archbishop of Canterbury in a sermon at Christmas 2003 commented:

“Historically, the answer, is, alas, that religious faith has too often been the language of the powerful, the excuse for oppression, and the alibi for atrocity. It has appeared as itself intolerant of difference, as a campaigning, aggressive force for uniformity, as a self-defensive and often corrupt set of institutions indifferent to basic human welfare. Yet religion has appeared as something fighting to take over territory in the human soul and the human world - an empire pushing at the frontiers, struggling to defeat the independence and dignity of people.”

The positions of the abovenamed clerics were highlighted simply because they were the more prominent leaders of the church in their time, and they reflected a fundamental shift in tolerance for the homosexual lifestyle. In Barbados and much of the Caribbean diaspora however, religious

beliefs and practices have continued along traditional lines and continue to be the most powerful inhibition to effecting changes in attitudes towards human sexual conduct. I am not convinced that changes in the national law related to homosexual practise would ever be supported by the Christian Church or the minority religions, particularly in Barbados. As mentioned earlier, the fear of the church as expressed by many denominations is that changes in the law would damage the morality of the whole society and contribute in no small way to the delinquency of minors, especially young boys.

Though the number of originally planned interviews were prevented by the onset of the coronavirus pandemic, I was however able to make contact with a few of the leading clerics in the main denominations locally. Those would include the Anglican, Catholic and Methodist denominations. The positions of those interviewed were unified in their condemnation of homosexuality even though admitting of God's love for the sinner. Pastor of the African Methodist Episcopal Church in Barbados Ruth V. E. Phillips stated that her church would continue to teach as accustomed on the issue of homosexuality despite whatever laws were amended. Roman Catholic Priest Father Clement Paul highlighted the fact that Barbados' buggery laws applied to both men and women. Commenting on the request to have Barbados repeal its buggery laws, he expressed the view that the State ought not to legislate on the type of shared intimacy which could be enjoyed by married couples.

Anglican Priest Senator Reverend John A. Rogers expressed the need for there to be a greater understanding of human sexuality by Church leaders. He explained that gender identity was non-binary, a term used to describe gender identities which were not strictly male or female. He stated that the position of intersex persons, persons born with a sexual anatomy which did not fit the typical definition of male or female, should be fully examined and understood before enacting legislation which might prejudice them unfairly due to no fault of their own. Falling short of stating emphatically whether he thought that the island's buggery laws ought or ought not to be repealed, Senator Rogers said that the matter was under current review and that a definitive response would be made public in due course.

I personally did not focus on the intersex persons as that involves a medical condition which is not widely understood by many and which is not subject to blameworthiness. This I believe should be the focus of a medical research paper.

The Agenda

The primary objective therefore of those seeking to have a recognition of LGBT rights was to find a path whereby dialogue could be opened between persons on opposing sides of the divide. In another article published in Guide Magazine in 1987, a strategy was devised for gaining favourable acceptance to the recognition of LGBT rights, and is outlined in its entirety for the most part as follows:

“The first order of business is desensitization of the American public concerning gays and gay rights. To desensitize the public is to help it view homosexuality with indifference instead of with keen emotion. Ideally, we would have straights register differences in sexual preference the way they register different tastes for ice cream or sports games: she likes strawberry and I like vanilla; he follows baseball and I follow football. No big deal.

And any campaign to accomplish this turnaround should do six things.

STEP 1: TALK ABOUT GAYS AND GAYNESS AS LOUDLY AND AS OFTEN AS POSSIBLE.

The principle behind this advice is simple: almost any behavior begins to look normal if you are exposed to enough of it at close quarters and among your acquaintances. The acceptability of the new behavior will ultimately hinge on the number of one's fellows doing it or accepting it. One may be offended by its novelty at first-- many, in times past, were momentarily scandalized by "streaking," eating goldfish, and premarital sex. But as long as Joe six-pack feels little pressure to perform likewise, and as long as the behavior in question presents little threat to his physical and financial security, he soon gets used to it and life goes on. The skeptic may still shake his head and think "people are crazy these days," but over time his objections are likely to become more reflective, more philosophical, less emotional.

The way to benumb raw sensitivities about homosexuality is to have a lot of people talk a great deal about the subject in a neutral or supportive way. Open and frank talk makes the subject seem

less furtive, alien, and sinful, more above-board. Constant talk builds the impression that public opinion is at least divided on the subject, and that a sizable segment accepts or even practices homosexuality. Even rancorous debates between opponents and defenders serve the purpose of desensitization so long as "respectable" gays are front and center to make their own pitch. The main thing is to talk about gayness until the issue becomes thoroughly tiresome.

And when we say talk about homosexuality, we mean just that. In the early stages of any campaign to reach straight America, the masses should not be shocked and repelled by premature exposure to homosexual behavior itself. Instead, the imagery of sex should be downplayed and gay rights should be reduced to an abstract social question as much as possible. First let the camel get his nose inside the tent--only later his unsightly derriere!

*Where we talk is important. The visual media, film and television, are plainly the most powerful image-makers in Western civilization. The average American household watches over seven hours of TV daily. Those hours open up a gateway into the private world of straights, through which a Trojan horse might be passed. As far as desensitization is concerned, the medium is the message-- of normalcy. So far, gay Hollywood has provided our best covert weapon in the battle to desensitize the mainstream. Bit by bit over the past ten years, gay characters and gay themes have been introduced into TV programs and films (though often this has been done to achieve comedic and ridiculous affects). On the whole the impact has been encouraging. The prime-time presentation of *Consenting Adults* on a major network in 1985 is but one high-water mark in favorable media exposure of gay issues. But this should be just the beginning of a major publicity blitz by gay America...*

STEP 2: PORTRAY GAYS AS VICTIMS, NOT AS AGGRESSIVE CHALLENGERS.

In any campaign to win over the public, gays must be cast as victims needing protection so that straights will be inclined, by reflex to assume the role of protector. If gays are presented, instead, as a strong and prideful tribe promoting a rigidly nonconformist and deviant lifestyle, they are more likely to be seen as a public menace that justifies resistance and oppression. For that reason, we must forego the temptation to strut our "gay pride" publicly when it conflicts with the Gay

Victim image. And we must walk the fine line between impressing straights with our great numbers, on the one hand, and sparking their hostile paranoia-"They are all around us!"--on the other.

A media campaign to promote the Gay Victim image should make use of symbols which reduce the mainstream's sense of threat, which lower it's guard, and which enhance the plausibility of victimization. In practical terms, this means that jaunty mustachioed musclemen would keep very low profile in gay commercials and other public presentations, while sympathetic figures of nice young people, old people, and attractive women would be featured....

STEP 3: GIVE PROTECTORS A JUST CAUSE.

A media campaign that casts gays as society's victims and encourages straights to be their protectors must make it easier for those to respond to assert and explain their new protectiveness. Few straight women, and even fewer straight men, will want to defend homosexuality boldly as such. Most would rather attach their awakened protective impulse to some principle of justice or law, to some general desire for consistent and fair treatment in society. Our campaign should not demand direct support for homosexual practices, should instead take anti-discrimination as its theme. The right to free speech, freedom of beliefs, freedom of association, due process and equal protection of laws-these should be the concerns brought to mind by our campaign.

It is especially important for the gay movement to hitch its cause to accepted standards of law and justice because its straight supporters must have at hand a cogent reply to the moral arguments of its enemies. The homophobes clothe their emotional revulsion in the daunting robes of religious dogma, so defenders of gay rights must be ready to counter dogma with principle.

STEP 4: MAKE GAYS LOOK GOOD.

In order to make a Gay Victim sympathetic to straights you have to portray him as Everyman....The honor roll of prominent gay or bisexual men and women is truly eye-popping. From Socrates to Shakespeare, from Alexander the Great to Alexander Hamilton, from Michelangelo to Walt Whitman, from Sappho to Gertrude Stein, the list is old hat to us but shocking news to heterosexual America. In no time, a skillful and clever media campaign could have the gay community looking like the veritable fairy godmother to Western Civilization.

STEP 5: MAKE THE VICTIMIZERS LOOK BAD.

At a later stage of the media campaign for gay rights-long after other gay ads have become commonplace-it will be time to get tough with remaining opponents. To be blunt, they must be vilified. This will be all the more necessary because, by that time, the entrenched enemy will have quadrupled its output of vitriol and disinformation. Our goal is here is twofold. First, we seek to replace the mainstream's self-righteous pride about its homophobia with shame and guilt. Second, we intend to make the antigays look so nasty that average Americans will want to dissociate themselves from such types.

STEP 6: SOLICIT FUNDS: THE BUCK STOPS HERE

Any massive campaign of this kind would require unprecedented expenditures for months or even years, an unprecedented fundraising drive. Effective advertising is a costly proposition: several million dollars would get the ball rolling. There are 10-15 million primarily homosexual adults in this country: if each one of them donated just two dollars to the campaign, its war chest would actually rival that of its most vocal enemies. And because those gays not supporting families usually have more discretionary income than average, they could afford to contribute much more⁴⁹. ”

Aspects of that approach to acceptance via those six steps were in fact employed in the Caribbean as a whole and in Barbados in particular. The Caribbean in the early part of the 21st century found itself in the unenviable position of being one of the worst affected regions in the world in terms of HIV prevalence, second only to Sub-Saharan Africa where a human, economic and social tragedy of immense proportion occurred⁵⁰. The HIV/AIDS epidemic affected individuals in the most productive age groups and had the potential to reverse gains in life expectancy and increase the social and economic burden on society. Shades of Sub-Saharan Africa started to appear in the Caribbean where in Guyana and Haiti, for example, life expectancy had declined as a result of the disease.

⁴⁹ The Overhauling of Straight America by Marshall K. Kirk and Erastes Pill

⁵⁰ Report of the Caribbean Regional Consultation: February 2006, p. 12

In the Caribbean region, by the end of the year 2000, it was estimated that there were over 500,000 persons living with HIV, and that AIDS had emerged within the region as the primary cause of death among individuals aged 15 to 49 years old⁵¹. Tackling HIV and AIDS, therefore, had become one of the most urgent development priorities for the Caribbean.

In the year 2000, the then Prime Minister of Barbados, The Right Honourable Owen Arthur M.P. assumed the responsibility for directing the programme on HIV/AIDS and set as objectives a 50% reduction in mortality of the AIDS patients by 2003 and a similar reduction in HIV prevalence by the year 2005. The National HIV/AIDS Commission was set up in 2001 to coordinate the multi-sectoral effort required to achieve these objectives.

The implementation of multisectoral HIV/AIDS programs as a strategy to fighting the pandemic warranted total national commitment whereby all sectors of the community – governmental and nongovernmental agencies along with civil society – were engaged in the development of efforts needed to have the necessary information to adequately respond to this pandemic. That initiative was coordinated by the National HIV/AIDS Commission of which I was a member.

The multi-sectoral effort opened the doorway for members of the LGBT community to become involved in the fight against the spread of the HIV/AIDS virus. That pandemic therefore provided the common cause to which the LGBT community could align themselves. Hence, in Barbados, there was the emergence of the organisation United Gay and Lesbian Association of Barbados (UGALAB). This Association was instrumental in raising the profile of LGBT groups in Barbados and was provided with office space to carry out its HIV outreach by the Government of Barbados. This action seemingly represented a supportive statement with regard to the observance of LGBT rights. Further actions by Government Officials also tended to create the impression of changed outlook.

On the occasion of the International Day for the Elimination of Violence against Women in 2009, the Honourable Esther Byer-Suckoo, the then Minister of Family, Youth and Sports of Barbados, condemned homophobic violence in the country and also announced her government's intention to craft domestic violence legislation that took into account the realities of sexual minorities.

⁵¹ UNICEF: World fit for Children in the Caribbean Beyond 2002, p. 20

Speaking at a public outreach activity at a mall known as Cave Shepherd's, Broad Street, in the capital city, Bridgetown, on Nov. 25, 2009, Minister Byer-Suckoo said:

“We realize there’s not only violence against women but also violence against men, and then also, those persons who are transgender are also subjected to serious violence.

Regardless of our personal views towards transgenders, it’s about respect for a person’s life. In preparing the legislation one thing we are aware of is that legislation cannot be gender-biased; that is a case for all the legislation the Ministry of Family is addressing.

It can no longer be gender-biased... The law has to protect all its citizens. If we’re amending legislation or drafting new legislation we have to take into consideration the nuances of the environment in which we live today.”

Speaking at a conference on HIV and Human Rights held at the Cave Hill Campus of the University of the West Indies on September 13, 2010, the then acting Prime Minister of Barbados the Hon. Freundel Stuart Q.C said:

“Very little attempt is made now, to consider that it might just be that practitioners of this lifestyle homosexuality were responding to the irresistible promptings of nature with the result that imputing fault to them satisfied no known definition of fairness. Further, that even if rather than responding to nature’s promptings, these practitioners were pursuing this lifestyle as a result of nurture, in which case they may have been exercising some measure of choice, the right to choose in these circumstances was protected by the Constitution as long as its exercise did not interfere with the rights of others.”

Despite these positive statements, it must be noted that in February 2013, the Hon. Freundel Stuart Q.C. who had by this time taken over as Prime Minister, was reported in a major daily newspaper as saying that same-sex unions would not be recognized in Barbados. This may well have been political posturing in advance of the general elections which were held on February 21, 2013, as the majority of the Barbadian society had signaled that they were not supportive of the repealing of anti-gay laws. The political party of Prime Minister Stuart was victorious in the general election of February 21, 2013.

Research done in Trinidad showed that religious groups from ten Christian, Hindu and Muslim denominations by a large majority expressed negative attitudes toward homosexuals and homosexuality. Some indicated that homosexuality was abominable or "sickening", while others recommended "redemption" for homosexuals, suggesting that gays could be converted to adopt more acceptable behaviours. Some religious groups expressed extreme disapproval of homosexuality, to the extent that the homosexual lifestyle was solely blamed for the outbreak of HIV/AIDS⁵².

The Ombudsman of Barbados and I met with representatives of the LGBT community to hear the complaints from members of that community who were of the view that they had a cause for concern which fell under the purview of that Office⁵³. The Office of the Ombudsman for Barbados was established in 1987 in spite of the fact that the legislation had been enacted some six years earlier⁵⁴. The Ombudsman's Office was established to provide a safeguard against maladministration and to protect the rights and interests of Barbadians who felt disadvantaged by the actions of government Ministries and Departments.

Members of the LGBT community present at the meeting advanced a number of issues facing that community including:

1. Access to health services at Polyclinics
2. Reporting issues to the Royal Barbados Police Force was problematic as it was felt that the issues raised were ignored
3. Treatment from Government Institutions
4. In 2007 the murder of Andrew Browne. The deceased was threatened in Court by the assailant but not enough protection was given.
5. The Court System does not give the complaints of LGBT individuals enough respect.
6. The members of the LGBT sometimes engender negativity from the wider community.
7. Even though agencies have anti-discrimination policies in place, persons within the institution follow their own prejudices. Their mindset is fixed.

⁵² Genrich, G.L., and B. A. Brathwaite. 2005. "Response of religious groups to HIV/AIDS as a sexually transmitted infection in Trinidad." *BioMedical Central Public Health* 5 (121)

⁵³ Meeting held July 25, 2017

⁵⁴ The Laws of Barbados, CAP. 8A

8. Some of the policies are vague. Sexual harassment law needs to be further refined.
9. Bathroom usage by Transgender Persons remains an issue. Issues concerning bathroom usage needs a set policy.
10. There is no recourse for certain types of harassment in the workplace.
11. Transgender persons have passport issues when travelling.
12. Some Transgender women are searched or placed in a holding cell.
13. Immigration Officers needed to be sensitized on Transgender issues.
14. There is no place to house Transgender persons in Hospitals, Prison, or Mental Institutions. It's traumatizing for Transgender Persons to be housed in areas with which there are not comfortable.
15. Transgender issues should be raised at the policy level. Taxi operators oftentimes refuse to carry Transgender Persons.
16. LGBT had difficulty accessing work in Barbados. Persons in the LGBT community are sometimes forced to have secret lives in order to work.
17. Same sex marriage was raised as an issue.
18. Persons have violence committed against them due to being part of the LGBT community.
19. Social pressures have forced members of the LGBT community to resort to certain types of jobs e.g. sex work.
20. Violent acts against LGBT members are for the most not reported to the relevant authorities.
21. There are children who do not get proper parental care due to being perceived as being sexually different.
22. The buggery laws affect much of the LGBT community and should be repealed.
23. The LGBT members were sometimes victimized like name calling.

Those representatives of the LGBT community who were present at the meeting held with representatives from the Office of the Ombudsman in Barbados all agreed that work with and the buy-in of the church was at the crux of the matter in terms of gaining tolerance for the LGBT community going forward.

The Country Reports on Human Rights Practices for 2018, United States Department of State, Bureau of Democracy, Human Rights and Labor, reported that according to information received from interested parties, the law in Barbados did not prohibit discrimination against a person based on real or perceived sexual orientation or gender identity in employment, housing, education, or health care. Civil society groups in Barbados were said to have reported to the Bureau that lesbian, gay, bisexual, transgender, and intersex (LGBTI) persons faced discrimination in employment, housing, and access to education and health care. Activists stated that while many individuals were open about their sexual orientation or gender identity, police disapproval and societal discrimination made LGBTI persons more vulnerable to threats, crime, and destruction of property. According to civil society groups, LGBTI women in Barbados were particularly vulnerable to discrimination and unequal protection under the law⁵⁵.

Transgender Issues

The impact of the recognition and the addressing of the rights pertaining to the transgender community may for the most part weigh heavily on the state apparatus. This means that the Government may need to ensure that its policies cater for the specific difficulties faced by transgender people. This recognition is likely to have both a policy as well as a financial impact on respective Governments. Examination of a few cases should indicate the manner in which Government policy and budget could be impacted.

In the case of *Bellinger v Bellinger* [2002] 2 WLR 41; [2002] FAM 150, Lord Nicholls of Birkenhead stated by way of definition that “transsexual is the label given, not altogether happily, to a person who has the misfortune to be born with physical characteristics which are congruent, but whose self-belief is incongruent. Transsexual people are born with the anatomy of a person of one sex but with an unshakeable belief or feeling that they are persons of the opposite sex. They experience themselves as being of the opposite sex. Mrs. Bellinger is such a person. The aetiology of this condition remains uncertain. It is now generally recognised as a psychiatric disorder, often known as gender dysphoria or gender identity disorder. It can result in acute psychological distress.”

⁵⁵ Barbados 2018 Human Rights Report <https://www.state.gov/wp-content/uploads/2019/03/Barbados/2018>

He added that “My Lords, I am profoundly conscious of the humanitarian considerations underlying Mrs. Bellinger’s claim. Much suffering is involved for those afflicted with gender identity disorder. Mrs. Bellinger and others similarly placed do not undergo prolonged and painful surgery unless their turmoil is such that they cannot otherwise live with themselves. Non-recognition of their reassigned gender can cause them acute distress. I have this very much in mind.”

The facts of that case are that a transsexual female married a man and sought a declaration from the court confirming their lawful marriage. The Matrimonial Causes Act 1973 states that a marriage may be entered into as between a “male” and “female” only – something which could not take into account gender reassignment, as is the case here. The Court therefore refused to issue the declaration: since the transsexual female was, at birth, classified male, there could be no lawful recognition of the marriage.

The Court of Appeal and House of Lords dismissed the appeals. However, in recognizing that the primary legislation deprived the claimant’s right to marriage (Article 12 ECHR), the House of Lords issued a declaration of incompatibility under section 4 of the Human Rights Act 1998.

Therefore, the outcome of the case was a declaration, but not the one sought by the claimant. The Claimant wanted a declaration giving effect to lawfulness of her marriage. Instead, a declaration of incompatibility was made to Parliament.

Note should be taken of the dicta in the Australian case of *Secretary, Department of Social Security v SRA* (1993) 118 ALR 467 where it was held that the respondent, who was a pre-operative male to female transsexual, did not fall within the ordinary meaning of the word “female” as her anatomical sex and her psychological sex had not been harmonized. One of the medical reports referred to by Lockhart J. in the Federal Court of Australia, at p 477, explained very clearly what the surgery seeks to achieve, and what it cannot do: “Genetically, and anatomically she is a ‘male’, however, she dresses and behaves as a woman. She considers herself as a woman. It is not for me to decide what the Court or the Department of Social Security chooses to consider someone - but I do not think of, and treat the respondent as a woman. The fact that she has not had surgery

to me is irrelevant. The aim of the surgery is to make somebody feel more comfortable with their body, not to 'turn them into a woman'. The surgery does not supply the patient with a uterus, nor with ovaries. It is purely and simply an attempt to allow the person's body to approximate to how they feel within themselves.”

In the case of *Christine Goodwin v. United Kingdom* (2002) 35 EHRR 447, the applicant, Christine Goodwin, a United Kingdom national born in 1937, is a post-operative male to female transsexual. She claimed that she had problems and faced sexual harassment at work during and following her gender re-assignment. She also alleged that the fact that she keeps the same National Insurance number has meant that her employer has been able to discover that she previously worked for them under another name and gender, with resulting embarrassment and humiliation.

Relying on Articles 8, 12, 13 and 14 of the Convention, the applicant complained about her treatment in relation to employment, social security and pensions and her inability to marry.

The European Court of Human Rights found a violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights; a violation of Article 12 (right to marry and to found a family); and did not find a violation of Article 13 (right to an effective remedy). It found that no separate issue had arisen under Article 14 (prohibition of discrimination).

The Court found that no concrete or substantial hardship or detriment to the public interest had been demonstrated as likely to flow from any change to the status of transsexuals. Society might reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost. It concluded that the fair balance that was inherent in the Convention now tilted decisively in favor of the applicant. There had, accordingly, been a failure to respect her right to private life in breach of Article 8. The Court also found no justification for barring the transsexual from enjoying the right to marry under any circumstances. It concluded that there had been a breach of Article 12. The case-law of the Convention institutions indicated that Article 13 could not be interpreted as requiring a remedy against the state of domestic law.

In the circumstances no breach of Article 13 arose. The lack of legal recognition of the change of gender of a post-operative transsexual laid at the heart of the applicant's complaints under Article 14 of the Convention and had been examined under Article 8 so there was no separate issue arose under Article 14.

In the case of *R (on the application of Green) v Secretary of State for Justice* [2013] EWHC 3491, His Honour Judge Jeremy Richardson outlined that the claimant was a serving prisoner. She was born male on 29th December 1983 with the name Craig Hudson. He married a woman called Rachel Hudson. On 21st December 2005 the claimant (together with other family members) was convicted of the murder of Rachel Hudson in the Crown Court at Nottingham before Mr. Justice Hughes (as he then was) following a five week trial. The claimant was sentenced to Life Imprisonment with a minimum term of 14 years less time served on remand before sentence.

Kimberley Green (the claimant) seeks to impugn various decisions of the Governor of HMP Frankland (the Governor) relating to her situation as a prisoner seeking to transition from the male gender to female. It asserted that the Governor had acted in an unlawful and discriminatory manner by placing barriers in the way of the claimant living the gender role she had chosen contrary to the policy of the Secretary of State for Justice (Secretary of State) in PSI 7/2011.

The argument of the Governor was engagingly straightforward. There had been no departure from national policy in the way in which the claimant had been treated; and, even if there had, entirely rational reasons had been given to justify that. It was also argued, contrary to the submissions of the claimant, there had been no direct (or any) discrimination — indeed, arguably more favourable treatment had been extended to the claimant than to a male prisoner who was not seeking gender reassignment.

The phenomenon of a prisoner desiring to transfer from one gender to the other is unusual within the context of the prison population. Notwithstanding the relatively few number of prisoners in this group, the Secretary of State has devised via the National Offender Management Service (NOMS), a policy to cover this situation: *The Care and Management of Transsexual Prisoners PSI 07/2011* (PSI 07).

This policy document came into force on 2nd March 2011. It contains guidance on the care, management and treatment of transgender prisoners. An essential aspect of PSI 07 is that any prisoner who considers him/herself to be transgender and wishes to commence gender re-assignment is permitted to live permanently in their acquired gender role. The aim is “to ensure all transsexual prisoners are treated fairly and in accordance with the law”.

The essence of the repeated complaints was that there was (and remains) discrimination towards transgender prisoners. This included:

- (1) No access to hormone treatment.
- (2) No access to wigs.
- (3) No access to certain prosthetic devices (designed to aid the intimate appearance of a woman — it is unnecessary to be more graphic than that).
- (4) No hair removal products.
- (5) No separate changing facilities for the gym and no privacy screens.
- (6) An expectation that male urinals would be used for drug testing purposes.
- (7) Items required for living in the female role ordered from certain specialist suppliers were routinely returned at reception.

The particular problem asserted by the claimant is her access to prosthetic items — wigs, breasts and vaginas.

The Governor contended that to provide those items would heighten the risk of sexual abuse and assault by other prisoners. Additionally, it would heighten the risk of a prisoner concealing items which might compromise the security of the prison. The provision of wigs produces a security risk as they provide a very convenient and highly effective disguise if misused in the prison environment. Their effective use in the event of an escape is obvious.

The Governor has emphasized the security issues in relation to the various items and the fact that he has to consider the wider prison population as well within HMP Frankland. The Governor puts his defence plainly upon security, good order and discipline. It is averred the claimant is not required to live as a man. She is able to access female items from the canteen list and the special Cosmetic Order Form.

A male prisoner, who wishes to remain male as most do, does not need to express his gender identity in any purposeful way. He does so innately through the male clothes he wears and certainly does so via prison clothing. Transsexual prisoners are treated differently (and wish to be so) and as such, have a number of advantages in terms of clothing and lifestyle not available to the remainder of the male prison population.

At present the Governor has complied with the policy and where he has departed from it, he has done so for entirely good reasons. PSI 07 is a sensible and workable policy document seeking to strike the right balance between legitimate desires of the transsexual prison population and the real security concerns of the Secretary of State and individual prison governors. It is a difficult balance to strike and it will not always be possible to do that which is possible outside prison. In this case the Governor has struck the right balance, but needs to keep matters under review as I believe he will. This claim for judicial review is dismissed.

This case is of particularly significance since every country has a prison population and would therefore be likely to encounter the issues which surfaced in this case. The question is not if but when those issues will present in the respective countries.

In the case of *Identoba v Georgia* (2015) 39 BHRC 510, the Identoba, a Georgian non-governmental organization, whose mission is to promote and protect the rights of Lesbian, Gay, Bisexual and Transgender (LGBT) persons in Georgia, planned to organize a peaceful march in the center of the capital, from the Tbilisi Concert Hall until the Orbeliani Square, to celebrate International Day against Homophobia and Transphobia.

In advance of the demonstration, on 8 May 2012, the Identoba had given the Tbilisi City Hall and the Old Tbilisi Police Department of the Ministry prior notice of their aim of holding a peaceful demonstration on 17 May 2012, informing the authorities of the planned route of the march and the number of participants, as required by the relevant domestic law. In addition, in the light of a foreseeable protest from those opposed to the LGBT community in Georgia, the Identoba specifically requested that the authorities provide protection from possible violence.

On 15 May 2012 the Identoba was contacted by an employee of the Old Tbilisi Police Department of Georgian Ministry of Internal Affairs, who clarified the details of the planned demonstration and confirmed that the police would be mobilized to secure the participants.

Members of a religious organisation, the Orthodox Parents' Union and members of the Georgian Orthodox Church parish arrived at the Tbilisi Concert Hall area. The counter-demonstrators then began an assault physically, by pushing and punching, the front row of the demonstrators. The Strasbourg Court found a breach of article 3 of the Convention where the authorities had failed to protect LGBTI demonstrators from attack by homophobic counter-demonstrators.

In the case of *R (on the application of C) v Secretary of State for Work and Pensions* (2017) UKSC 72, Lady Hale in her opening paragraph stated the following:

“We lead women’s lives: we have no choice”. “Thus has the Chief Justice of Canada, the Rt. Hon Beverley McLachlin, summed up the basic truth that women and men do indeed lead different lives. How much of this is down to unquestionable biological differences, how much to social conditioning, and how much to other people's views of what it means to be a woman or a man, is all debatable and the accepted wisdom is perpetually changing. But what does not change is the importance, even the centrality, of gender in any individual's sense of self. Over the centuries many people, but particularly women, have bitterly resented and fought against the roles which society has assigned to their gender. Genuine equality between the sexes is still a work in progress. But that does not mean that such women or men have not felt entirely confident that they are indeed a woman or a man. Gender dysphoria is something completely different — the overwhelming sense that one has been born into the wrong body, with the wrong anatomy and the wrong physiology. Those of us who, whatever our occasional frustrations with the expectations of society or our own

biology, are nevertheless quite secure in the gender identities with which we were born, can scarcely begin to understand how it must be to grow up in the wrong body and then to go through the long and complex process of adapting that body to match the real self. But it does not take much imagination to understand that this is a deeply personal and private matter; that a person who has undergone gender reassignment will need the whole world to recognise and relate to her or to him in the reassigned gender; and will want to keep to an absolute minimum any unwanted disclosure of the history. This is not only because other people can be insensitive and even cruel; the evidence is that transphobic incidents are increasing and that transgender people experience high levels of anxiety about this. It is also because of their deep need to live successfully and peacefully in their reassigned gender, something which non-transgender people can take for granted”.

The Learned Judge continued her outline of the case in terms of the following: ‘The appellant has undergone gender reassignment from male to female. Her transition began in 2003 and she changed her name in 2004. She has undergone full gender reassignment treatment and surgery, which in her case included facial feminization surgery, in her words because it was "incredibly important" to her "easily to 'pass' as a woman". Her gender recognition certificate (GRC) was one of the first to be issued under the Gender Recognition Act 2004. The Gender Recognition Panel notified both the Inland Revenue (now HMRC) and the Department of Work and Pensions (DWP) of the change.

The DWP uses a centralized database, the Customer Information System (CIS), to record information relating to each of its "customers" and everyone else who has a National Insurance number. The CIS interfaces or links to a number of other computer systems, including over 40 systems within government and quasi-government departments, local authorities and HMRC, as well as to benefit-specific computer systems, including the Jobseeker's Allowance Payments system (JSAPS) which is used to administer JSA. About 140,000 persons are authorized to access the CIS.

The information recorded on the CIS about a customer includes his or her current sex, the fact that he or she was previously recorded as having a different sex (if applicable), his or her current name and title, and his or her former names and titles (if applicable), the fact that a person has a GRC, its date of issue and date of notification to DWP, and (where this is the case) the reason for a change of recorded sex being gender reassignment. These data, including the data recording a change of gender, are held for the life of the individual concerned and for 50 years and one day thereafter. This has been referred to as "the Retention policy" in these proceedings.

Under the SCR policy, an individual's CIS record receives a protected marking, ranging (at the material time) from private, restricted, confidential, secret to top secret. Transgender records were marked restricted. Persons wishing to access them must be specifically authorized and must have a legitimate business reason for doing so; access is limited to a specific purpose or purposes; and it is time-limited for a period not exceeding four hours. Access to an individual's CIS record is not required for the routine issue of benefit payments, including JSA. However, an adviser will need to access the CIS in order to make routine changes to relevant information, such as a change of address or contact details.

The appellant challenged the Retention and SCR policies on three grounds: (1) inconsistency with sections 9 and 22 of the Gender Recognition Act 2004 (2) incompatibility with the rights under articles 3, 8 and 14 of the European Convention on Human Rights (article 3 is raised for the first time in this court); and (3) infringement of section 13, 19 or 26 of the Equality Act 2010 (direct discrimination under section 13 was not pursued before the Court of Appeal but is raised again before this court; harassment under section 26 is an entirely new argument).

Lady Hale continued that there is nothing in section 9 to require that the previous state of affairs be expunged from the records of officialdom. Nor could it eliminate it from the memories of family and friends who knew the person in another life. Rather, sections 10 and 22 provide additional protection against inappropriate official disclosure of that prior history.

Section 22, as we have seen, protects from disclosure by officials information concerning a person's gender *before* it became the acquired gender. It contains several exceptions, including one for disclosure for the purpose of the social security system or a pension scheme. Obviously, therefore, section 9 contemplates that the previous history may be kept on record, for otherwise there would be no need for the protection given by section 22.

The problem with this argument is that section 9(1) clearly contemplates a change in the state of affairs: before the issue of the GRC a person was of one gender and after the issue of the GRC that person "becomes" a person of another gender. The sections which follow section 9 are designed, in their different ways, to cater for the effect of that change.

I conclude, therefore, that the Retention and SRC policies are not inconsistent with, or prohibited by, any provision of the Gender Recognition Act 2004.

In this court, the statement of facts and issues raises for the first time the question of a possible violation of article 3, the right not to be subjected to inhuman or degrading treatment. In her submissions, however, article 3 was deployed to make the point that there are positive obligations to protect individuals against such treatment, as indeed there are under article 8.

Two legitimate aims were put forward by the DWP for the Retention policy. The first is the need to retain the information for the purpose of calculating entitlement to state retirement pension. The second legitimate aim put forward is to identify and detect fraud. There is a particular risk of identity theft in the case of transgender customers. A fraudster may obtain a birth certificate in the customer's original name and use this, along with other evidence, to obtain a national insurance number allocated to that name (two linked examples of this were detected in 2012).

The appellant accepted that these were legitimate aims in the courts below and the evidence in support of them was not challenged.

The DWP policies *do* treat transgender customers differently from others. For those who want it, the SCR policy applies. In this respect, transgender customers are in no different position from any of the other vulnerable groups to whom the policy is applied if wanted and needed.

In my view, the concerns which the appellant has raised before and during these proceedings are very real and important to her, and no doubt to other transgender customers of the DWP. The proceedings have already brought about some change in DWP policy and no doubt the DWP will continue to consider how the service it offers to transgender customers could be improved. The introduction of Universal Credit is an opportunity to do this. But for all the reasons given earlier the Retention and SCR policies are not unlawful under either the Human rights Act 1998 or the Equality Act 2010 and this appeal must be dismissed’.

This case in particular highlights the need for governments to be mindful in future that its policies cater for the specific difficulties faced by transgender people. As Lady Hale emphasized, gender dysphoria is “completely different” and most of us “can scarcely begin to understand how it must be to grow up in the wrong body”. For many Governments therefore, consideration of Transgender issues has to become a continuous work in progress.

As was previously mentioned, in Barbados, there were a number of anti-gay marches lead by religious groups during the month October 2020, during which uncorroborated allegations were made accusing gays of causing the economic and societal challenges facing the country. There was also the recognition of civil unions by Government at that time which also sparked the unrest, an issue upon which I will go into detail later in this work. This demonstrated lack of public support for the recognition of LGBT rights by the religious sect meant that the Government would not be persuaded to review Barbados’ position regarding the recognition of LGBT rights any time soon. At the time of compiling this work therefore, it would seem that the attitude by the majority of the Barbadian society remained unchanged with regard to the observance of LGBT rights.

Chapter 3

CONSTITUTIONAL PROTECTION OF THE LGBT COMMUNITY

The issue of LGBT rights has been controversial for decades, and it has always sparked heated discussions between those who believe in fighting for perceived and sought after LGBT rights and those who strongly oppose that effort. The core agenda by many activists is said to be to achieve equity, end discrimination, and have acceptability within society. Historically, the LGBT community has experienced much hostility and disapproval when engaging in public participation like reform formulation or even recognition of its relationships. Over time, LGBT advocates have overcome enormous challenges and risks to their own personal safety to call out perceived abuses of the human rights of LGBT people, and force changes to laws which they considered discriminated against them.

This status quo sparked much unrest in the mid-twentieth century, with one major upheaval being the Stonewall unrest. The Stonewall Riots, also called the Stonewall Uprising, began in the early hours of June 28, 1969, when New York City police raided the Stonewall Inn, a gay club located in Greenwich Village in New York City. The raid sparked a riot among bar patrons and neighborhood residents as police roughly hauled employees and patrons out of the bar. This action led to six days of protests and violent clashes with law enforcement outside the bar on Christopher Street, in neighboring streets and in nearby Christopher Park. The Stonewall Riots has been considered by some to be a catalyst for the gay rights movement in the United States and around the world. In 2016, the then President of the United States Barack Obama designated the site of the riots - Stonewall Inn, Christopher Park, and the surrounding streets and sidewalks - a national monument in recognition of the area's contribution to gay rights⁵⁶.

The momentum of the Stonewall riots' impact was fast. A few weeks after the event, new LGBT organizations and newspapers were founded. A year later, the first Pride parade took place on its anniversary, and the next day, Pride events and marches took place on the West Coast. From then on, the marches spread across the United States and around the world⁵⁷.

⁵⁶ History.com Editors

⁵⁷ <https://www.history.com/topics/gay-rights/the/stonewall/riots>

Barbadian Sir George Alleyne⁵⁸ stated that “Sooner rather than later, our societies will come to terms with the conflict between the desire to maintain what it considers moral behaviour and the reality that such tenets run counter to the laudable goals of our constitution”. He continued: “Someday we will have to come to terms with the apparent conflict between the observation and preservation of human rights, and the putative danger to the public’s health if these rights are not upheld.”

Questions surrounding what rights count as human rights have proven to be highly contentious. Over the last few decades, there has been an upsurge in the lobby largely by the international community for the recognition of LGBT rights. A number of countries have decriminalized same-sex sexual acts, and now extend legal rights towards homosexuals, such as the right to adopt, marry or engage in civil unions. I will presently expand on those points in greater detail.

In the Caribbean, members of the LGBT community have complained that they have experienced both legal and social challenges to full inclusion and enjoyment of the rights which they seek. Despite some positive rhetoric from some political leaders, as well as increased attention and funding to address some of the issues relating to anti-discrimination policy and law, the need for legislative reform remains paramount in order to guarantee equality for members of the LGBT community under the law. Punitive laws and practices have had a critical impact on the observance of human rights of that community.

I am of the view that the link between the law and buy-in by those who are expected to follow that law, can only be made by creating the deepest understanding as to the human failings in refusing to follow that said law. The question remains as to whether legislative changes in conformity with international pressures, could gain internal acceptance by the average Barbadian, and by extension, the Caribbean citizen. It is therefore necessary to establish whether any systems already exist which offer protection to the LGBT community.

⁵⁸ United Nations Secretary-General's Special Envoy for HIV/AIDS in the Caribbean Region 2003-2010

Enshrined in most if not all the Constitutions of regional island states is the protection of Fundamental Rights and Freedoms of the individual.

When Barbados became independent on November 30, 1966, it adopted a written constitution. The Constitution was made by the representatives of the people of Barbados gathered at a conference in London. It derived formal legitimacy from an Order in Council made under powers conferred by the Barbados Independence Act 1966, passed by the Parliament of the United Kingdom, the outgoing sovereign power in the Island. But once the Constitution had come into effect, its British origins became no more than a matter of historical interest. The Constitution became and remained the supreme law of Barbados because it was accepted by the people of Barbados as the instrument which they had chosen to regulate their government and society.

Section 1 declared the constitution to be the supreme law of Barbados as follows: "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."

In the case of *Reid v. Covert*, 354 U.S. 1, 16–17 (1957), Black J. stated that Article VI, the Supremacy Clause of the Constitution of the United States, declares: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land;..." There is nothing in this language which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. Nor is there anything in the debates which accompanied the drafting and ratification of the Constitution which even suggests such a result. It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights — let alone alien to our entire constitutional history and tradition — to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V. The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined.

In the case of *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924), the Court ruled that “The treaty-making power of the United States is not limited by any express provision of the Constitution, and, though it does not extend “so far as to authorize what the Constitution forbids,” it does extend to all proper subjects of negotiation between our government and other nations.”

In the case of *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890), the Court declared “The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent.”

In the case of *Texas v. Johnson*⁵⁹, the U.S. Supreme Court ruled on June 21, 1989, that the burning of the U.S. flag was a constitutionally protected form of speech under the U.S. Constitution’s First Amendment.

During the 1984 Republican National Convention, respondent Johnson participated in a political demonstration to protest the policies of the Reagan administration and some Dallas-based corporations. After a march through the city streets, Johnson burned an American flag while protesters chanted. No one was physically injured or threatened with injury, although several witnesses were seriously offended by the flag burning. Johnson was convicted of desecration of a venerated object in violation of a Texas statute, and a state court of appeals affirmed.

However, the Texas Court of Criminal Appeals reversed, holding that the State, consistent with the First Amendment, could not punish Johnson for burning the flag in these circumstances. The court first found that Johnson's burning of the flag was expressive conduct protected by the First Amendment. The court concluded that the State could not criminally sanction flag desecration in order to preserve the flag as a symbol of national unity. It also held that the statute did not meet the State's goal of preventing breaches of the peace, since it was not drawn narrowly enough to

⁵⁹ 491 U.S. 397 (1989)

encompass only those flag burnings that would likely result in a serious disturbance, and since the flag burning in this case did not threaten such a reaction. Further, it stressed that another Texas statute prohibited breaches of the peace and could be used to prevent disturbances without punishing this flag desecration.

It was held by the Court that Johnson's conviction for flag desecration was inconsistent with the First Amendment.

The Court held that the Government may not prohibit the verbal or nonverbal expression of an idea merely because society finds the idea offensive or disagreeable, even where our flag is involved. Expression may not be prohibited on the basis that an audience that takes serious offense to the expression may disturb the peace, since the Government cannot assume that every expression of a provocative idea will incite a riot, but must look to the actual circumstances surrounding the expression. Justice William Brennan wrote for a five-justice majority in holding that defendant Gregory Lee Johnson's act of flag burning was protected speech under the First Amendment to the United States Constitution.

The point of citing *Texas v. Johnson*⁶⁰ which attracts our attention are those parts of the dicta which stated that 'Government may not prohibit the verbal or nonverbal expression of an idea merely because society finds the idea offensive or disagreeable' and the section which stated that 'expression may not be prohibited on the basis that an audience that takes serious offense to the expression may disturb the peace'.

The case of *West Virginia State Board of Education et al. v. Barnette et al*⁶¹ is a landmark decision by the United States Supreme Court holding that the Free Speech Clause of the First Amendment protects students from being forced to salute the American flag or say the Pledge of Allegiance in public school.

⁶⁰ Ibid.

⁶¹ (1943) 319 U.S. 624

Mr. Justice Jackson who delivered the opinion of the Court stated, inter alia, that “the prohibition against any religious establishment by the government placed denominations on an equal footing. It assured freedom from support by the government to any mode of worship and the freedom of individuals to support any mode of worship. Any person may therefore believe or disbelieve what he pleases. He may practice what he will in his own house of worship or publicly within the limits of public order. But the lawmaking authority is not circumscribed by the variety of religious beliefs, otherwise the constitutional guaranty would be not a protection of the free exercise of religion but a denial of the exercise of legislation”.

He however balanced that notion by explaining that “the very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections”.

Thus, if the freedom of association as guaranteed by the Barbados Constitution is to be withdrawn from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the Courts, then, based on that reasoning, the LGBT community could claim that their association is a fundamental right guaranteed under the Constitution.

In the Restatement (Third) of the Foreign Relations Law of the United States (1987) excerpt para.111, it was stated, inter alia, as follows:

‘Cases arising under international law or international agreements of the United States are within the Judicial Power of the United States and, subject to Constitutional and statutory limitations and requirements of justiciability, are within the jurisdiction of the federal courts....Whether an agreement is or is not self-executing in the law of another state party to the agreement is not controlling for the United States’⁶².

⁶² Wikipedia - https://en.wikipedia.org/wiki/Restatements_of_the_Law

Individual Restatement volumes are essentially compilations of case law which are common law judge-made doctrines that developed gradually over time because of the principle of *stare decisis* (precedent). Although Restatements of the Law are not binding authority in and of themselves, they are highly persuasive because they are formulated over several years with extensive input from law professors, practicing attorneys, and judges. They are meant to reflect the consensus of the American legal community as to what the law is, and, in some cases, what it should become⁶³.

Among the entrenched provisions of the Barbados Constitution is Chapter III, headed ***“Protection of Fundamental Rights and Freedoms of the Individual”***. This chapter begins (in section 11) with a declaration that “every person in Barbados is entitled to the fundamental rights and freedoms of the individual” including “life, liberty and security of the person” and a list of other human rights common to international human rights instruments starting with the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations in 1948.

Section 11 of the Barbados Constitution reads as follows:

‘Whereas every person in Barbados is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, color, 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 and security of the person;
- b. protection for the privacy of his home and other property and from deprivation of property without compensation;
- c. the protection of the law; and
- d. freedom of conscience, of expression and of assembly and association...’

Section 11 then goes on to say that the following provisions of Chapter III were to have effect for “affording protection to those rights and freedoms”.

⁶³ Ibid.

Sections 12 to 23 of the Barbados Constitution set out in detail the extent of the protection which the Constitution afforded to the specified rights and freedoms, together with limitations “designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest”.

Those protections include:

- Protection of right to life
- Protection of right to personal liberty
- Protection from slavery and forced labour
- Protection from inhuman treatment
- Protection from deprivation of property
- Protection against arbitrary search or entry
- Provisions to secure protection of law
- Protection of freedom of conscience
- Protection of freedom of expression
- Protection of freedom of assembly and association
- Protection of freedom of movement
- Protection from discrimination on grounds of race, etc.
- Protection of persons detained under emergency laws.

The Constitution of Barbados⁶⁴ which predates the emergence of treaties enshrining generic norms of human rights addresses the issue of discrimination at Sections 23. Section 23 (1) and (2) read as follows:

23. (1) *Subject to the provision of this section –*
- (a) *no law shall make any provision that is discriminatory either of itself or in its effect; and*
 - (b) *no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.*
- (2) *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*

⁶⁴ The Laws of Barbados Chapter 1

description are subject to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not afforded to persons of another such description.

It is uncertain if the omission of the word “sex” in section 23 (2) of the Barbados Constitution where the expression "discriminatory" is said to mean affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour or creed was or was not by design. To my mind, it would be a moot point yet deserving of some clarity. I am however doubtful whether that omission was deliberate.

Discrimination deals with any differential conduct that is based on any of the listed grounds set out in section 23(2) of the Barbados Constitution, which damages the dignity of another or adversely affects another in a serious way. Discrimination can be either direct or indirect and can result from an act or failure to act. Mere differentiation is all forms of differential treatment that don't fall under discrimination. Rationality is the only requirement for mere differentiation in order for it to be constitutionally valid.

Direct discrimination occurs where a person treats another person less favourably than a third person would have been treated in comparable circumstances, or attributes characteristics which are thought to relate generally or be generally imputed to people of a particular status.

Indirect discrimination occurs where an apparently neutral provision, criterion or practice would put persons within a particular grouping at a disadvantage compared to others, unless that provision, criterion or practice, is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

Outside of the philosophical debate, it is necessary to outline some of the principles on the constitutionality of enactments and the interpretation of the fundamental rights provisions.

To begin with, there is a general presumption that an enactment is constitutional. For, as was stated by Baroness Hale in *Surratt et al v The Attorney General of Trinidad and Tobago*⁶⁵:

“The constitutionality of a parliamentary enactment is presumed unless it is shown to be unconstitutional and the burden on a party seeking to prove invalidity is a heavy one. On the other hand, the Constitution itself must be given a broad and purposive construction”.

In the Barbadian case of *Boyce v R (2004)* UKPC 32, Lord Hoffman stated in part:

“Parts of the [Barbados] Constitution, and in particular the fundamental rights provisions of Chapter III, are expressed in general and abstract terms which invite the participation of the judiciary in giving them sufficient flesh to answer concrete questions...The judges are the mediators between the high generalities of the constitutional text and the messy detail of their application to concrete problems. And the judges, in giving body and substance to fundamental rights, will naturally be guided by what are thought to be the requirements of a just society in their own time. In so doing, they are not performing a legislative function. They are not doing work of repair by bringing an obsolete text up to date. On the contrary, they are applying the language of these provisions of the Constitution according to their true meaning. The text is a ‘living instrument’ when the terms in which it is expressed, in their constitutional context, invite and require periodic re-examination of its application to contemporary life.”

Lord Bingham of Cornhill said in *Reyes v. The Queen* (2002) 2 AC 235, “A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. 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. In carrying out its task of constitutional interpretation, the Court is not concerned to evaluate and give effect to public opinion.”

⁶⁵ (2007) UKPC 55

It must be stressed that, even where an enactment on the face of it appears to infringe a fundamental right protected under the Constitution, this is not the end of the matter. The Court has a further obligation to conduct a balancing exercise in order to determine whether or not the particular enactment is constitutional. As Baroness Hale stated in the *Surratt*⁶⁶ case:

“It cannot be the case that every Act of Parliament which impinges in any way upon the rights protected in sections 4 and 5 of the Constitution is for that reason alone unconstitutional. Legislation frequently affects rights such as freedom of thought and expression and the enjoyment of property. These are both qualified rights which may be limited, either by general legislation or in the particular case, provided that the limitation pursues a legitimate aim and is proportionate to it. It is for Parliament in the first instance to strike the balance between individual rights and the general interest. The Courts may on occasion have to decide whether Parliament has achieved the right balance.”

It is unnecessary to cite these authorities at length because the principles are clear. With the above principles firmly in mind, I now turn attention to the same-sex relationship issue.

Section 1 of the Barbados Constitution states that “the Constitution is the supreme law of Barbados and subject to the provisions of this Constitution, if any other law is inconsistent with this Constitution, the Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.”

Sections 21(1) and (2) provide:

“Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and to associate with other persons and in particular to form or belong to political parties or to form or belong to trade unions or other associations for the protection of his interests.

⁶⁶ Ibid.

- (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision-
- (a) that is reasonably required in the interests of defence, public safety, public order; public morality or public health; or
 - (b) that is reasonably required for the purpose of protecting the rights or freedoms of other persons; or
 - (c) that imposes restrictions upon public officers or members of a disciplined force.”

In *Attorney General of Barbados v Smith (1984) 38 WIR 33*, Williams J as he then was stated: “But it would seem to me that in a society of free men and women, freedom of association must guarantee the individual as well the right to choose with whom he wishes to have social, business and other relationships. A man or a woman must be free to choose his or her spouse, his or her friends, his or her business partner, his or her employer or employee.”

However, according to section 11 of the Barbados Constitution, freedom of association is “subject to respect for the rights and freedoms of others and for the public interest.” Therefore, the freedoms guaranteed by the Barbados Constitution are all subject to limitations.

In the South African case of *Harksen v Lane NO and Others (CCT9/97) [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300 (7 October 1997)* dealing specifically with the issue of denial of equality before the law and equal protection of the law, Goldstone J. stated, inter alia: “Where section 8 is invoked to attack a legislative provision or executive conduct on the ground that it differentiates between people or categories of people in a manner that amounts to unequal treatment or unfair discrimination, the first enquiry must be directed to the question as to whether the impugned provision does differentiate between people or categories of people. If it does so differentiate, then in order not to fall foul of section 8(1) of the interim Constitution there must be a rational connection between the differentiation in question and the legitimate governmental purpose it is designed to further or achieve. If it is justified in that way, then it does not amount to a breach of section 8(1).

Section 8 provides:

“(1) Every person shall have the right to equality before the law and to equal protection of the law.
(2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.”

Goldstone J. continued that differentiation that does not constitute a violation of section 8(1) may nonetheless constitute unfair discrimination for the purposes of section 8(2). He stated that his understanding of the judgment in *Prinsloo v Van der Linde and Another* (1997) ZACC 5; (1997) 3 SA 1012 (CC) was that as stated in the majority judgment to the effect that: “Accordingly, before it can be said that mere differentiation infringes section 8, it must be established that there is no rational relationship between the differentiation in question and the governmental purpose which is proffered to validate it. In the absence of such rational relationship the differentiation would infringe section 8. But while the existence of such a rational relationship is a necessary condition for the differentiation not to infringe s 8, it is not a sufficient condition; for the differentiation might still constitute unfair discrimination if that further element . . . is present.”

Goldstone J. further added that in order to determine whether the discriminatory provision has impacted on complainants unfairly, various factors must be considered. These would include:

- (a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;
- (b) any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.

He further stated that the stages of enquiry which become necessary where an attack is made on a provision in reliance on section 8 of the interim Constitution were:

(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:

(b)(i) Firstly, does the differentiation amount to “discrimination”? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(b)(ii) If the differentiation amounts to “discrimination”, does it amount to “unfair discrimination”? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified.

The question for our consideration at this point therefore becomes, whether the differentiation complained of by members of the LGBT community in Barbados and other persons with whom they have unfavourable dealings, constitutes discrimination and whether the differentiation is on one of the specified grounds in the Barbados constitution.

Besides entrenching fundamental rights in its Constitution, Barbados also acceded to international human rights treaties. In 1967 it became a member of the Organisation of American States (OAS). Membership involves adherence to the OAS Charter, which includes an obligation in very general terms to respect the fundamental rights of the individual. These were elaborated in 1948 by the American Declaration of the Rights and Duties of Man, similar in its terms to the Universal Declaration. Article I of the American Declaration provides that “Every human being has the right to life, liberty and the security of his person”. The Inter-American Commission on Human Rights, an organ of the OAS, has expressed the view that all member states are bound by the American Declaration.

In 1978, the American Convention on Human Rights (ACHR) came into force. Barbados ratified the ACHR in 1982. The organ which interprets the treaty is the Inter-American Court of Human Rights and in 2000 Barbados accepted its compulsory jurisdiction.

In the case of *Boyce v R* (2004) UKPC 32, Lord Hoffman stated in part: ‘The rights of the people of Barbados in domestic law derive solely from the Constitution. But international law can have a significant influence upon the interpretation of the Constitution because of the well-established principle that the Courts will so far as possible construe domestic law so as to avoid creating a breach of the State’s international obligations. So far as possible means that if the legislation is ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with the treaty the Court will, other things being equal, choose the meaning which accords with the obligations imposed by the treaty’.

As was stated by Lord Oliver in *Maclaine Watson & Co Ltd v Dept. of Trade and Industry*⁶⁷: “Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is *res inter alios acta* (“a matter between others is not our business”) from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations, and it is outside the purview of the Court not only because it is made in the conduct

⁶⁷ (1989) 3 All ER 523 at 544-545

of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant.”

In the island of St. Lucia, the Constitution⁶⁸ also has the following enshrined provisions:

1. Protection of right to life.
2. Protection of right to personal liberty.
3. Protection from slavery and forced labour.
4. Protection from inhuman treatment.
5. Protection from deprivation of property.
6. Protection from arbitrary search or entry.
7. Provision to secure protection of the law.
8. Protection of freedom of conscience.
9. Protection of freedom of expression.
10. Protection of freedom of assembly and association.
11. Protection of freedom of movement.
12. Protection from discrimination on grounds of race, etc.

Section 13 (1) to (3) reads as follows:

13. (1) Subject to the provisions of subsection (4), (5) and (7) of this section, no law shall make any provisions that is discriminatory either of itself or in its effect.

(2) Subject to the provisions of subsection (6), (7) and (8) of this section, no person shall be treated in a discriminatory manner by any person or authority.

(3) In this section, the expression "discriminatory" means affording different treatment to different person attributable wholly or mainly to their respective descriptions by sex, race, place of origin, political opinions, colour or creed whereby persons of one such descriptions are subject to disabilities or restrictions to which persons of another such description are not made subject or

⁶⁸ Laws of Saint Lucia Cap. 1.01

are accorded privileges or advantages which are not accorded to persons of another such descriptions.

The Constitution of St. Lucia does include the word ‘sex’ in the definition of the expression "discriminatory".

In the Republic of Trinidad and Tobago, section 4 of the Constitution, inter alia, states as follows: *“It is hereby recognized and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms...”*

The above comparisons were made to highlight the pattern of drafting which holds true for most if not all of the Constitutions of the Caribbean islands. What is characteristically common to each of these Constitutions is the absence of any mention of sexual orientation as these were adopted prior to the emergence of LGBT rights consciousness or advocacy movements. It should be noted as has been pointed out by constitutional scholars, that these provisions govern discrimination by the state and are not strictly applicable to individuals and organisations outside of the state apparatus. In addition, it is notoriously difficult and expensive for an aggrieved individual to challenge the state particularly on constitutional matters.

The situation in Belize is somewhat different. Section 16 (3) of the Belize Constitution reads as follows:

In this section, the expression “discriminatory” means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by sex, 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.

The case of *Attorney General of Belize v. Caleb Orozco*⁶⁹ - judgment delivered December 30, 2019, must be highlighted. Section 53 of Belize’s Criminal Code criminalised “carnal intercourse against the order of nature” which included consensual same-sex sexual activity between adults in private. In 2010 Caleb Orozco, a Belizean gay man and a prominent human rights defender, filed a challenge to Section 53 in the Supreme Court of Belize. The Human Dignity Trust joined the litigation as an Interested Party in April 2011. The case was heard in May 2013 and the first instance judgment was delivered by Chief Justice Kenneth Benjamin on 10 August 2016, finding in favour of Mr. Orozco on all grounds, namely that Section 53 was unconstitutional, effectively decriminalising consensual same-sex activity conducted by adults in private.

The Attorney General appealed the Supreme Court’s judgment, albeit limited to two particular grounds, namely freedom of expression and non-discrimination on the grounds of “sex” under Sections 12 and 16 of the Constitution respectively. Notably, the decriminalisation of same-sex intimacy itself was not challenged by the Government. The Court of Appeal heard the case on 29 October 2018. The three-judge bench, made up of Mr. Justice Samuel Awich, Mr. Justice Murrio Ducille and Mr. Justice Lennox Campbell, returned the Court of Appeal ruling on 30 December 2019, finding against the Appellant and upholding the judgment of the Supreme Court. In particular, the Court of Appeal upheld Chief Justice Benjamin’s reasoning in the Supreme Court that non-discrimination on the grounds of “sex” under sections 3 and 16 of the Constitution encompasses sexual orientation.

The issue of the distinction between ‘sex’ and ‘sexual orientation’ was considered in the case of *Pearce v. Governing Body of Mayfield School*⁷⁰. Ms. Pearce was subjected to a sustained campaign of harassment while employed as a teacher at Mayfield School, because she was a lesbian. She claimed that this treatment comprised 'direct' sex discrimination, that is, discrimination as defined in section 1(1)(a) of the 1975 Act. Section 1(1) (a) provides that a person discriminates against a woman if 'on the ground of her sex he treats her less favourably than he treats or would treat a man'.

⁶⁹ <https://www.humandignitytrust.org/>

⁷⁰ [2003] All ER 259

Much of the argument was directed at identifying the appropriate person with whom the appellant was to be compared when making the 'less favourable treatment' comparison. This issue was placed at the forefront of the appellant's submission. The statute, she said, envisages a simple comparison of how the claimant was treated and how a person of the opposite sex would have been treated in the same circumstances.

Ms. Pearce advanced her claim on the basis that she was subjected to a campaign of gender specific harassment. She was vilified in terms which would not have been used against a man. This, it was submitted, is capable of amounting to less favourable treatment on the ground of her sex without the need to identify a male comparator and regardless of the reason for the campaign.

Lord Nicholls pointed out that a claim under the Act cannot get off the ground unless the claimant can show she was harassed because she was a woman. A male employee may make office life difficult for a female employee, not because she is a woman, but because he objects to having anyone else in his office. He would be equally unwelcoming to a male employee. Harassment of a woman in these circumstances would not be sex discrimination.

In the case of Ms. Pearce, the abuse was in homophobic terms: 'lezzie', 'lemon', 'lesbian shit' and the like. The natural inference to be drawn from this form of abuse is that the reason for this treatment was Ms. Pearce's sexual orientation, not her sex. Ms. Pearce did not put forward any evidence or argument that a male homosexual teacher would have been treated any differently either by the pupils or by the school. This being so, Ms. Pearce did not establish that the harassment was on the ground of her sex. Her appeal therefore failed.

The House of Lords therefore laid down the principle that sex discrimination legislation could not be used where the principle discrimination was on the ground of sexual orientation. This decision however runs counter to the position held by the Belizean Court of Appeal.

The constitutional issue to consider at this point therefore is whether, though not specifically stated, sexual orientation could be considered as falling in line with the thinking of the framers of the Constitutions of the Caribbean island states. To determine such, one could employ a technique

of constitutional interpretation, one such being the moral reading of Constitutions.

The Moral Reading of Constitutions

Dworkin explained that the moral reading had long been an established feature of our constitutional tradition and practice⁷¹. According to the moral reading, as Dworkin initially explains it, each of us citizens, lawyers, elected officials, and judges should "interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice⁷²."

In this way of reading the Constitution, the broadly stated individual rights guarantees of the Constitution (freedom of speech, equal protection of the laws, etc.) should be understood as setting forth abstract moral principles which judges must interpret and apply in ways faithful not only to our constitutional tradition, but also to their own views of political morality⁷³.

Dworkin argues that the framers did not intend abstract expressions such as "freedom of religion," "unreasonable searches and seizures," and "just compensation", to be "treated only as coded messages or shorthand statements of very concrete, detailed historical agreements⁷⁴."

In support of this position, Dworkin cites the dictum of Chief Justice Harlan Fiske Stone who wrote in 1941: "In determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government, they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses. Hence we read its words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of great purposes which were intended to be achieved by the Constitution as a continuing instrument of government⁷⁵."

⁷¹ Freedom's Law at 2-4

⁷² Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution (1996)

⁷³ Ibid, 7-12

⁷⁴ Ronald Dworkin, Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom 128

⁷⁵ United States v. Classic, 313 U.S. 299, 316 (1941)

As Dworkin argues in a famous passage, there is often an important distinction between what people say and what they expect will be the result of their saying it. He writes: 'Suppose I tell my children simply that I expect them not to treat others unfairly. I no doubt have in mind examples of the conduct I mean to discourage, but I would not accept that my "meaning" was limited to these examples, for two reasons. First I would expect my children to apply my instructions to situations I had not and could not have thought about. Second, I stand ready to admit that some particular act I had thought fair when I spoke was in fact unfair, or vice versa, if one of my children is able to convince me of that later. In that case, I should want to say that my instructions covered the case he cited, not that I had changed my instructions. I might say that I meant the family to be guided by the concept of fairness, not by any specific conception of fairness I might have had in mind⁷⁶.' Dworkin argues that the moral reading is more plausible and attractive than what he claims are the only principled alternatives to it, which are passivism and originalism⁷⁷.

"Passivism" is Dworkin's term for a particularly strict version of constitutional judicial restraint. Dworkin rejects passivism on several grounds. First, such an extreme form of judicial restraint is clearly inconsistent with settled constitutional practice⁷⁸. He argues that democratic processes and the quality of public deliberation may in some instances be enhanced "when final decisions...are removed from ordinary politics and assigned to courts, whose decisions are meant to turn on principle, not on the weight of numbers or the balance of political influence⁷⁹."

We can now consider the other stated alternative to the moral reading which is originalism. According to Dworkin, originalism embodies the view that the Constitution should be interpreted in accordance with the framers' own assumptions and expectations about the correct application of the provisions they enacted⁸⁰.

⁷⁶ Ronald Dworkin, *Taking Rights Seriously* 134

⁷⁷ *Freedom's Law* at 12-15

⁷⁸ *Ibid* at 12

⁷⁹ *Ibid* at 334

⁸⁰ *Ibid* at 13

In Freedom's Law, Dworkin however emphasizes three main objections to the principle of originalism:

(a) that originalism is self-defeating, since there is persuasive evidence that the framers did not intend their own understanding of constitutional language to be binding on future interpreters⁸¹;

(b) that originalism is flawed because it fails to recognize that the framers' intentions can often be described at different levels of abstraction, and that the framers' dominant intention must be presumed to have been to use abstract language in its normal abstract sense⁸²; and,

(c) that originalism is inconsistent with our constitutional tradition, since it "would condemn not only the Brown decision but many other Supreme Court decisions that are now widely regarded as paradigms of good constitutional interpretation⁸³."

The Brown decision mentioned above refers to the case of *Brown v. Board of Education 347 U.S. 483 (1954)* which outlawed segregated public schooling.

So as not to be side-tracked on a philosophical tangent, in summary, Dworkin views the moral reading as a theory of constitutional adjudication essentially involving a three-step process of judicial reasoning. The first step consists in asking a threshold question: Did the framers intend in the relevant provision to enact a general moral principle? Only if the answer is "yes," Dworkin says, is the moral reading the appropriate interpretive approach⁸⁴.

Once it has been determined that the framers did intend to enact a general moral principle, we next must ask: Which general principle? "That further question," Dworkin says, must be answered by constructing different elaborations of the abstract phrases the framers used, each of which we can recognize as a principle of political morality that might have won their respect, and then by asking which of these it makes most sense to attribute to them, given everything else we know⁸⁵.

⁸¹ Freedom's Law at 380 n. 1(b)

⁸² Ibid at 76

⁸³ Ibid at 13

⁸⁴ Ibid at 8

⁸⁵ Ibid at 9

Finally, "the moral reading asks Judges to find the best conception of constitutional moral principles...that fits the broad story of America's historical record⁸⁶."

Focusing on the Constitution of Barbados, when applying the moral reading concept, the question becomes what was the original meaning or intent of the given law as worded. Section 23 (1) (a) of the Barbados Constitution states that '*no law shall make any provision that is discriminatory either of itself or in its effect*'. The Constitution then goes on to state, inter alia at section 23 (1) (b) that, '*no person shall be treated in a discriminatory manner by any person acting by virtue of any written law*'. Did the framers intend in section 23 (1) (b) to enact a general moral principle? If the answer is 'yes', then according to Dworkin, the moral reading would be the appropriate interpretive approach.

Dworkin favoured the moral reading of the Constitution of the United States because, in his opinion, it allowed judges to incorporate rights not found in the majority vote process by relying on their "own background convictions of political morality⁸⁷." He viewed morality not as the prerogative of any particular group of society, not even the majority, but rather a limited number of basic principles shared by all members of the community. As mentioned earlier, he viewed them as "legal principles" to which judges were bound in deciding "hard cases". Dworkin believed that distributive justice and equality established the framework for political morality⁸⁸.

Further, Dworkin maintained that these fundamental principles of justice and equality constituted political morality because all members of society embrace them. He believed that the enforcement of these principles corresponded with the critical interests of any integrated citizen because, as Dworkin contends, such citizen "accepts that the value of his own life depends on the success of his community in treating everyone with equal concern⁸⁹," thereby merging political morality which represents equality for all with critical self-interest which represents living in an equal society.

⁸⁶ Freedom's Law at 11

⁸⁷ Ibid.

⁸⁸ Ibid

⁸⁹ R. Dworkin, "Liberal Community" (1989) 77 - Online

There can be no argument that the framers of the various Constitutions of the Caribbean States intended equality for all. As cited earlier in the Barbados Constitution⁹⁰ *'no person shall be treated in a discriminatory manner by any person acting by virtue of any written law'*. It should have been easy to conclude at this point that based on the literal interpretation of that wording, the framers intended that through the ages, absolutely no one should be discriminated against based on any written law, and that would have included persons within the LGBT community. This however is not the reality within our respective Caribbean societies. Again, this constitutes philosophical theory which does not readily get the buy-in from the wider society, in particular the religious community.

Focus therefore, must be turned to other sources from which Barbados and the other Caribbean territories can identify as the root for their anti-discrimination practice, as many cases of discrimination fall outside of the legislative scheme. Such cases may be covered by reference to the provisions as contained in the various Treaties and Conventions to which these territories have become signatories.

One such convention is the Universal Declaration of Human Rights Convention, Articles of which provide that the rights in the said Declaration must be secured without discrimination *'on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, or birth.'* This is among the oldest of such Conventions which relate to the issue of discrimination. The language in that Declaration however mirrors that in Caribbean Constitutions in terms of the absence of any specific mention of sexual orientation.

As mentioned later in this work, another treaty to which Barbados is a signatory is the International Covenant on Civil and Political Rights 1966 (ICCPR). Articles 2(1) and 26 of the ICCPR set out the non-discrimination standards to which signatories would be held.

⁹⁰ The Constitution of Barbados Section 23 (1) (b)

Under Article 2(1) of the ICCPR, a state party “undertakes to respect and to ensure to all individuals within its territories and subject to its jurisdiction the rights recognized in the present Covenant, 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.”

Article 26 of the ICCPR recognizes that “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law,” prohibiting “any discrimination,” and “guarantee(s) to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.”

It is arguable that the term ‘other status’ could cover the LGBT community but that issue has never been raised in any of the Courts of Barbados.

Chapter 4

LEGAL CHALLENGES TO RIGHTS OBSERVANCE

Sexual relationships with a partner of the same sex are considered illegal in many countries worldwide. For example, in Bangladesh, Barbados, Guyana, Sierra Leone, Qatar, Uganda and Zambia, the punishment is imprisonment for life. There are nine countries which punish homosexuality with death. These include Afghanistan, Brunei, Iran, Iraq, Mauritania, Pakistan, Saudi Arabia, Sudan and Yemen⁹¹. I will expand on some of these in more detail further on in this work.

A number of countries in the Caribbean in particular still have anti-homosexuality laws on their statute books. These include but are not limited to, Barbados, Jamaica, and the Republic of Trinidad and Tobago.

It should be noted at this point that effective implementation of anti-discrimination legislation requires first, a system of procedural law which readily permits the presentation of serious claims; secondly, a definition of unlawful practices which includes those which actually bar some aspect of progress; thirdly, remedies which provide incentive for voluntary compliance and effective means of change; and fourthly, the availability of adequate resources to implement the law.

In Barbados, there is a provision in the Constitution that prevents the Courts from declaring these pieces of legislation criminalizing same-sex intimacy from being in breach of the human rights provisions in the Constitution. This prohibition known as a savings law clause⁹², applies to all laws passed before the enactment of the Constitution in Barbados, of which the buggery law is one.

⁹¹ <https://76crimes.com/76-countries/where/homosexuality/is/illegal>

⁹² Constitution of Barbados, Section 26

The organisation Human Rights Watch, founded in 1978, is an international non-governmental organisation, headquartered in New York City, which conducts research and advocacy on human rights. The group pressures governments, policy makers, companies, and individual human rights abusers to denounce abuse and respect human rights. The group often works on behalf of refugees, children, migrants, and political prisoners⁹³.

Human Rights Watch prepared a report in 2008 which, inter alia, outlined the manner in which in their opinion, anti-homosexuality laws affected the LGBT community:

“These laws invade privacy and create inequality. They relegate people to inferior status because of how they look or who they love. They degrade people's dignity by declaring their most intimate feelings “unnatural” or illegal. They can be used to discredit enemies and destroy careers and lives. They promote violence and give it impunity. They hand police and others the power to arrest, blackmail, and abuse. They drive people underground to live in invisibility and fear⁹⁴.”

I have not seen evidence of this in Barbados. It is an often-stated fact that in Barbados, law enforcement does not prosecute persons for homosexuality, thereby, homosexuals usually operate without fear of legal consequence as those laws are not enforced.

Human Rights Watch also conducted a number of interviews among the LGBT community in Barbados four of which I will highlight.

Florence, a 24-year-old transwoman from Barbados, told Human Rights Watch that the buggery and serious indecency laws “allow people to treat LGBT people badly. It steals them into thinking they can get away with it because, since the law is ‘on their side’, they think they are being a good citizen.”

⁹³ Wikipedia - <https://en.wikipedia.org/wiki/Human/Rights/Watch>

⁹⁴ This Alien Legacy: The Origins of ‘Sodomy’ Laws in British Colonialism page 5

Jason, a 40-year-old gay man from Barbados, said: “People don’t understand how much pressure it is not to be your true authentic self and how that is such a mental strain, to the point where that is so detrimental to you as a person if you are living where you are constantly scolded and told that you’re not good for just being you. And it hinders our education opportunities, and work opportunities and taking part in your community, which to me is a human rights violation. It doesn’t have to be physical violence for it to be a human rights violation.”

Florence, a 23-year-old transgender woman from Barbados felt compelled to hide her gender identity from her stepfather for fear of being thrown out of her home, although she did confide in her mother: “In the summer 2010, I confessed to my mother that I was attracted to men. My stepdad functioned as dad and was more than extended family. I looked up to him, but his attitudes towards LGBT community let me know that his care to me would be conditional if I told him. He would have kicked me out had I told him anything.”

Ernest, a 20-year-old gay man from Barbados, suffered a traumatic coming out experience which included physical violence from family members. In 2011 he came out to his mother, who shouted: *“how could you like men, that’s nasty, you give up that shit, you’re nasty, you’re nasty”*. *From that day on, she confronted me with passages from the Bible, while encouraging my brothers to beat me. I think they were trying to beat it out of me, convert me, but this is who I am, I can’t change it... They’d keep on coming and beating me... Barbadians use the bible to justify their actions. I would call the police, but because my mother knew the police at that station, if I called, then she would call them back and then they would not come. I was a voice in the wilderness and nobody’s paying me any attention.*

On one occasion my three uncles beat me up because of being gay. One was in front, one was on the right and one was on the left, and they beat me until I spat blood. They cut my face in all directions. I called my grandfather and he did nothing.

After that my mother put me out. I was on the street for a night. And when my grandmother heard about it she came for me. I had to sleep on grandmother’s floor, she gives me food, but doesn’t support me emotionally. I wish to get away from my family. I have to see my uncles - who beat me - and my mother almost every day.”

The comments from those interviews have been cited in order to highlight the emotional distress under which some LGBT people live, always under the shadow of potential rejection and ridicule. Though I have cited only four examples, and restricted them to my country Barbados, research of the work of Human Rights Watch has revealed a plethora of such cases throughout the Caribbean diaspora.

From an historical standpoint, the Buggery Act 1533, passed during the reign of King Henry VIII, was the first time in law that male homosexuality was targeted for persecution in the UK. It moved the issue of sodomy from the ecclesiastical courts to the state legislature. It should be noted that the Act did not explicitly target sex between men, as it also applied to sodomy between men and women, and a person with an animal. Convictions between men for sodomy were by far the most common and well publicized. Convictions under the Buggery Act 1533 were punishable by death⁹⁵.

As noted earlier, the issue of discrimination and group inequality can never be understood in isolation from the particular society in which it is alleged to be occurring. Early Barbados and by extension the wider Caribbean inherited its legal system from its colonizers. Barbados in particular, would have inherited its laws from England. During the eighteenth and nineteenth centuries, male homosexuality in England was viewed as perverting the State and regarded as offences against God⁹⁶.

That having been said, the LGBT community in the United Kingdom experienced a turbulent history, in part due to the predominantly Christian heritage of the nation. Christian values and teaching on homosexuality and gender identity helped to shape historic laws. However, the laws were largely focused on male homosexuality, rather than lesbian relationships or female homosexual acts. Until 1861, English law allowed for the death penalty to be given to people found guilty of engaging in male homosexual sexual activities. The Offences against the Person Act 1861 removed the possibility of the death penalty, however homosexuality between men was still

⁹⁵ British Library Website - <https://en.wikipedia.org/wiki/Buggery/Act/1533>

⁹⁶ Herek G. M., Beyond "Homophobia": Thinking About Sexual Prejudice and Stigma in the Twenty-First Century

punishable by a potential prison sentence. Author Oscar Wilde was famously sentenced to 2 years of penal labour after being convicted of homosexuality⁹⁷.

During the nineteenth century, the laws preventing homosexuality were often used in a more political way, rather than as an attempt to completely prevent homosexuality in the UK. Police allowed some homosexuality to occur, as long as it was carefully concealed. On the other hand, some politicians or members of high society would use the laws as leverage to discredit their opponents. Homosexuality was also considered as a mental illness. Some doctors or religious groups took steps to try to “cure” LGBT people⁹⁸.

During the early twentieth century, police began to increase their efforts to enforce the laws prohibiting homosexual offences. By 1954, there were over 1000 men in prison for homosexuality (with some homosexuals convicted of “gross indecency”). Some men were offered the option to take female hormones (“chemical castration”) rather than go to prison⁹⁹.

This brings me to the consideration of the case of *Alan Turing*. Alan Turing was an English mathematician and pioneer of theoretical computer science and artificial intelligence. During World War 2, he was instrumental in breaking the German Enigma code, leading to Allied victory over Nazi Germany. In 1952, Turing reported a burglary to the police, where it emerged that the perpetrator, Arnold Murray, was in a sexual relationship with him. As a result of anti-homosexuality laws in the UK in the 1950s, Alan was charged with gross indecency (overturned in 2013). He avoided prison by accepting chemical castration, which eventually left him impotent. On 7 June 1954, Turing was found dead from cyanide poisoning. An inquest ruled that it was suicide¹⁰⁰.

⁹⁷ British Library Website - <https://www.bl.uk/people/alan-turing>

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

The case of note which followed was that of *Edward Douglas-Scott-Montagu, 3rd Baron Montagu of Beaulieu et al.*

Lord Montagu, a then 28-year-old socialite and the youngest peer in the House of Lords, was imprisoned for 12 months in 1954. He was one of three men convicted of "conspiracy to incite certain male persons to commit serious offences with male persons" alongside Peter Wildeblood, the diplomatic correspondent of the *Daily Mail* and Michael Pitt-Rivers.

In the summer of 1953, Lord Montagu of Beaulieu had offered Wildeblood the use of a beach hut near his country estate. Wildeblood brought with him two young RAF servicemen: his lover Edward McNally, and John Reynolds. The foursome were joined by Montagu's cousin Michael Pitt-Rivers. At the subsequent trial, the two airmen turned Queen's Evidence, and claimed there had been dancing and "abandoned behaviour" at the gathering. Wildeblood said it had in fact been "extremely dull". Montagu claims that it was all remarkably innocent, saying: "We had some drinks, we danced, we kissed, that's all."¹⁰¹

Arrested on 9 January 1954, in March of that year, Wildeblood was brought before the British Courts also charged with "conspiracy to incite certain male persons to commit serious offences with male persons" or "buggery". Wildeblood was charged along with Lord Montagu and Michael Pitt-Rivers, and during the course of the trial, he admitted his homosexuality to the Court. He was sentenced to 18 months in prison as a result of these and other charges.

Major Michael Augustus Lane-Fox Pitt-Rivers was the cousin of Lord Montagu of Beaulieu. He too was convicted of "conspiracy to incite certain male persons to commit serious offences with male persons" or "buggery" in the 1954 trial with Beaulieu and Peter Wildeblood. He received a sentence of 18 months in prison.

The prosecution of these men provoked a wave of sympathy from the Press and the public, many of whom felt it amounted to little more than an unedifying witch-hunt. A backlash of opinion among some politicians and even church leaders led the Conservative Government to set up a

¹⁰¹ LGBT Archive - www.lgbtarchive.uk

Departmental Committee under Sir John Wolfenden, the then Vice-Chancellor of Reading University, to consider both homosexuality and prostitution. The Committee published what became known as the *Wolfenden Report* in September 1957, recommending the decriminalization of homosexual activity in private between two adults. It has been said that Wildeblood's testimony to the Wolfenden Committee was influential on its recommendations¹⁰².

Ten years after the *Wolfenden Report* was published, homosexuality was decriminalized in the UK in 1967 whereby homosexual acts between two men, older than 21, in private were no longer illegal¹⁰³.

Note that Barbados became an independent nation on November 30, 1966, one year before homosexuality was decriminalized in the UK. Even though no longer bound to follow English laws except those preserved by the savings clause in the Barbados Constitution, there was then no political will on the part of Barbados' leadership to follow the example of the UK on the issue of legalizing homosexuality, as was decriminalized in the UK in 1967.

In the United States, there was a gradual shift in the policy on homosexual activity. In the matter of *Bowers v. Hardwick*¹⁰⁴ in 1982, the respondent Hardwick was charged with violating Georgia's anti-sodomy law after a law enforcement officer saw him committing sodomy in his home with another man. The local prosecutor declined to prosecute the case. Hardwick, however, was concerned that as a gay man, he would always be under the threat of prosecution from the law. Accordingly, Hardwick sued in Federal District Court, asking that Georgia's anti-sodomy law be declared unconstitutional.

The District Court dismissed Hardwick's declaratory judgment action. The Eleventh Circuit Court of Appeals reversed, holding that the Georgia law violated the Ninth Amendment and the Due Process clause of the Fourteenth Amendment. The State of Georgia appealed. Because other Courts of Appeal were in conflict with the Eleventh Circuit's holding, the U.S. Supreme Court

¹⁰² British Library Website - <https://www.bl.uk/collection-items/wolfenden-report-conclusion>

¹⁰³ United Kingdom – Sexual Offences Act 1967, Section 1 (1)

¹⁰⁴ (1986) 478 U.S. 186

granted certiorari. The act of "granting certiorari" means that the Supreme Court agrees to hear a case. Certiorari must be requested by submitting a Petition for Writ of Certiorari to the Supreme Court.

The fundamental issue was whether homosexuals had a constitutional right to engage in sodomy. The Supreme Court of the United States held that there was no fundamental right to engage in homosexual sodomy.

Part of the reasoning given was that 'the Court has sought to identify those fundamental rights that require heightened judicial protection under the Constitution. Homosexual sodomy is not among those fundamental rights. That activity is neither "implicit in the concept of ordered liberty," nor "deeply rooted in this Nation's history and tradition." In fact, until 1961, all 50 States outlawed sodomy, thereby demonstrating that such a right is not deeply rooted in the culture of this Nation. The privacy rights recognized by this Court in the past, involving family relationships or procreation, have no resemblance to the right asserted in the present case. The fact that the act in question took place in a private home does not change that conclusion.

Further, the Court should resist recognizing new fundamental rights under the Due Process clause. This is to avoid the Court losing legitimacy by straying too far from the concepts rooted in the Constitution. Here, the right asserted does not compel the Court to overcome that resistance¹⁰⁵.

Justice Burger in the *Bowers* case stated, inter alia: "Throughout history, society has condemned homosexual activity. Thus, finding homosexual sodomy to be a fundamental right tosses aside centuries of moral teaching".

¹⁰⁵ Ibid.

The decision in the *Bowers*' case was however overturned in 2003 in the case of *Lawrence v. Texas*¹⁰⁶.

In the *Lawrence* case, responding to a reported weapons disturbance in a private residence, Houston police entered petitioner Lawrence's apartment and saw him and another adult man, petitioner Garner, engaging in a private, consensual sexual act. The petitioners were arrested and convicted of deviate sexual intercourse in violation of a Texas statute forbidding two persons of the same sex to engage in certain intimate sexual conduct. In affirming, the State Court of Appeals held, *inter alia*, that the statute was not unconstitutional under the Due Process Clause of the Fourteenth Amendment.

The United States Supreme Court held that the Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violates the Due Process Clause¹⁰⁷.

Part of the reasoning is as follows: 'Resolution of this case depends on whether petitioners were free as adults to engage in private conduct in the exercise of their liberty under the Due Process Clause. For this inquiry the Court deems it necessary to reconsider its *Bowers* holding. The *Bowers* Court's initial substantive statement - "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy ...," 478 U. S., at 190 - discloses the Court's failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it said that marriage is just about the right to have sexual intercourse. Although the laws involved in *Bowers* and here purport to do no more than prohibit a particular sexual act, their penalties and purposes have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. They seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals. The liberty protected by the Constitution allows homosexual persons

¹⁰⁶ Lawrence v. Texas (2003) 539 U.S. 558

¹⁰⁷ Ibid. pp. 564 - 579

the right to choose to enter upon relationships in the confines of their homes and their own private lives and still retain their dignity as free persons¹⁰⁸.’

The case of *Lawrence v. Texas* was therefore a landmark decision of the United States Supreme Court in which the Court ruled that United States laws prohibiting private homosexual activity, sodomy, and oral sex between consenting adults were unconstitutional.

There has also been a shift in policy in European countries towards homosexuality which developed out of the decisions of the European Court of Human Rights.

First I will consider the case of *Dudgeon v. United Kingdom*¹⁰⁹. In Northern Ireland, the commission of an act of buggery and an attempt to commit buggery are offences under sections 61 and 62 of the Offences against the Person Act 1861. An act of gross indecency committed by a man with another man is an offence under section 11 of the Criminal Law Amendment Act 1885 and an attempt to commit an act of gross indecency is an offence at common law. Unlike the position in the other constituent parts of the United Kingdom, no legislation has been enacted in relation to Northern Ireland to provide (subject to exceptions in relation to persons who are especially vulnerable, *e.g.* persons under 21 and mental patients), that private acts of buggery and gross indecency between consenting males over 21 should not be criminal offences.

Mr. Jeffrey Dudgeon, who was 35 years of age, was a shipping clerk resident in Belfast, Northern Ireland. He is a homosexual and his complaints were directed primarily against the existence in Northern Ireland of laws which have the effect of making certain homosexual acts between consenting adult males criminal offences. The applicant has, on his own evidence, been consciously homosexual from the age of 14. For some time he and others have been conducting a campaign aimed at bringing the law in Northern Ireland into line with that in force in England and Wales and, if possible, achieving a minimum age of consent lower than 21 years.

¹⁰⁸ Ibid. pp. 564-567

¹⁰⁹ (1981), 45 Eur. Ct. H.R. 21 (Ser. A); 4 E.H.R.R. 149

The relevant provisions in force in Northern Ireland at that time were contained in the Offences against the Person Act 1861 ('the 1861 Act'), the Criminal Law Amendment Act 1885 ('the 1885 Act') and the common law.

Under sections 61 and 62 of the 1861 Act, committing and attempting to commit buggery were made offences punishable with maximum sentences of life imprisonment and 10 years' imprisonment, respectively. Buggery consists of sexual intercourse *per anum* by a man with a man or a woman, or *per anum* or *per vaginam* by a man or a woman with an animal.

By section 11 of the 1885 Act, it was an offence, punishable with a maximum of two years' imprisonment, for any male person, in public or in private, to commit an act of 'gross indecency' with another male. 'Gross indecency' is not statutorily defined but relates to any act involving sexual indecency between male persons; it usually takes the form of mutual masturbation, inter-crural contact or oral-genital contact.

At common law, an attempt to commit an offence is itself an offence and, accordingly, it is an offence to attempt to commit an act proscribed by section 11 of the 1885 Act.

On January 21, 1976, the police went to Mr. Dudgeon's address to execute a warrant under the Misuse of Drugs Act 1971. During the search of the house, a quantity of cannabis was found which subsequently led to another person being charged with drug offences. Personal papers, including correspondence and diaries belonging to the applicant in which were described homosexual activities were also found and seized. As a result, he was asked to go to a police station where for about four and a half hours he was questioned on the basis of these papers about his sexual life.

The police investigation file was sent to the Director of Public Prosecutions. It was considered with a view to instituting proceedings for the offence of gross indecency between males. The Director, in consultation with the Attorney-General, decided that it would not be in the public interest for proceedings to be brought. Mr. Dudgeon was so informed in February 1977 and his papers, with annotations marked over them, were returned to him.

The applicant complained that under the law in force in Northern Ireland, he was liable to criminal prosecution on account of his homosexual conduct and that he had experienced fear, suffering and psychological distress directly caused by the very existence of the laws in question, including fear of harassment and blackmail. He further complained that, following the search of his house in January 1976, he was questioned by the police about certain homosexual activities and that personal papers belonging to him were seized during the search and not returned until more than a year later. He alleged that, in breach of Article 8 of the *European Human Rights Convention*, he has thereby suffered, and continues to suffer, an unjustified interference with his right to respect for his private life.

Article 8 of the Convention provides as follows:

- 1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
- 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

The Court held that the maintenance in force of the impugned legislation constituted a continuing interference with the applicant's right to respect for his private life (which includes his sexual life) within the meaning of Article 8 (1). In the personal circumstances of the applicant, the very existence of this legislation continuously and directly affects his private life, either he respects the law and refrains from engaging (even in private with consenting male partners) in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution.

This case was significant as the first successful case before the European Court of Human Rights on the criminalization of male homosexuality. It was further considered as the case which led to legislation in 1982 bringing the law on male homosexuality in Northern Ireland into line with that in Scotland (since 1980) and in England and Wales (since 1967).

Another case, the case of *Norris v. Ireland*¹¹⁰ was a case also decided by the European Court of Human Rights (ECHR) in 1988, in which David Norris successfully charged that Ireland's criminalization of certain homosexual acts between consenting adult men violated his right to respect for private life and was in breach of Article 8 of the European Convention on Human Rights.

The Court held that even though the impugned laws were never applied against the defendant, they directly affect him because he had to fear prosecution whenever he engaged in intimate relations with another man. The Court added that Article 25 of the Convention gave individuals the right to argue that a law violates their human rights by itself, without regard to its implementation, if they are potentially at risk.

In the case of *Modinos v. Cyprus*¹¹¹, the Applicant alleged that Cypriot criminal laws which penalized homosexual conduct violated Article 8 of the European Human Rights Convention's prohibition on unjustified interference with his right to respect for private life. The Applicant was a homosexual man who was then in a sexual relationship, and was President of the "Liberation Movement of Homosexuals in Cyprus". He claimed that he suffered great strain, apprehension and fear of prosecution due to various criminal laws that penalize certain homosexual acts. The relevant laws, Sections 171-173 of the Criminal Code of Cyprus, made it a crime to have sex "against the order of nature", and for two men to have sex.

In 1992, the Minister of the Interior stated that he did not favor the abolition of the law even though it was not being enforced. In a 1982 case in which a soldier was charged with the above crimes after having sex with a man, the Cypriot Supreme Court rejected the ECHR's holding in *Dudgeon v. the United Kingdom*, which addressed the same basic issues. Even so, prosecutions for homosexual conduct stopped after the Dudgeon case because the Attorney-General was concerned that Sections 171-173 conflicted with Article 8 of the Convention. Thus, the Attorney-General's office never allowed or instituted any such prosecutions for homosexual conduct. However, private prosecutions were still allowed as they fall outside the control of the Attorney-General.

¹¹⁰ (1989) 142 Eur. Ct. H.R. 20 (Ser. A); 13 E.H.R.R. 186

¹¹¹ (1993), 16 E.H.R.R. 485

The Court held that even though the Attorney-General had refused to enforce Sections 171-173 of the Criminal Code of Cyprus by bringing prosecutions, the Government still refused to amend those laws to decriminalize homosexual conduct, whereby the Attorney-General could change his/her decision not to prosecute at any time.

The Court held that the impugned laws constituted a continuous and direct negative threat to the private life of the Applicant, and was in breach of Article 8 of the Convention.

Thus the above cited cases of *Dudgeon*, *Norris* and *Modinos*, all resulted in the decision that the sodomy statutes of the United Kingdom, Ireland, and Cyprus respectively were in violation of privacy rights under the European Human Rights Convention. The European Court of Human Rights held that the legitimate interests of states in protecting morality, public health and youth were "outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant. As a result, sodomy was decriminalized in all member states of the Council of Europe.

The above decided cases therefore represent a global shift in the recognition of LGBT rights in Europe.

In the Caribbean, Barbados is amongst several countries with laws criminalizing intimacy between consenting partners of the same sex on its statute books¹¹². Section 9 of the Barbados Act criminalizes "buggery," which the Courts have confirmed means anal sex not only between men, but also between a man and a woman. Under the Barbados legislation, the maximum penalty is life in prison, which makes it the harshest buggery law in the hemisphere.

Section 12 criminalizes "serious indecency," which is sweepingly defined in the Sexual Offences Act as any act by anyone "involving the use of the genital organs for the purpose of arousing or gratifying sexual desire." The maximum penalty is 10 years in prison if the act is committed on or towards a person aged 16 or older; the penalty is higher in the case of a person under the age of 16.

¹¹² Sexual Offences Act, Laws of Barbados – CAP 154

Similarly, homosexuality is illegal and is a criminal offence in Trinidad and Tobago¹¹³. Section 13 of the Act states as follows:

13. (1) A person who commits the offence of buggery is liable on conviction to imprisonment for twenty-five years.

(2) In this section "buggery" means sexual intercourse per anum by a male person with a male person or by a male person with a female person.

In February 2017, Jason Jones, a Trinidadian born activist, filed a lawsuit against the colonial era laws, stating that sections 13 and 16 of the Sexual Offences Act, which relate to the act of buggery and serious indecency of those of the same sex, respectively, as to being a violation of rights and freedom of expression. In April 2018, that buggery law was deemed decriminalized, null and void by Judge Devindra Rampersad of the High Court in Trinidad and Tobago.

On June 6, 2018, three Barbadians - a transgender woman, a lesbian and a gay man - *Alexa Hoffman et al v. Barbados* - filed a petition against Barbados before the Inter-American Commission on Human Rights (IACHR) challenging laws criminalizing "buggery" and other intimacy between consenting partners, including same-sex partners, as violating numerous rights guaranteed in the *American Convention on Human Rights*. The IACHR is a principal and autonomous organ of the Organization of American States (OAS) whose mission is to promote and protect human rights in the American hemisphere.

It is extremely important to note that Barbados is the only Commonwealth Caribbean country that recognizes the binding jurisdiction of the Inter-American Court of Human Rights.¹¹⁴

¹¹³ The Sexual Offences Act 1986, Laws of Trinidad and Tobago CAP 11:28

¹¹⁴ <https://en.wikipedia.org/wiki/Inter-American/Court/of/Human/Rights>

Focusing for a moment on the Inter-American Court of Human Rights, in 2010, that Court ruled in the *Karen Atala and Daughters*¹¹⁵ case that discrimination on the grounds of sexual orientation was a violation of the Inter-American Convention on Human Rights.

This case concerned the discriminatory treatment and arbitrary interference in the private and family life of Ms. Karen Atala Riffo. Ms. Atala Riffo was a Chilean judge and a lesbian mother of three daughters. She separated from her husband in 2001, and originally reached a settlement with her ex-husband that she would retain custody of the children. When she came out as a lesbian in 2005, however, her ex-husband sued for custody, where the case was eventually heard by the Supreme Court of Chile. That court awarded the husband custody, saying that Ms. Atala Riffo's relationship put the development of her children at risk. The Inter-American Court found that the State violated the American Convention on Human Rights. It was the first case the Court took regarding LGBT rights.

In its report No. 139/09, the IACHR recommended that the Chilean State:

1. Provide Karen Atala and individual daughters with comprehensive redress for the human rights violations that arose from the decision to withdraw her custody on the basis of her sexual orientation, taking into consideration their situation and needs; and
2. Adopt legislation, public policies, programs, and directives to prohibit and eradicate discrimination on the basis of sexual orientation from all spheres of public power, including the administration of justice. These measures must be accompanied by adequate human and financial resources to guarantee their implementation, as well as training programs for the public officials involved in upholding those rights.

The Inter-American Commission on Human Rights in its 2015 report “Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas,¹¹⁶” highlighted that laws criminalizing consensual sex between same-sex persons are incompatible with the principles of equality and non-discrimination.

¹¹⁵ Atala Riffo and Daughters v. Chile, City University of New York Law Review Vol.2

¹¹⁶ <http://www.oas.org/en/iachr/reports/pdfs/violenceigbtipersons.pdf>.

I will outline the particulars of the petition - *Alexa Hoffman et al v. Barbados* - filed against Barbados on June 6, 2018 verbatim as presented by the drafters of that petition as follows:

“The challenge is focused on two sections of Barbados' Sexual Offences Act, sections 9 and 12.

Section 9 criminalizes "buggery," which the Courts have confirmed means anal sex not only between men, but also between a man and a woman. Under the Barbados legislation, the maximum penalty is life in prison, which makes it the harshest buggery law in the hemisphere.

Section 12 criminalizes "serious indecency," which is sweepingly defined in the Sexual Offences Act as any act by anyone "involving the use of the genital organs for the purpose of arousing or gratifying sexual desire." The maximum penalty is 10 years in prison if the act is committed on or towards a person aged 16 or older; the penalty is higher in the case of a person under the age of 16.

1. Which laws are being challenged?

The petitioners are challenging two sections of the Sexual Offences Act (SOA) of Barbados.

- Section 9 criminalizes “buggery” — which the courts have confirmed means anal sex — between men, but also between a man and a woman. The maximum penalty is life in prison.
- Section 12 criminalizes “serious indecency,” which is sweepingly defined in the SOA as any act by anyone “involving the use of the genital organs for the purpose of arousing or gratifying sexual desire.” The maximum penalty is 10 years in prison if the act is committed on or towards a person aged 16 or older; the penalty is higher in the case of person under the age of 16.

The prohibition on buggery was first enacted in 1868, when Barbados was under British colonial rule. Although Barbados achieved independence in 1966, it has preserved this offence in Barbadian criminal law. The prohibition on serious indecency was first enacted in 1978, but its roots also lie in colonial-era English law.

2. Why are these laws being challenged?

These laws violate multiple fundamental rights of all people in Barbados. For example, by criminalizing a wide array of consensual sexual conduct between adults, they violate the right to privacy of all sexually active people. In addition, while these laws appear to be neutral regarding sexual orientation, de facto they also both embody and encourage discrimination particularly against lesbian, gay, bisexual, transgender and queer (LGBTQ) people, in various ways.

- The law against “buggery” inherently criminalizes sex between men and is widely understood as existing for this purpose, even if it is settled in Barbadian law that it can also encompass anal sex between heterosexuals. Gay men and (some) transgender women are directly criminalized by the buggery law.
- The offence of “serious indecency” is extremely broad; on its face, it captures any consensual sexual activity by anyone that involves the genitals. Of course, it is the sexuality and sexual activity of LGBTQ people that is far more commonly considered to be indecent because it differs from dominant norms. The heterosexual conduct theoretically covered by the law is generally not perceived the same way and therefore not likely to be considered criminal. Even when seemingly neutral, there is a long history of indecency laws being used to target same-sex intimacy.
- Because the buggery law turns gay men and (some) trans women into presumed criminals, and the indecency law extends the taint of potential criminality to all LGBTQ people, these sections of the SOA send a powerful message that people — whether state agents such as the police or private individuals — are entitled to discriminate and commit other human rights abuses against LGBTQ people (and those perceived to be LGBTQ).

- Because the “serious indecency” law contributes to and reinforces a more general stigma against homosexuality, it encourages discrimination and violence against women who are, or are perceived to be, lesbian.

- Sexual orientation and gender identity are different facets of a person. Yet they are often incorrectly conflated and equated because they both involve difference from presumed, accepted norms — of sexual conduct and/or of the gender ascribed to a person at birth. When a person’s gender presentation is perceived as differing from the gender norms associated with the genitalia or other physical sex characteristics they have (or are assumed to have), it is not uncommon for others to assume that their sexual activity is also “deviant” — possibly criminally indecent, including possibly buggery — even if this isn’t the case. As such, the criminalization of consensual same-sex sexual activity also contributes to discrimination and violence against people who are identified as transgender.

The SOA provisions criminalizing consensual sexual activity not only invade privacy, and have a particularly discriminatory effect on LGBTQ people, they also undermine the right to health. They create a hostile climate for LGBTQ Barbadians who seek any kind of health services, particularly sexual health services. Among other things, such laws, and the stigma and discrimination they contribute to, deter trans people, gay men and other men who have sex with men (MSM) from seeking critical HIV services, including testing, treatment, care and support services. This undermines an effective national response to the epidemic. Changing these laws is a human rights and public health imperative.

3. Why are these petitioners bringing this case?

Two of the petitioners in the case are directly at risk of criminal prosecution for “buggery” as a result of the expression of their sexuality with consenting partners. The third could conceivably be at risk for “serious indecency” charges.

Petitioner Alexa Hoffmann, the only petitioner willing to be publicly identified, is a heterosexual trans woman (although her female identity is not recognized in law and she is therefore still treated legally as a man). Petitioner “D.H.” is a gay (cisgender) man.

In each of their cases, their sexual activity with male partners includes anal sex — “buggery,” prohibited by SOA section 9. Both Hoffmann and “D.H.” could be incarcerated for life for private sexual intercourse with consenting adult same-sex partners. Finally, petitioner “S.A.” is a lesbian; she and her adult female partner could be subject to prosecution and imprisonment for “serious indecency” for their consensual acts of intimacy.

Beyond the risk of criminal sanction, all three petitioners have experienced discrimination, harassment, threats on multiple occasions, and even homophobic/transphobic attacks — abuse and hostility that is encouraged by these SOA provisions. In cases of physical violence, too often Barbadian police fail to adequately assist and protect, at times ignoring or failing to effectively investigate attacks against LGBTQ people. For example, most recently, the petitioner Alexa Hoffmann, a well-known trans activist, was savagely attacked with a meat cleaver, yet the police allowed her attacker, who had been identified and was easy to locate, to remain free for two days. One officer told Hoffmann, on the condition of anonymity, that the police are reluctant to assist with cases involving LGBTQ people.

In light of their clear or potential legal jeopardy under the SOA provisions, and their experience of other human rights abuses in a climate of anti-LGBTQ hostility created in part by the SOA provisions, all three petitioners have filed a petition before the IACHR asking for a review of Barbados’s laws effectively criminalizing the sexuality and gender identity of LGBTQ people as breaching various rights under the American Convention on Human Rights (the Convention).

4. How do these laws violate the American Convention on Human Rights?

The two SOA provisions that are being challenged violate numerous rights guaranteed by the Convention. Barbados ratified the Convention in 1981, which means it is legally bound to respect this treaty. By unreasonably and arbitrarily criminalizing the private intimate acts of consenting partners, and by inviting and inciting violence and discrimination against

LGBTQ people or people perceived to be LGBTQ, the laws violate, both directly and indirectly, the rights of Barbadians to the following:

- privacy;
- non-discrimination and equal protection;
- freedom of expression;
- physical, mental and moral integrity;
- family; and
- judicial protection.

Barbados has recognized these human rights in international human rights treaties it has ratified, and most of them in its own Constitution. The infringement of these rights is indefensible in a free and democratic society.

5. How do these laws fuel the HIV epidemic in Barbados?

As has been widely and repeatedly recognized, including by such bodies 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 LGBTQ people undermines effective responses to HIV.

Such laws create apprehension among LGBTQ people, who fear that even the mundane activities of daily life will lead to accusations of criminal acts or provoke discriminatory or abusive treatment. For example, a man seeking HIV testing or visiting the doctor for a check-up who indicates he is sexually active with a male partner or partners is confessing to a crime. More generally, open and non-judgmental discussion about sex between persons of the same sex, including safer sex education for purposes of HIV prevention, is more difficult in a climate where anal sex or other acts of intimacy between same-sex couples is a crime, and anyone identified as an LGBTQ person risks discrimination, violence or possible prosecution.

Furthermore, the government does not wish to be seen as “promoting homosexuality” or providing “special” services to a criminalized population. This complicates and undermines HIV-related programs (outreach, testing, support, treatment, care) by government agencies that target men who have sex with men (MSM). The result is the creation of significant barriers to effective HIV and AIDS health programs. Partly as a result of this environment, Barbados is in the midst of an ongoing HIV crisis: about 14% of all MSM are living with HIV, according to most recent estimates from UNAIDS (in 2017).

6. Why is a legal challenge necessary?

For many years, evidence has been mounting of the harms caused to Barbadians by criminalizing LGBTQ people, including the stigma, discrimination and violence encouraged by such laws. The continued criminalization of consensual sex by LGBTQ people through the “buggery” and “serious indecency” laws, and the broader abuses against LGBTQ Barbadians to which such criminalization contributes, have damaged too many lives — and continue to do so every day. These are the lives not only of LGBTQ Barbadians, but of their family members and friends who have lost loved ones to violence or HIV, or when those facing persecution have sought asylum elsewhere.

Despite repeated calls from domestic and international bodies for the repeal of the buggery law, successive Barbadian governments have steadfastly refused to do so. Instead government officials have prioritized the views of conservative religious groups over the lives of LGBTQ citizens. Furthermore, there is no likelihood that, within any reasonable time frame, a sufficient number of Parliamentarians will support legislative reforms abolishing the law. Any proposal for decriminalization already encounters substantial backlash and hostility.

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 depend upon the approval of a majority, or else the rights of any person or community is at risk. The

Convention is an essential manifestation of Barbados's commitment to basic democratic principles, and the rights it protects must be guaranteed for all Barbadians.

7. How can these laws be challenged?

The Constitution of Barbados includes a “savings clause” (section 26), which is designed to prevent the country's domestic courts from constitutionally reviewing any laws passed before independence (in 1966), unless and until such a law is amended in some way by Barbados that introduces a new, unconstitutional aspect — at which point it would be subject to constitutional challenge. The “savings clause” therefore appears to prevent a constitutional challenge in Barbadian courts to the criminalization of “buggery,” which was first outlawed by Britain in 1868 during the colonial era and then preserved in subsequent legislation after independence, including the current SOA enacted in 1992. (The “serious indecency” offence was first introduced in 1978, but modelled on colonial-era British law criminalizing “gross indecency.”)

Therefore, the only avenue available to challenge the buggery law is to take it before international tribunals whose jurisdiction Barbados recognises. These include the IACHR and the Inter-American Court of Human Rights. Both of these bodies are supposed to ensure that ratifying countries comply with the Convention. Barbados became a full party to this treaty in 1981. Individuals can file petitions with the IACHR requesting a hearing on their state's compliance with the provisions of the Convention. If the state's laws are found to be in violation of the Convention, the IACHR can recommend that the state change its laws. If the state fails to comply, the IACHR can take the state to the Inter-American Court. The Court can make a binding decision obliging the state to end any breach of the Convention, including by changing its laws.

8. What is the ultimate goal of this petition?

The goal of this petition is to end the criminalization of consensual sexual activity between persons above the age of consent, in particular the criminalization of consensual sex between partners of the same sex. This can happen if Barbados acts on a suitable recommendation of the IACHR; alternatively, the Inter-American Court of Human Rights

can issue a binding decision ordering Barbados to comply with its obligations under the Convention.

The petitioners argue that, in order to comply with the Convention, Barbados should repeal the criminal prohibitions on “buggery” (SOA section 9) and “serious indecency” (SOA section 12) in their entirety, so as to decriminalize consensual sexual activities (including anal sex) among persons above the age of consent established elsewhere in Barbadian law.

The petitioners are also asking the IACHR to recommend a number of proactive measures to be taken by Barbados to better protect LGBTQ people from the discrimination, harassment and violence to which this criminalization has contributed. Barbadian law would continue to criminalize non-consensual sexual contact of any kind (including anal sex) under SOA section 3, which prohibits rape, and sections 4 and 5, which prohibit sex with those under the legal age of consent. These are appropriate limits on the use of the criminal law in a free and democratic society.

9. What is the likely timeline for the petition?

Petitions should be given priority by the IACHR as they concern fundamental rights and freedoms. Furthermore, the violation of such rights continues each day the criminal prohibitions remain in effect, along with the stigma, violence and abuse against LGBTQ people they encourage.

However, the IACHR receives numerous petitions each year from across the Americas, so the processing time is slow. The IACHR also encourages friendly settlement of disputes and allows the petitioners and the state time to exchange documents over a lengthy period in order to try to resolve the issue.

If no friendly settlement is possible, the IACHR will hold a hearing. If the IACHR finds that Barbados’s laws violate the Convention, it should recommend that Barbados make changes to bring its laws in line with its human rights obligations under the treaty.

If Barbados refuses to implement the IACHR recommendations, then the IACHR may take the matter to the Inter-American Court for a hearing. The Court may issue a binding decision to the state of Barbados compelling them to make the required changes. It could take years before there is a final resolution.

10. Why was the matter not tried in Barbados?

As noted above, there is a provision in the Constitution of Barbados (section 26) that prevents the country's domestic courts from constitutionally reviewing any law passed before independence in 1966, unless and until that law is amended in some way that introduces a new, unconstitutional aspect. This includes the prohibition on "buggery" (SOA section 9), as this were originally imposed by Britain in 1868 during the colonial period and preserved after independence, carried forward into the SOA enacted in 1992. Therefore, the only avenue available to challenge this law is to take it before international tribunals whose jurisdiction Barbados recognises. These include the Inter-American Commission (IACHR) and the Inter-American Court of Human Rights.

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 Barbados'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. 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 respectful society, which is also based on the core values of their own faith tradition.

Some religious leaders have attempted to conflate calls for decriminalizing consensual sexual activity by LGBTQ people with legislating same-sex marriage. This position is misguided and illogical. This petition challenges the unjustifiable criminalization and punishment of consensual sex between people above the age of consent. Nothing in the

petition before the IACHR addresses the question of granting marriage rights to same-sex couples. Decriminalizing LGBTQ people (and indeed heterosexuals who also engage in consensual anal sex or other consensual acts that could fall afoul of the broad offence of “serious indecency”) does not mean legalizing same-sex marriage in Barbados, nor does it compel religious leaders or organizations to perform or recognize such marriages.

Nor does decriminalizing consensual sex between those who are above the age of consent interfere with other people’s freedom of opinion or belief, in a free and democratic society, people are free to hold their own views, religious or otherwise. This petition 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 LGBTQ people, but for all Barbadians. Realizing the human rights guarantees in the Convention is of benefit to all and is part of the larger project of ensuring that fundamental human rights are universally respected and protected.

12. Who is supporting this legal challenge?

Widespread homophobia makes it very difficult to find local support in Barbados to pay lawyers and to provide technical assistance for such a legal challenge. This petition is being brought by three Barbadians, with support from groups and advocates both inside and outside Barbados — including Trans Advocacy & Agitation Barbados, the Canadian HIV/AIDS Legal Network and the University of Toronto’s International Human Rights Program, organizations that are committed to advancing human rights as a matter of basic principle and as an essential aspect of responding effectively to the HIV epidemic.’

To the best of my research at the time of compiling this work, Barbados continued to await initial contact from the Inter-American Commission on Human Rights on the filed petition.

In the month of April 2021, also in Barbados, Remy Reeco Rock, a self-avowed homosexual, has presented a challenge to the island's buggery laws in the local Court. He contends that the law criminalizing sexual intercourse between adult men who consent to the act is unlawful, against the International Covenant on Civil and Political Rights, and should be struck down¹¹⁷.

Bearing in mind that State actors and lawmakers in Barbados have a legal duty to comply with the terms of the international human rights conventions that Barbados has ratified or acceded to, based on the decision in the case of *Atala Riffo and Daughters v. Chile*¹¹⁸, by retaining the anti-sodomy and "serious indecency law" which disproportionately affect the LGBT community, Barbados might be ruled effectively in violation of its obligations under the Inter-American Convention.

Focusing for a moment on Trinidad & Tobago, that twin-island state became a party to the American Convention when it deposited its instrument of ratification of that treaty on May 28, 1991. Trinidad & Tobago subsequently denounced the American Convention by notice given on May 16, 1998 in accordance with Article 78 of the American Convention, which then took effect one year later. Moreover, as mentioned above, Trinidad & Tobago deposited its instrument of ratification of the OAS Charter on March 17, 1967, and accordingly is a Member State of the OAS since that date. As such, with respect to acts done by the State wholly before May 26, 1999, Trinidad and Tobago is subject to the allegations set forth in the American Declaration of the Rights and Duties of Man and the OAS Charter, and subject to the Inter-American Commission's authority to supervise the State's compliance with that instrument.

Under Art. 78(2) of the American Convention on Human Rights (ACHR) and its supervisory organs – the IACHR and the Inter-American Commission on Human Rights – in a series of cases concerning Trinidad and Tobago including *Ramcharan v. Trinidad and Tobago*, it was held that the twin-island State was not relieved from its obligations for alleged violations committed before denunciation (which was submitted on 26 May 1998 and thus took effect on 26 May 1999) and, therefore, the IACHR possessed jurisdiction over all alleged violations before the latter date. In the words of the Inter-American Commission on Human Rights: 'States Parties to [ACHR] have,

¹¹⁷ Evanson, Heather-Lynn, "A Bugbear," *Saturday Sun* April 17, 2021. P. 1

¹¹⁸ City University of New York Law Review Vol.2

by the plain terms of Art. 78(2), agreed that a denunciation taken to the Convention by any of them will not release the denouncing State from its obligations under the Convention with respect to acts taken by that State prior to the effective date of the denunciation that may constitute a violation of those obligations. A State party's obligations under the Convention encompass not only those provisions of the Convention relating to the substantive rights and freedoms guaranteed thereunder. They also encompass provisions relating to the Convention's supervisory mechanisms, including those under Chapter VII relating to the jurisdiction, functions and powers of the Inter-American Commission on Human Rights. Notwithstanding Trinidad and Tobago's denunciation of the Convention therefore, the Commission will retain jurisdiction over complaints of violations of the Convention by Trinidad and Tobago in respect of acts taken by that State prior to May 26, 1999. Consistent with established jurisprudence, this includes acts taken by the State prior to May 26, 1999, even if the effects of those acts continue or are not manifested until after that date'¹¹⁹.

In *Ivcher Bronstein v. Peru*¹²⁰ Series C No. 54, IACHR 24 September 1999, in 1999 Peru sought to withdraw, with immediate effect, from its 1981 declaration recognizing the IACHR's contentious jurisdiction under Art. 62(1) ACHR. The IACHR concluded that Peru's withdrawal had no legal effect, because the "[ACHR] contains no provision that would make it possible to withdraw recognition of the Court's contentious jurisdiction, as such a provision would be antithetical to the Convention and have no foundation in law. Even supposing that a State could withdraw its jurisdiction of the Court's contentious jurisdiction, formal notification would have to be given one year before the withdrawal could take effect, for the sake of juridical security and continuity... Termination with immediate effect was precluded by the law of treaties, which demanded reasonable notice."

The *UN International Covenant on Civil and Political Rights (ICCPR)* is unique among international human rights treaties in that it permits no denunciations from the obligations undertaken. General Comment 26¹²¹ to the ICCPR, adopted by the UN Human Rights Committee on August 12, 1997, provides that the Covenant: 'does not contain any provision regarding its

¹¹⁹ Ramcharan v. Trinidad and Tobago (2002) para. 26

¹²⁰ <http://hrlibrary.umn.edu/cases/1997/peru20-98.html>

¹²¹ Human Rights Committee (CCPR) General Comment No. 26: Continuity of Obligations, OHCHR.org

termination and does not provide for denunciation or withdrawal. Consequently, the possibility of termination, denunciation or withdrawal must be considered in the light of applicable rules of customary international law which are reflected in the Vienna Convention on the Law of Treaties. On this basis, the Covenant is not subject to denunciation or withdrawal unless it is established that the parties intended to admit the possibility of denunciation or withdrawal or a right to do so is implied from the nature of the treaty’.

General Comment 26 was adopted in reaction to the impending denunciation of the Covenant by a particular State party. In August 1997, North Korea informed the UN that it had decided to withdraw from the ICCPR with immediate effect and to suspend its reporting to the UN Committee on the Rights of the Child. It stated that it had taken these steps in protest against a resolution critical of the human rights situation in North Korea, adopted in August 1997 by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. This resolution criticized in particular North Korea’s failure to allow visits by human rights monitors and its failure to report in a timely manner to the UN Human Rights Committee on its implementation of the Covenant¹²².

That the parties to the Covenant did not admit the possibility of denunciation and that it was not a mere oversight on their part to omit reference to denunciation is demonstrated by the fact that article 41 (2) of the Covenant does permit a State party to withdraw its acceptance of the competence of the Committee to examine inter-State communications by filing an appropriate notice to that effect while there is no such provision for denunciation of or withdrawal from the Covenant itself.

The routes of withdrawal or denunciation of the ICCPR are clearly not viable options which would be open to Barbados. Barbados has become party to many of the below listed Conventions.

¹²² Human Rights Committee (CCPR) General Comment No. 26: Continuity of Obligations, OHCHR.org

International Covenant on Civil and Political Rights (ICCPR)¹²³

The ICCPR obligates countries who have ratified the treaty to protect and preserve basic human rights such as the right to life and to human dignity, equality before the law, freedom of speech, assembly and association, religious freedom and privacy, freedom from torture, ill-treatment and arbitrary detention, gender equality, fair trial and minority rights.

International Convention on the Elimination of All Forms of Racial Discrimination (CERD)¹²⁴;

CERD is designed to protect individuals and groups from discrimination based on race, whether the discrimination is intentional or is the result of seemingly neutral policies. Barbados is bound by all provisions of the treaty, which includes a periodic compliance review conducted by the United Nations Committee on the Elimination of Racial Discrimination.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)¹²⁵;

This United Nations Convention was designed to safeguard the human rights of citizens by protecting them from torture. It came into force June 26, 1987 and established the UN Committee Against Torture, which monitors implementation of the Convention in each State.

Convention on the Prevention and Punishment of the Crime of Genocide¹²⁶;

On December 9, 1948, in the shadow of the Holocaust, the United Nations approved the Convention on the Prevention and Punishment of the Crime of Genocide. This convention establishes “genocide” as an international crime, which signatory nations “undertake to prevent and punish.”

¹²³ Accession by Barbados on January 5, 1973

¹²⁴ Accession by Barbados on November 8, 1972

¹²⁵ Barbados has not yet signed on to this Convention

¹²⁶ Accession by Barbados on January 14, 1980

***Convention on the Rights of Persons with Disabilities (CRPD)*¹²⁷;**

CRPD was inspired by United States leadership in recognizing the rights of people with disabilities. The CRPD is a vital framework for creating legislation and policies around the world that embrace the rights and dignity of all people with disabilities.

***Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*¹²⁸;**

CEDAW is the most comprehensive and detailed international agreement which seeks the advancement of women. It establishes rights for women in areas not previously subject to international standards. The treaty provides a universal definition of discrimination against women so that those who would discriminate on the basis of sex can no longer claim that no clear definition exists.

***International Covenant on Economic, Social and Cultural Rights (CESCR)*¹²⁹;**

Nearly every country in the world is party to this legally binding treaty that guarantees rights, which include rights at work, the right to education, cultural rights of minorities and Indigenous Peoples, the right to the highest attainable standard of physical and mental health, the right to adequate housing, the right to food, and the right to water.

***Convention on the Rights of the Child (CRC)*¹³⁰;**

On November 20, 1989, the United Nations General Assembly adopted the CRC, a landmark for human rights, which for the first time sought to address the particular needs of children and to set minimum standards for the protection of their rights. It is the first international treaty to guarantee civil and political rights as well as economic, social, and cultural rights. The CRC is the most widely accepted human rights treaty of all the United Nations member states.

¹²⁷ Ratified by Barbados on February 27, 2013

¹²⁸ Ratified by Barbados on October 16, 1980

¹²⁹ Accession by Barbados on January 5, 1973

¹³⁰ Ratified by Barbados on October 9, 1990

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW)¹³¹;

The Convention recognizes the human rights of migrant workers and promotes their access to justice as well as to humane and lawful working and living conditions. It provides guidance on the elaboration of national migration policies and for international cooperation based on respect for human rights and the rule of law. It sets out provisions to combat abuse and exploitation of migrant workers and members of their families throughout the migration process.

International Convention for the Protection of All Persons from Enforced Disappearance (CED)¹³²;

The Convention obliges states to hold any person involved in an enforced disappearance criminally responsible. It recognizes the families' rights to know the truth about the fate of a disappeared person and to obtain reparations. It also requires states to institute stringent safeguards for people deprived of their liberty; to search for the disappeared person and, if they have died, to locate, respect and return the remains.

In order that the status of Barbados relating to the Conventions is firmly understood, I have below explained the meaning of the applicable terms.

Ratification

Ratification¹³³ defines the international act whereby a State indicates its consent to be bound to a treaty if the parties intended to show their consent by such an act. In the case of bilateral treaties, ratification is usually accomplished by exchanging the requisite instruments, while in the case of multilateral treaties the usual procedure is for the depositary to collect the ratifications of all states, keeping all parties informed of the situation. The institution of ratification grants States the necessary time-frame to seek the required approval for the treaty on the domestic level and to enact the necessary legislation to give domestic effect to that treaty.

¹³¹ Barbados has not yet signed on to this Convention

¹³² Barbados has not yet signed on to this Convention

¹³³ Arts.2 (1) (b), 14 (1) and 16, Vienna Convention on the Law of Treaties 1969

Accession

Accession¹³⁴ is the act whereby a State accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by other States. It has the same legal effect as ratification. Accession usually occurs after the treaty has entered into force. The Secretary-General of the United Nations, in his function as depositary, has also accepted accessions to some conventions before their entry into force. The conditions under which accession may occur and the procedure involved depend on the provisions of the treaty. A treaty might provide for the accession of all other States or for a limited and defined number of States. In the absence of such a provision, accession can only occur where the negotiating States were agreed or subsequently agree on it in the case of the State in question.

The Office of the High Commissioner for Human Rights (OHCHR) is of the view that protecting LGBT people from violence and discrimination does not require the creation of a new set of LGBT specific rights, nor does it require the establishment of new international human rights standards. That Office holds the opinion that the legal obligations of States to safeguard the human rights of LGBT people are well established in international human rights law on the basis of the Universal Declaration of Human Rights and subsequently agreed international human rights treaties. I do not accept that position wholeheartedly.

While one could agree that as embodied in the various international treaties, all people, irrespective of sex, sexual orientation or gender identity, are entitled to enjoy the protections provided for by international human rights law, including respect of rights to life, security of person and privacy, the right to be free from torture, arbitrary arrest and detention, the right to be free from discrimination and the right to freedom of expression, association and peaceful assembly, it is without doubt that impressive rhetoric as codified in those treaties does not guarantee buy-in amongst those with opposing views. Most if not all of those negatives have been addressed by one United Nations treaty or the other, yet the problems continue to exist.

¹³⁴ Arts.2 (1) (b) and 15, Vienna Convention on the Law of Treaties 1969

In 2006, the United Nations General Assembly resolution 60/251 established the Human Rights Council (HRC), with the Universal Periodic Review (UPR) as a subsidiary mechanism tasked to review the human rights performance of each UN Member State. The evaluation process that ensued resulted in a strengthened focus on implementation of UPR recommendations and an appeal to States and other stakeholders, including civil society, to provide the Council with progress reports halfway between reviews.

Barbados rejected the 2008 Universal Periodic Review recommendation to repeal its anti-gay laws. The delegation claimed, among other things, that there was no political mandate to repeal those laws. The country also underwent a UPR review on January 25, 2013, where a similar recommendation was made and the said response from Barbados was given. The Working Group on the Universal Periodic Review, established in accordance with Human Rights Council resolution 5/1, held its twenty-ninth session from January 15 - 26, 2018, at which session the progress made by Barbados again came up for review. The review of Barbados was held on January 19, 2018. The delegation of Barbados was headed by the then Minister of Social Care, Constituency Empowerment and Community Development, the Honourable Steven Blackett.

Minister Blackett stated at the 2018 review that, despite the many changes that had occurred locally and internationally, the people of Barbados continued to attach great importance to core values, like perseverance, pride and industry, which had made them strong throughout their history. He said that Barbados remained committed to the promotion and protection of human rights and fundamental freedoms, as well as respect for the dignity of all persons. Those priorities were reflected he said in the investment that the Government had made on education, social services and social security, which continued to consume approximately two thirds of the national budget.

However, on the issue which affected the LGBT community, the Minister repeated the previously submitted response to the effect that in Barbados, there was no political mandate to legalize same-sex relationships. Similarly he said, there was no national consensus on the issue of repealing the country's laws on buggery. He added that same-sex relations were not criminalized in legislation, but what was criminalized was buggery, and that there was no intervention by the law between

consenting adults. He pointed out however that in a case in which a minor was involved, or in the case of non-consenting adults, prosecution was possible against the offender.

As mentioned earlier, the link between the law and buy-in by those who are expected to follow a newly amended law which was made in conformity with international pressures can only be achieved by creating the deepest understanding as to the moral human failings in refusing to follow that said amended law.

Chapter 5

Same-Sex Marriage and the Fight for Legalization

For many years, same-sex marriage has been a hot topic of endless debate. Supporters of same-sex marriage hold the view that a relationship and subsequent marriage between two people of the same sex is natural and normal. These supporters believe that a person does not choose to be gay and is instead born that way.

A new scientific study of 409 pairs of gay brothers could put to rest decades of debate over the existence of the so-called ‘gay gene’. Research conducted by the NorthShore Research Institute in the United States found clear links between male sexual orientation and two specific regions of the human genome, with lead scientist Alan Sanders declaring that the work “erodes the notion that sexual orientation is a choice”. The study is three times larger than any previously done and highlights two genetic regions that have been tied to male homosexuality in separate research: Xq28, first identified in 1993, and 8q12, spotted in 2005. Xq28 is a chromosome band and genetic marker situated at the tip of the X chromosome which has been studied since at least 1980. 8q12 carries way too much scientific explanation far beyond the understanding of this writer and the scope of this work.

However, Sanders does not claim to have identified a single gene which ‘causes’ male homosexuality in humans and stresses that with complex human traits like sexual orientation there are many influencing factors, both genetic and environmental. Supporters also say that same-sex couples are just as capable as heterosexual couples when it comes to getting married, living together, and raising children¹³⁵.

On the flip side, there are people that are bitterly against gay marriage. These people may have religious beliefs that tell them it is wrong. Others say that same-sex relationships and marriage is abnormal and can have negative effects on children that are raised in a same-sex household.

¹³⁵ World Population Review - <https://worldpopulationreview.com>

Same-sex marriage, also known as gay marriage, is the marriage of two people of the same sex or gender entered into in a civil or religious ceremony¹³⁶. The common law definition of marriage in Barbados remains the union of one man and one woman, and that continues to be the case until such time as the Parliament of Barbados enacts legislation to allow same sex marriage, or the common law definition of marriage is changed. The Marriage Act of Barbados¹³⁷ speaks to marriage as a union between a man and a woman in all of its references though it does not actually define marriage as such. Under the Act¹³⁸, a marriage solemnized between a man and a woman related to him in any of the relationships mentioned in column 1 of the *First Schedule* or between a woman and a man related to her in any of the relationships mentioned in column 2 thereof is void.

Column 1 of the *First Schedule* includes: Mother, Daughter, Father's mother, Mother's mother, Son's daughter, Daughter's daughter, Sister, Father's sister, Mother's sister, Brother's daughter, Sister's daughter.

Column 2 of the *First Schedule* includes: Father, Son, Father's father, Mother's father, Son's son, Daughter's son, Brother, Father's brother, Mother's brother, Brother's son, Sister's son.

The columns do not operate interchangeably whereby each column can operate for both man and woman, therefore, one can safely conclude that the understanding of the drafters of the Act was that in keeping with the Common Law definition of marriage, which is, a union of one man with one woman, to the exclusion of all others, while the marriage lasts.

In summary, though freely entered into by the parties, marriage must be undertaken in a public and formal way, and once concluded, it must be registered. Formalities for the celebration of a marriage are strictly set out in the Marriage Act¹³⁹. A marriage must be conducted by a marriage officer, to whom objections may be directed. If objections to the marriage are lodged, the marriage officer must satisfy herself or himself that there are no legal obstacles to the marriage.

¹³⁶ Wikipedia-<https://simple.wikipedia.org/wiki/Same-sex/marriage>

¹³⁷ Laws of Barbados CAP. 218A

¹³⁸ Ibid. Section 3 (1)

¹³⁹ Laws of Barbados CAP. 218A

Those wishing to get married must produce copies of their identity documents, or alternatively make affidavits in the prescribed form. Marriages must take place in a church or other religious building, or in a public office or home, and the doors must be open. Both parties must be present as well as at least two competent witnesses. A particular formula for the ceremony is provided in the Marriage Act, but other formulae, such as religious rites, may be approved by the Minister. Once the marriage has been solemnized, both spouses, at least two competent witnesses, and the marriage officer must sign the marriage register. A copy of the register must then be transmitted to the Department of Home Affairs to be officially recorded. These formalities make certain that it is known to the broader community precisely who gets married and when they got married. Certainty is important for the broader community in the light of the wide range of legal implications that marriage creates. Marriage is thus taken seriously not only by the parties, their families and society, but by the State.

One of the most common arguments against same-sex marriage is society's image of the ideal family. "The public acceptance of homosexuality subverts the stability and self-understanding of the heterosexual family"¹⁴⁰. Conservatives believe that the ideal family includes one father and one mother, and both of the parents influence their children in a certain way. Many believe that a same-sex couple cannot raise a child properly because the child is not raised with both fatherly and motherly qualities.

To date, much of the international community has gone the route of recognizing same-sex marriages. Some of them are as follows:

Canada (2005)

Same-sex couples in Canada gained most of the legal benefits of marriage in 1999 when the federal and provincial governments extended common law marriages to gay and lesbian couples. Through a series of court cases beginning in 2003, same-sex marriage gradually became legal in nine of the country's 13 provinces and territories. In 2005, the Canadian Parliament passed legislation making

¹⁴⁰ Andrew Sullivan, *Same Sex Marriage: Pro and Con* 1997, p.146.

same-sex marriage legal nationwide. In 2006, lawmakers defeated an effort by the ruling Conservative Party of Canada to reconsider the issue, leaving the law unchanged¹⁴¹.

France (2013)

On May 18, French President Francois Hollande signed into law a measure legalizing same-sex marriage, making France the 14th country to grant gays and lesbians the right to marry. Although the bill had passed the National Assembly and the Senate in April, Hollande's signature had to wait until a court challenge brought by the conservative opposition party, the UMP, was resolved. On May 17, France's highest court, the Constitutional Council, ruled that the bill was constitutional.

In May 2012, Hollande was elected and his Socialist Party won majorities in both houses of France's legislature. True to their campaign promises, Hollande and the Socialists have pushed through a law that not only legalizes same-sex marriage but also gives gay and lesbian couples the right to adopt children - a provision that has drawn especially strong criticism from French Catholic leaders.

While recent polls show that a majority of French adults support the law, opposition to the change has been intense. Since the beginning of 2013, several anti-gay marriage protests with occasionally volatile crowds numbering in the hundreds of thousands have taken place in Paris and elsewhere¹⁴².

Ireland (2015)

On May 22, 2015, Catholic-majority Ireland became the first country to legalize same-sex marriage through a popular referendum. More than six-in-ten Irish voters (62%) voted "yes" to amend the Constitution of Ireland to say that "marriage may be contracted in accordance with law by two persons without distinction as to their sex."

¹⁴¹ Ibid.

¹⁴² Ibid.

While some Catholic Church leaders opposed the change, Dublin Archbishop Diarmuid Martin wrote a commentary in The Irish Times newspaper before the referendum, saying that he would not tell people how to vote and that he had “no wish to stuff my religious views down other people’s throats.” Irish Prime Minister Enda Kenny supported the “yes” campaign¹⁴³.

United States (2015)

Eleven years after same-sex marriage was first made legal in Massachusetts, the U.S. Supreme Court ruled that the Constitution guarantees it throughout the country. The 5-4 decision rests in part on the court’s interpretation of the 14th Amendment, and states that limiting marriage only to heterosexual couples violates the amendment’s guarantee of equal protection under the law. Before the ruling, 36 states and the District of Columbia had legalized same-sex marriage¹⁴⁴.

Russia (2021)

During the month of April 2021, the Russian President Vladimir Putin signed into law a series of constitutional amendments that, inter alia, officially changed that country’s Constitution resulting in a ban on same-sex marriage and the ability of transgender persons to adopt children. The move followed a national referendum in which it is reported that 77 per cent of the people in Russia voted in favour of the ban in July 2020. The Russian Constitution now states that marriage can exist only between a man and a woman, therefore same-sex couples will not be able to legally get married in that country¹⁴⁵.

However in Barbados, as recent as June 2016, the then Attorney General, the Hon. Adriel Brathwaite said that the Barbados Government would not change the law to allow for same-sex marriages.

The Government of Barbados changed in May 2018 and as part of a Throne Speech delivered by Her Excellency the Governor General Dame Sandra Mason during the opening of Parliament at the Lloyd Erskine Sandiford Centre¹⁴⁶, the following was stated: “Mr. President, my Government

¹⁴³ Ibid.

¹⁴⁴ Gay Marriage Around the World, Pew Research Centre - pewforum.org

¹⁴⁵ Murphy, Troy, “Vladimir Putin bans Same-Sex Marriage,” <https://www.dnamagazine.com.au/> (April 13, 2021)

¹⁴⁶ <https://gisbarbados.gov.bb/download/throne/speech/delivered/september/15/2020>

is prepared to recognize a form of civil unions for couples of the same gender so as to ensure that no human being in Barbados will be discriminated against, in exercise of civil rights that ought to be theirs. The settlement of Barbados was birthed and fostered in discrimination, but the time has come for us to end discrimination in all forms. I wish to emphasize that my Government is not allowing any form of same sex marriage, and will put this matter to a public referendum. My Government will accept and be guided by the vote of the public as promised in the manifesto. If Barbados wants to be counted among the progressive nations of the world, the country must change how we treat to human sexuality and relations”.

Dame Sandra added: “My Government will do the right thing, understanding that this too will attract controversy. Equally, it is our hope that with the passage of time, the changes we now propose will be part of the fabric of our country’s record of law, human rights and social justice”. In prefacing this announcement, the Governor General referenced other “controversial” legislation such as the signing of the Charter of Barbados in Oistins in 1652, universal adult suffrage and a woman’s right to vote, universal free secondary education, the ending of “backstreet abortions” through the Medical Termination of Pregnancy Act, as well as the Tenantry Freehold Purchase Act in the 1980s, which opened up the possibility of landownership to those previously unable to afford it.

The Governor-General noted that “Barbados took these decisions because they were the right thing to do and because it was the correct direction for our culture, social and economic circumstances. In each case, we now accept these rights as essential, and part of the national social and legal fabric. However, at the time they were taken, each of these decisions was highly controversial and bitterly opposed”.

Barbadians were therefore informed that legal protection would be granted to same-sex couples through the legalizing and recognition of civil unions. Within weeks of that declaration being made by the Governor-General, religious groups had mobilized and were marching in the streets against what they considered to be the tacit legalizing of homosexuality and same-sex marriage. The Government of Barbados however did explicitly state that it was not yet allowing same-sex marriage, but would put the matter to a referendum and “be guided by the vote of the public”.

It should be noted that the anti-gay laws in Barbados are rarely ever used by local law enforcement to police the private sexual activities of consenting adults. In fact, the laws are to a large extent unenforced. Thus, one may wonder since same-sex conduct is rarely penalized, why keep the laws in place in the face of international pressures? It seems clear that there is tremendous public support for the retention of those laws on Barbados' statute books.

It is common understanding that human rights are a concept according to which every human being has universal inalienable rights regardless of his or her nationality, ethnicity, social status, culture, religion and the law in force in the country where he or she lives. The question to consider then becomes whether same-sex couples are being discriminated against since people in a heterosexual relationships have access to civil unions, while same-sex couples do not have access to marriage. Is the right to same-sex marriage a human right? Resort might have to be given to the reasoning in decided cases to find the possible answer.

I will first examine the Canadian case of *Halpern v. Attorney General of Canada*¹⁴⁷. In that case, after applying unsuccessfully for civil marriage licences from the Clerk of the City of Toronto, seven gay and lesbian couples commenced an application for various remedies. Around the same time, the pastor of the Metropolitan Community Church of Toronto ("MCCT"), a Christian church, published the banns of marriage for two same-sex couples on three consecutive Sundays and then presided at their weddings. When MCCT submitted the requisite documentation for the two marriages to the Office of the Registrar General, the Registrar refused to accept the documents for registration, citing an alleged federal prohibition against same-sex marriages.

MCCT also commenced an application in the Divisional Court. The applications were heard together. The court unanimously held that the common law definition of marriage as "the voluntary union for life of one man and one woman to the exclusion of all others" infringed the couples' equality rights under s. 15(1) of the Canadian Charter of Rights and Freedoms in a manner that was not justified under s. 1 of the Charter. The Court rejected MCCT's claim that the current definition of marriage infringed its freedom of religion, contrary to s. 2(a) of the Charter, and its equality rights as a religious institution.

¹⁴⁷ (2003), 65 O.R. (3D) 201 C.A.

The Court was divided on the issue of the appropriate remedy. The formal judgment of the Court gave Parliament two years to amend the common law rule, failing which the definition of marriage would automatically be reformulated by substituting the words “two persons” for “one man and one woman”. The Attorney General of Canada appealed on the equality issue. The couples appealed on the question of remedy. MCCT also cross-appealed on the question of remedy, and cross-appealed from the Court’s dismissal of its claim that its freedom of religion and its equality rights as a religious institution were infringed.

Aspects of the Court’s judgment are outlined as follows: “Whether same-sex couples can marry is a matter of capacity. Parliament clearly has authority, found in s. 91 of the Constitution Act, 1867, to make laws regarding the capacity to marry. Moreover, to freeze the definition of marriage to whatever meaning it had in 1867 is contrary to Canada’s jurisprudence of progressive constitutional interpretation. The term “marriage” as used in s. 91 of the Constitution Act, 1867 has the constitutional flexibility necessary to meet changing realities of Canadian society without the need for recourse to constitutional amendment procedures”.

“The Divisional Court correctly rejected MCCT’s argument that the common law definition violated its freedom of religion under s. 2(a) of the Charter. This case was solely about the legal institution of marriage. It was not about the religious validity or invalidity of various forms of marriage. It did not, in any way, deal with or interfere with the religious institution of marriage. Even if s. 2(a) of the Charter was engaged, it was not the case that, because the same-sex religious marriage ceremonies MCCT performed were not recognized for civil purposes, it was constrained from performing those religious ceremonies or coerced into performing opposite-sex marriage ceremonies only. MCCT also failed to establish religious discrimination contrary to s. 15(1) of the Charter. Any potential discrimination arising out of the differential treatment of same-sex marriages performed by MCCT was based on sexual orientation, not on the religious beliefs held by the same-sex couples or by the institution performing the religious ceremony”.

“The common law definition of marriage creates a formal distinction between opposite-sex couples and same-sex couples on the basis of their sexual orientation. Sexual orientation is an analogous ground of discrimination under s. 15(1) of the Charter. Gays and lesbians are a historically disadvantaged group in Canada. Historical disadvantage is a strong indicator of discrimination. A law that prohibits same-sex couples from marrying does not accord with the needs, capacities and circumstances of same-sex couples. The Attorney General’s submission that marriage relates to the capacities, needs and circumstances of opposite-sex couples, and that the concept of marriage is that of an institution to facilitate, shelter and nurture the unique union of a man and woman who, together, have the possibility to bear and shelter children, could not be accepted. The purpose and effects of the impugned law must be viewed from the perspective of the claimant. The question to be asked was whether the law takes into account the actual needs, capacities and circumstances of same-sex couples, not whether the law takes into account the needs, capacities and circumstances of opposite-sex couples”.

“There is no pressing and substantial objective for excluding same-sex couples from the institution of marriage. The Attorney General suggested three purposes of marriage: uniting the opposite sexes; encouraging the birth and raising of children of the marriage; and companionship. The first purpose, which results in favouring one form of relationship over another, suggests that uniting two persons of the same sex is of lesser importance. A purpose that demeans the dignity of same-sex couples is contrary to the values of a free and democratic society and cannot be considered to be pressing and substantial.”

“The encouragement of procreation and childrearing is not a pressing and substantial objective of maintaining marriage as an exclusively heterosexual institution. An increasing number of children are being born to and raised by same-sex couples. There is no evidence that same-sex couples are not equally capable of childrearing.”

“While companionship is a laudable goal of marriage, encouraging companionship cannot be considered a pressing and substantial objective of the omission of the impugned law. Encouraging companionship between only persons of the opposite sex perpetuates the view that persons in same-sex relationships are not equally capable of providing companionship and forming lasting

and loving relationships. If the objectives advanced by the Attorney General were pressing and substantial, those objectives are not rationally connected to the opposite-sex requirement in the common law definition of marriage, and the opposite-sex requirement does not minimally impair the rights of same-sex couples”.

“The deleterious effects of the exclusion of same-sex couples from marriage outweigh its objectives. The violation of the couples’ equality rights under s. 15(1) of the Charter is not justified under s. 1 of the Charter”.

The appeal of the Attorney General was dismissed; the couples’ and MCCT’s cross-appeal on remedy was allowed; MCCT’s appeal was otherwise dismissed.

Section 1 of the Canadian Charter of Rights and Freedoms is the section that confirms that the Rights listed in the Charter are guaranteed¹⁴⁸.

Section 15 of the Canadian Charter of Rights and Freedoms contains guaranteed equality rights. As part of the Constitution of Canada, the section prohibits certain forms of discrimination perpetrated by the Government of Canada. Rights under Section 15 include racial equality, sexual equality, mental disability, and physical disability¹⁴⁹.

The case of *Halpern*¹⁵⁰ therefore establishes that in Canada, the common law bar against same-sex marriage is of no force or effect because it violates rights and freedoms guaranteed by s. 15 of the Charter and does not constitute a reasonable and demonstrably justifiable limit on those rights within the meaning of s. 1 of the Charter. The Ontario Court of Appeal declared the existing common law definition of marriage to be invalid and reformulated the common-law definition as “the voluntary union for life of two persons to the exclusion of all others.”

¹⁴⁸ Wikipedia- https://en.wikipedia.org/wiki/Canadian_Charter_of_Rights_and_Freedoms

¹⁴⁹ Ibid.

¹⁵⁰ (2003), 65 O.R. (3D) 201 C.A.

In the case of *R v. Swain*¹⁵¹, Lamer C.J. commented as follows: “Given that the common law rule was fashioned by judges and not by Parliament or a legislature, judicial deference to elected bodies is not an issue. If it is possible to reformulate a common law rule so that it will not conflict with the principles of fundamental justice, such a reformulation should be undertaken”.

The case of *Loving v. Virginia*¹⁵² was a Supreme Court case that struck down state laws banning interracial marriage in the United States. The plaintiffs in the case were Richard and Mildred Loving, a white man and Black woman whose marriage was deemed illegal according to Virginia state law. With the help of the American Civil Liberties Union (ACLU), the Lovings appealed to the U.S. Supreme Court, which ruled unanimously that so-called “anti-miscegenation” statutes were unconstitutional under the 14th Amendment. The decision is often cited as a watershed moment in the dismantling of “Jim Crow” race laws.

Of paramount significance is that this case classified marriage as one of the “basic civil rights of man, fundamental to our very existence and survival”. “The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men”.

In the case of *Goodridge v. Dept. of Public Health*¹⁵³, seven same-sex couples filed suit against the Massachusetts Department of Public Health (DOPH) after they were denied marriage licenses. DOPH’s defense was that the purpose of marriage is procreation, that heterosexual marriages provide are the healthiest environments in which to raise children, and preventing same-sex couples from marriage helps to preserve state resources. The trial court ruled in favor of the DOPH. The couples appealed that decision.

The issue was whether Massachusetts could prevent homosexual couples from getting married. The Court stated no, and reversed the decision of the lower Court.

¹⁵¹ (1991) 1 SCR 993, at 978.

¹⁵² 388 U.S. 1 (1967)

¹⁵³ 798 N.E.2d 941 (Mass. 2003)

The Court ruled that there was no evidence that the purpose for marriage was to procreate or that children living in households with heterosexual parents grew up in a healthier environment than children who grew up in households with homosexual parents. Similarly, Massachusetts did not have laws which denied or provided any aid dependent on a couple's marital status. Due to the DOPH not having provided a rational basis to prevent same sex couples from marriage, the decision of the lower Courts were reversed.

In the *Goodridge* case, GREANEY, J. stated and I quote; "I agree with the result reached by the court, the remedy ordered, and much of the reasoning in the court's opinion. In my view, however, the case is more directly resolved using traditional equal protection analysis.

(a) Article 1 of the Declaration of Rights, as amended by art. 106 of the Amendments to the Massachusetts Constitution, provides:

"All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin."

"This provision, even prior to its amendment, guaranteed to all people in the Commonwealth, equally, the enjoyment of rights that are deemed important or fundamental. The withholding of relief from the plaintiffs, who wish to marry, and are otherwise eligible to marry, on the ground that the couples are of the same gender, constitutes a categorical restriction of a fundamental right. The restriction creates a straightforward case of discrimination that disqualifies an entire group of our citizens and their families from participation in an institution of paramount legal and social importance. This is impermissible under art. 1".

Goodridge v. Department of Public Health has been considered a truly landmark decision in the United States. It was the first case in the highest court of any State to declare that marriage (rather than civil unions) should be permitted for same-sex couples, and that denying marriage to same-sex couples violates equal protection and due process. The U.S. Supreme Court eventually

followed the *Goodridge* case twelve years later in the case of *Obergefell v. Hodges*¹⁵⁴, making same-sex marriages legal throughout the United States.

In the case of *Obergefell v. Hodges*¹⁵⁵, the petitioners, 14 same-sex couples and two men whose same-sex partners were deceased, filed suits in Federal District Courts in their home States, claiming that respondent state officials violated the Fourteenth Amendment by denying them the right to marry or to have their marriages lawfully performed in another State given full recognition. The States of Michigan, Kentucky, Ohio, and Tennessee all defined marriage as a union between one man and one woman. Each District Court ruled in the petitioners' favour, but the Sixth Circuit consolidated the cases and reversed those decisions.

The Fourteenth Amendment speaks to equal protection under the law. Equal Protection refers to the idea that a governmental body may not deny people equal protection of its governing laws. The governing body State must treat an individual in the same manner as others in similar conditions and circumstances.

The Court in *Obergefell* ruled that the Fourteenth Amendment requires a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State.

In Europe, as of July 2020, sixteen European countries legally recognised and performed same-sex marriages. These include Austria, Belgium, Denmark, Finland, France, Germany, Iceland, Luxembourg, Malta, Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom. An additional fourteen European countries legally recognise some form of civil union, namely Andorra, Croatia, Cyprus, the Czech Republic, Estonia, Greece, Hungary, Italy, Liechtenstein, Monaco, Montenegro, San Marino, Slovenia, and Switzerland¹⁵⁶.

¹⁵⁴ 576 U.S. 644 (2015)

¹⁵⁵ Ibid.

¹⁵⁶ Wikipedia - <https://en.wikipedia.org/wiki/Recognition/of/same-sex/unions/in/Europe>

There are still however several European countries which do not recognise any form of same-sex unions. Marriage in those jurisdictions is defined as a union solely between a man and a woman as in the constitutions of Armenia, Belarus, Bulgaria, Croatia, Georgia, Hungary, Latvia, Lithuania, Moldova, Montenegro, Poland, Russia, Serbia, Slovakia and Ukraine. Of those countries however, Croatia, Hungary and Montenegro recognise same-sex partnerships.

Italy is the largest Western European country where same-sex marriage is not legal. Its Parliament, however, approved civil unions for same-sex couples in 2016¹⁵⁷.

Notwithstanding the gains made by the LGBT community in territories worldwide, the question still remains as to whether the right to marriage is a human right? The phrase “marriage equality¹⁵⁸” summarises so potently one of the central claims made by those advocating for marriage reform. It conveys the assertion that not permitting same-sex couples to access the institution of marriage is a breach of their human rights.

The “marriage equality” claim however is not borne out by the decisions of the highest human rights authorities in the international order. Both the United Nations Human Rights Committee and the European Court of Human Rights have held that there is no inequality where a State retains the traditional definition of marriage. Equality is a human right, but both the United Nations Human Rights Committee and the European Court of Human Rights have however declined to endorse claims that same-sex marriage is a human right.

The United Nations Human Rights Committee is a United Nations body of 18 experts established by a human rights treaty, the International Covenant on Civil and Political Rights (ICCPR). The Committee meets for three four-week sessions per year to consider the periodic reports submitted by the 172 States parties to the ICCPR on their compliance with the treaty, and any individual petitions concerning the 116 States parties to the ICCPR's First Optional Protocol¹⁵⁹.

¹⁵⁷ Ibid.

¹⁵⁸ Dictionary.com

¹⁵⁹ Wikipedia - https://en.wikipedia.org/wiki/United_Nations/Human/Rights/Committee

The First Optional Protocol to the International Covenant on Civil and Political Rights is an international treaty establishing an individual complaint mechanism for the International Covenant on Civil and Political Rights¹⁶⁰.

The European Court of Human Rights (ECHR or ECtHR), also known as the Strasbourg Court, is an International Court of the Council of Europe which interprets the European Convention on Human Rights¹⁶¹.

In the case of *Joslin et al. v New Zealand*¹⁶², Ms. Joslin and Ms. Rowan commenced a lesbian relationship in January 1988. Since then, they jointly assumed responsibility for their children out of previous marriages. They all lived together. They applied under the Marriage Act 1955 to the local Registrar of Births, Deaths and Marriages for a marriage licence, by lodging a notice of intended marriage at the local Registry Office. The Deputy Registrar-General rejected the application.

Similarly, Ms. Zelf and Ms. Pearl commenced a lesbian relationship in April 1993. They also share responsibility for the children of a previous marriage, pool financial resources and maintain sexual relations. On 22 January 1996, the local Registry Office refused to accept a notice of intended marriage. On 2 February 1996, Ms. Zelf and Ms. Pearl lodged a notice of intended marriage at another Registry Office. On 12 February 1996, the Registrar-General informed them that the notice could not be processed. The Registrar-General indicated that the Registrar was acting lawfully in interpreting the Marriage Act as confined to marriage between a man and a woman.

The authors claim a violation of article 26, in that the failure of the Marriage Act to provide for homosexual marriage discriminates against them directly on the basis of sex and indirectly on the basis of sexual orientation. They state that their inability to marry causes them to suffer “a real adverse impact” in several ways: they are denied the ability to marry, a basic civil right, and are excluded from full membership of society; their relationship is stigmatized and there can be

¹⁶⁰ Wikipedia - <https://en.wikipedia.org/wiki/First/Optional/Protocol/to/the/International/Covenant/on/Civil>

¹⁶¹ Wikipedia - <https://en.wikipedia.org/wiki/European/Court/of/Human/Rights>

¹⁶² CCPR/C/75/D/902/1999; International Commission of Jurist; <https://www.icj.org/>

detrimental effects on self-worth; and they do not have ability to choose whether or not to marry, like heterosexual couples do.

All four authors thereupon applied to the High Court for a declaration that, as lesbian couples, they were lawfully entitled to obtain a marriage licence and to marry pursuant to the Marriage Act 1955. On 28 May 1996, the High Court declined the application. Observing *inter alia* that the text of article 23, paragraph 2, of the Covenant “does not point to same-sex marriages”, the Court held that the statutory language of the Marriage Act was clear in applying to marriage between a man and a woman only.

On 17 December 1997, a Full Bench of the Court of Appeal rejected the authors’ appeal. The Court held unanimously that the Marriage Act, in its terms, clearly applied to marriage between a man and a woman only. A majority of the Court further went on to hold that the restriction in the Marriage Act of marriage to a man and a woman did not constitute discrimination. Justice Keith, expressing the majority’s views at length, found no support in the scheme and text of the Covenant, the Committee’s prior jurisprudence, the *travaux préparatoires* which makes repeated references to ‘husband and wife’, nor scholarly writing for the proposition that a limitation of marriage to a man and a woman violated the Covenant.

The Committee held as follows:

Article 23, paragraph 2, of the Covenant is the only substantive provision in the Covenant which defines a right by using the term “men and women”, rather than “every human being”, “everyone” and “all persons”. Use of the term “men and women”, rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other.

In light of the scope of the right to marry under article 23, paragraph 2, of the Covenant, the Committee cannot find that by mere refusal to provide for marriage between homosexual couples, the State party has violated the rights of the authors under articles 16, 17, 23, paragraphs 1 and 2, or 26 of the Covenant.

In *Joslin et al. v New Zealand* in summary therefore, the United Nations Human Rights Committee held that ‘marriage’ is a definitional construct which, by the expressed terms of Article 23(2) of the International Covenant on Civil and Political Rights (ICCPR), includes only persons of the opposite sex.

Importantly, the Committee held that the right to equality under Articles 2 or 26 of the ICCPR, was not then violated. That is to say, there is no inequality because the definitional boundary did not enfold persons of the same sex.

Similar conclusions have also been reached by the other principal arbiter of international human rights jurisprudence, the European Court of Human Rights.

On 3rd June 2010, the European Court considered for the first time the issue of whether two people of the same sex can claim to have a right to marry in the case of *Schalk and Kopf v. Austria*¹⁶³. The facts of the case were that two men applied in 2002 to the Austrian authorities to be permitted to marry. According to Austrian law, a marriage concluded between two people of the same sex was null and void. At that time there was no provision in Austrian law for registering a civil partnership. The Austrian Constitutional Court rejected the applicants' complaint that the legal impossibility of two persons marrying under Austrian law violated their right to respect for private and family life and the principle of non-discrimination. An application was then made to the European Court against the Republic of Austria, into which the United Kingdom government and the European Region of the International Lesbian and Gay Association, amongst others, intervened. During the course of the proceedings the Austrian Registered Partnerships Act came into force.

The European Court held:

(i) Whilst Article 12 of the European Convention gives men and women a right to marry, the Court no longer considered that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two people of different sex.

¹⁶³ (2010) ECHR 1996

(ii) There is no European consensus regarding same-sex marriage. Only 6 out of the 47 Council of Europe Member States granted same sex marriages at that time. This is an area of evolving rights and the decision whether to offer marriage to same-sex couples remains a matter for the national laws of contracting member states within the ‘margin of appreciation’. There is no breach of Article 12 of the European Convention where marriage is available to two people of the opposite sex but not two people of the same sex.

(iii) Where a Member State chooses to provide same-sex couples with an alternative to marriage such as a registered partnership, the Member State is not obliged to confer a status on same-sex couples which corresponds to marriage in each and every respect. There is a certain margin of appreciation as to the exact status conferred by the alternative means of recognition.

(iv) Whilst historically the court had left open the question of whether a right to family life, as opposed to simply private life, existed between same-sex couples, the court now considered it artificial to maintain the view that same-sex couples cannot enjoy ‘family life’ for the purposes of Article 8.

On June 9 2016, the European Court of Human Rights delivered its decision on the case of *Chapin and Charpentier v. France*¹⁶⁴. In May 2004, Mr. Chapin and Mr. Charpentier submitted a marriage application to the civil registry department of Bègles municipal council. The civil registrar published the notice of marriage and the public prosecutor at the Bordeaux *Tribunal de Grande Instance* served notice of objection to the marriage on the Bègles civil registrar and on Mr. Chapin and Mr. Charpentier. Despite the objection, the Mayor of Bègles performed the marriage ceremony and made an entry to that effect in the register of births, marriages and deaths. In June 2004 the public prosecutor brought proceedings against Mr. Chapin and Mr. Charpentier in the Bordeaux *Tribunal de Grande Instance*, seeking to have the marriage annulled. On 27 July 2004, the *Tribunal* annulled the marriage and ordered its judgment to be recorded in the margin of the parties’ birth certificates and the marriage certificate. The Bordeaux *Cour d’Appel* and the *Cour de Cassation* upheld that judgment. They lodged their complaint nine years ago: in 2013 France legalised same-sex marriage. In that case, relying on Article 12 (right to marry) together

¹⁶⁴ (n°40183/07); (2016) ECHR 504

with Article 14 (discrimination), the applicants argued that limiting marriage to opposite-sex couples was a discriminatory infringement of the right to marry. Relying on Article 8 (private and family life) taken with Article 14, they contended that they had been discriminated against on the basis of their sexual orientation.

The Government, relying on the case of *Schalk and Kopf v. Austria*¹⁶⁵ and the Court's affirmation that Article 12 does not oblige the respondent Government to open marriage to a homosexual couple, argued that the applicants could not claim discrimination because French legislation reserved marriage to opposite-sex couples. Moreover, following the entry into force of the Law of 17 May 2013, the applicants could now marry under the laws of the Republic.

In *Schalk and Kopf v Austria*¹⁶⁶, the Court had held that there was no European consensus on the issue of gay marriage; and though Article 12 applied to the applicants' complaint, whether or not to permit same-sex marriage was a matter for the national laws of States parties. Marriage had deeply rooted social and cultural connotations that were likely to differ significantly from one State to another; and the Court should be slow to substitute its own assessment for that of national authorities best placed to assess the needs of society. It had therefore concluded that Article 12 did not oblige Austria to open marriage to same-sex couples.

In *Oliari & Ors v. Italy*¹⁶⁷ the Court had said that the findings in *Schalk and Kopf* remained valid despite the gradual evolution in the attitudes of States parties – eleven now permitting same-sex marriage – and that neither Article 8 nor Article 12 (in conjunction with Article 14) could be interpreted as obliging States to open marriage to gay couples. It had therefore dismissed the Article 12 complaint as manifestly ill-founded.

¹⁶⁵ (2010) ECHR 1996

¹⁶⁶ Ibid, pp. 58-63

¹⁶⁷ (2015) ECHR 716

In Barbados, the Government has enacted the welcome stamp initiative which recognises civil unions. On June 30, 2020, the Barbados Government announced the introduction of the 12-month Barbados Welcome Stamp. This new remote work programme establishes a visa to allow foreign nationals to work remotely in Barbados for a maximum for 12 months. Persons may re-apply after the initial period expires. The visa is available to anyone who can meet the visa requirements and whose work is location independent, whether individuals or families. The individual will be deemed not to be a tax resident and will not be subject to income tax in Barbados.

This was subsequently legislated on 24 July 2020 by the Parliament of Barbados, as the *Remote Employment Act, 2020*¹⁶⁸.

Originally, within the Act, under the section “Declaration” in the Schedule to the said Act forming part of the Application Form, same-sex couples were expressly excluded. The Form had described spouses as a union between ‘a man and a woman’. That definition brought complaint from members of the LGBT community. The language was subsequently amended to include the word ‘partner’. The line in the ‘Declaration’ now begins “I hereby declare that I, my spouse, partner or dependents...”.

In order to accommodate that aspect of the Remote Employment Act, in August 2020, the Barbados Parliament passed the *Employment (Prevention of Discrimination) Act, 2020*, which prohibits employment discrimination on the basis of sex, sexual orientation, marital status and domestic partnership status, among other grounds.

The major problem confronting Barbados is the fact of having signed on to the jurisdiction of the Inter-American Court of Human Rights. States that are signatories to the American Convention on Human Rights adopted in 1969 are required to adhere to the Court's rulings. The Inter-American Court of Human Rights has ruled that same-sex marriage should be recognized, delivering a verdict binding on most Latin American States, some of which still hold traditionalist views opposing such unions. The decision was in response to a motion lodged by Costa Rica in May 2016.

¹⁶⁸ Laws of Barbados Remote Employment Act, 2020-23

On May 18 2016, the Republic of Costa Rica, based on Articles 64(1) and 64(2) of the American Convention¹⁶⁹ and in accordance with the provisions of Articles 70¹⁷⁰ and 72¹⁷¹ of the Rules of Procedure, presented a request for an advisory opinion concerning the interpretation and scope of Articles 11(2)¹⁷², 18¹⁷³ and 24¹⁷⁴ of the American Convention on Human Rights, in relation to Article 1¹⁷⁵ of this instrument.

The Court declared that the change of name and the rectification of public records and identity documents to conform to a person's gender identity are protected by the American Convention on Human Rights. Additionally, the Court maintained that States must extend all existing legal

¹⁶⁹ Article 64 of the American Convention: “1. The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court. 2. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments.”

¹⁷⁰ Article 70 of the Court’s Rules of Procedure: “1. 1. Requests for an advisory opinion under Article 64(1) of the Convention shall state with precision the specific questions on which the opinion of the Court is being sought. 2. Requests for an advisory opinion submitted by a Member State or by the Commission shall, in addition, identify the provisions to be interpreted, the considerations giving rise to the request, and the names and addresses of the Agent or the Delegates. 3. If the advisory opinion is sought by an OAS organ other than the Commission, the request shall also specify how it relates to the sphere of competence of the organ in question, in addition to the information listed in the preceding paragraph.”

¹⁷¹ Article 72 of the Court’s Rules of Procedure: “1. A request for an advisory opinion presented pursuant to Article 64(2) of the Convention shall indicate the following: a. the provisions of domestic law and of the Convention or of other treaties concerning the protection of human rights to which the request relates; b. the specific questions on which the opinion of the Court is being sought; c. the name and address of the requesting party’s Agent. 2. Copies of the domestic laws referred to in the request shall accompany the application.”

¹⁷² Article 11(2) of the American Convention: “Right to Privacy. [...] 2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.”

¹⁷³ Article 11(2) of the American Convention: “Right to Privacy. [...] 2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.”

¹⁷⁴ Article 24 of the American Convention: “Right to Equal Protection. All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law”.

¹⁷⁵ Article 1 of the American Convention: “Obligation to Respect Rights. 1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition. 2. For the purposes of this Convention, "person" means every human being.”

mechanisms, including marriage, to same-sex couples. The Court ruled that same-sex marriage is a human right. Based on the provisions of the American Convention, that ruling sets a binding precedent for Barbados to follow.

In the South African case of *Minister of Home Affairs and Another v Fourie and Another*¹⁷⁶, the facts are that finding themselves strongly attracted to each other, two people went out regularly and eventually decided to set up home together. After being acknowledged by their friends as a couple for more than a decade, they decided that the time had come to get public recognition and registration of their relationship, and formally to embrace the rights and responsibilities they felt should flow from and attach to it. Like many persons in their situation, they wanted to get married. There was one impediment. They were both women.

Ms. Marié Adriaana Fourie and Ms. Cecelia Johanna Bonthuys are the applicants in the first of two cases that were set down for hearing on the same day in this Court. Their complaint has been that the law excludes them from publicly celebrating their love and commitment to each other in marriage. Far from enabling them to regularize their union, it shuts them out, unfairly and unconstitutionally, they claim.

They contend that the exclusion comes from the common law definition which states that marriage in South Africa is “a union of one man with one woman, to the exclusion, while it lasts, of all others.” The common law is not self-enforcing, and in order for such a union to be formalised and have legal effect, the provisions of the Marriage Act have to be invoked. This, as contended for in the second case, is where the further level of exclusion operates. The Marriage Act provides that a minister of religion who is designated as a marriage officer may follow the marriage formula usually observed by the religion concerned.

The reference to wife (or husband) is said to exclude same-sex couples. It was not disputed by any of the parties that neither the common law nor statute provide for any legal mechanism in terms of which Ms. Fourie nor Ms. Bonthuys and other same-sex couples could marry.

¹⁷⁶ (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2005)

When this matter was heard before the High Court, the Court held that the applicants were barred from getting an order allowing them to marry because they had not challenged the constitutionality of the Marriage Act. The matter was then referred to the Supreme Court of Appeal. The majority in that Court held that the right of same-sex couples to celebrate a secular marriage would have to await a challenge to the Marriage Act; in the meanwhile the common law definition of marriage should be developed so as to embrace same-sex couples.

None of the parties to the litigation were satisfied with the outcome. The State noted an appeal on several grounds, revolving mainly around the proposition that it was not appropriate for the judiciary to bring about what it regarded as a momentous change to the institution of marriage, something that, it contended, should be left to Parliament. The applicants for their part were unhappy because although the newly developed definition of the common law included them in its terms, they were still prevented from getting married by the phrasing of the marriage vows in the Marriage Act. The only possible route enabling them to marry under the Act was a tenuous one, namely, to find a sympathetic religious denomination with an inclusive marriage vow that was approved by the Minister of Home Affairs.

The matter was appealed by all parties and was heard before the South Africa Constitutional Court. The issues before that Court were:

- Did the fact that no provision was made for the applicants, and all those in like situation, to marry each other, amount to denial of equal protection of the law and unfair discrimination by the State against them because of their sexual orientation?
- In the event that the answer was in the affirmative, what was the appropriate remedy that the Court should order?

The result was that the order of the Supreme Court of Appeal was set aside and replaced by an order which stated, inter alia, that:

- a. The common law definition of marriage was declared to be inconsistent with the Constitution and invalid to the extent that it does not permit same-sex couples to enjoy the status and the benefits coupled with responsibilities it accords to heterosexual couples.
- b. The omission from section 30(1) of the Marriage Act 25 of 1961 after the words “or husband” of the words “or spouse” was declared to be inconsistent with the Constitution, and the Marriage Act was declared to be invalid to the extent of this inconsistency.

I wish to point out that when the *Fourie* matter was considered at the level of the Supreme Court of Appeal (SCA), Cameron JA made what I considered to be statements worthy of particular note, and of which I will make some mention. He pointed out as follows; ‘our equality jurisprudence had taken great strides in respect of gays and lesbians in the last decade. The cases articulate far-reaching doctrines of dignity, equality and inclusive moral citizenship. They establish that gays and lesbians are a permanent minority in society who have suffered patterns of disadvantage and are consequently exclusively reliant on the Bill of Rights for their protection; the impact of discrimination on them has been severe, affecting their dignity, personhood and identity at many levels. Family as contemplated by the Constitution can be constituted in different ways and legal conceptions of the family and what constitutes family life should change as social practices and traditions change; permanent same-sex partners are entitled to found their relationships in a manner that accords with their sexual orientation and such relationships should not be subject to unfair discrimination; and same-sex life partners are as capable as heterosexual spouses of expressing and sharing love in its manifold form.’

Cameron JA continued that ‘The sting of the past and continuing discrimination against both gays and lesbians lies in the message it conveys, namely, that viewed as individuals or in their same-sex relationships, they ‘do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships.’ This ‘denies to gays and lesbians that which is foundational to our Constitution and the concepts of equality and dignity,’

namely, that ‘all persons have the same inherent worth and dignity, whatever their other differences may be.’

‘The denial of equal dignity and worth all too quickly and insidiously degenerated into a denial of humanity and led to inhuman treatment by the rest of society in many other ways. This was deeply demeaning and frequently had the cruel effect of undermining the confidence and sense of self-worth and self-respect of lesbians and gays’.

He added that ‘the capacity to choose to get married enhances the liberty, the autonomy and the dignity of a couple committed for life to each other. It offers them the option of entering an honourable and profound estate that is adorned with legal and social recognition, rewarded with many privileges and secured by many automatic obligations. It offers a social and legal shrine for love and commitment and for a future shared with another human being to the exclusion of all others.’

‘Legislative developments,’ he continued, ‘have ameliorated but not eliminated the disadvantages same-sex couples suffer. More deeply, the exclusionary definition of marriage injures gays and lesbians because it implies a judgment on them. It suggests not only that their relationships and commitments and loving bonds are inferior, but that they themselves can never be fully part of the community of moral equals that the Constitution promises to create for all. The applicants’ wish was not to deprive others of any rights. It was to gain access for themselves, without limiting that enjoyed by others.’

SACHS J in the instant case before the Constitutional Court also delivered dicta worthy of highlight. He stated that ‘a democratic, universalistic, caring and aspirationally egalitarian society embraces everyone and accepts people for who they are. To penalise people for being who and what they are is profoundly disrespectful of the human personality and violatory of equality. Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenization of behaviour

or extolling one form as supreme, and another as inferior, but an acknowledgement and acceptance of difference’.

He added that ‘the Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation. Accordingly, what is at stake is not simply a question of removing an injustice experienced by a particular section of the community. At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting.’

SACHS J continued that ‘the exclusion of same-sex couples from the benefits and responsibilities of marriage, accordingly, is not a small and tangential inconvenience resulting from a few surviving relics of societal prejudice destined to evaporate like the morning dew. It represents a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples. It reinforces the wounding notion that they are to be treated as biological oddities, as failed or lapsed human beings who do not fit into normal society, and, as such, do not qualify for the full moral concern and respect that our Constitution seeks to secure for everyone. It signifies that their capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples.’

He further maintained that ‘in the open and democratic society contemplated by the Constitution there must be mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognise the sphere which each inhabits, not to force the one into the sphere of the other. Provided there is no prejudice to the fundamental rights of any person or group, the law will legitimately acknowledge a diversity of strongly-held opinions on matters of great public controversy. I stress the qualification that there must be no prejudice to basic rights. Majoritarian opinion can often be harsh to minorities that exist outside the mainstream. It is precisely the function of the Constitution and the law to step in and counteract rather than reinforce unfair discrimination against a minority. The test, whether majoritarian or minoritarian positions are

involved, must always be whether the measure under scrutiny promotes or retards the achievement of human dignity, equality and freedom’.

The reason why I have cited those passages by Cameron JA and SACHS J is that to my mind, the common thread throughout their content cannot justifiably be refuted by either secular or religious commentators without tremendous personal difficulty. The theme of tolerance and mutual respect should ordinarily be appealing to most on both sides of the perceived moral divide. I agree with the comment of Sachs J when he stated that ‘the hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely-held world views and lifestyles in a reasonable and fair manner. The objective of the Constitution is to allow different concepts about the nature of human existence to inhabit the same public realm, and to do so in a manner that is not mutually destructive and that at the same time enables government to function in a way that shows equal concern and respect for all.’

Chapter 6

Conclusion

At this time when much of the international community has relaxed its once negative position towards gays, lesbians, bisexuals and transgender persons, Barbados and other Caribbean countries have maintained their historic stance of criminalizing homosexuality. The main problem as identified by the LGBT community is that criminalizing consensual sexual conduct between adults encourages discrimination and abusive treatment against them, and puts them at risk of criminal prosecution as a result of their expression of their sexuality with consenting partners. Both the international and LGBT communities have requested all countries which maintain anti-gay laws on their statute books to repeal those laws.

The main problem for Barbados in honouring the request for repeal is that, as the vast majority of Barbadians seem to follow the Christian faith and teachings, successive Governments have been reluctant to advance an affirmative response to the request for repeal of Barbados' anti-gay laws.

Notwithstanding having been officially removed from its former position of political control, the Church has been able to maintain its influence on the thinking of many in the Caribbean generally and Barbados in particular. This demonstrates that religious bodies still play a significant role in public life and therefore, it would be unsafe to dismiss opposition to homosexuality on religious grounds simply as an expression of bigotry to be equated with homophobia.

The issue of the legalizing of same sex marriage is also not welcomed by the great majority of the Barbadian people, as well as the Government as explained at the outset of this paper. It is considered as a violation of the core principles, norms and beliefs of the Barbadian people. Barbadians traditionally consider marriage to be an exclusive relationship between a man and a woman for the sake of procreation. Therefore, the LGBT community's demand for a lawful marriage in Barbados violates not only the Marriage Law but also the Barbadian people's way of life. Unless there is change in the religious mind-set, the demand for legal protection and lawful marriage by the LGBT community will hardly receive real attention in a conservative Barbados. These demands are deemed to violate centuries of religious teaching as outlined in the Bible.

Remember as stated earlier, the granting of legal recognition to civil unions has already led to some social unrest as evidenced by religious groups conducting marches in the streets of Barbados during the month of October 2020 after the Government's decision to recognise civil unions under the *Remote Employment Act, 2020* and the *Employment (Prevention of Discrimination) Act, 2020*, both Acts designed to facilitate the Barbados Welcome Stamp Initiative.

The Prime Minister of Barbados the Honourable Mia Amor Mottley, Q.C., M.P., was able to quell the unrest by reminding citizens that the issue of same-sex marriage would be put to referendum. It is therefore evident that recognition of the rights of the LGBT community as recommended by the various treaties and international lobbyists may not be supported by the Christian Church or the minority religions in Barbados. However, local policy makers will inevitably be faced with the challenge of having to make definitive determinations on issues surrounding the observance of those emerging rights pertaining to the LGBT community in Barbados.

Note that the United Nations Human Rights Committee and the European Court of Human Rights have both held that there is no inequality where a state retains the traditional definition of marriage. Through their respective decisions, they have both recognised equality as a human right, but have however declined to endorse claims that same-sex marriage is a human right.

Based on the decision in the case of *Schalk and Kopf v. Austria (2010) ECHR 1996*, whether or not to permit same-sex marriage is a matter for the national laws of states parties.

Questions deemed worthy of consideration which emerged out of this embroiled issue of observing LGBT rights included the following:

- Whether lesbian, gays, bisexual, and transgender (LGBT) rights qualify as human rights;
- Whether legislative changes in conformity with international pressures could gain internal acceptance by the average Barbadian citizen;
- What was the likelihood that Barbados might be forced into repealing its anti-gay laws due to Treaty commitments;
- What is the plight of many within the LGBT community in Barbados; and

- What would be the likely impact on the Barbadian society of an adoption by Barbados of the position taken by many in the international community towards the observance of rights to the LGBT community.

Most previous works on related issues have been position papers which supported one position or the other. This work has sought to maintain a neutral perspective on the various issues.

Recourse to the writings of certain philosophers when focusing on the issue of rights revealed that there are divergent views on what can be construed as a right *per se*. The English philosopher Jeremy Bentham has posited that all rights are a creation of the State. The government to Bentham is the source of law, and rights are created from the law made by the government. John Stuart Mill is of the view that whatever brings the greatest happiness to the greatest number should be the ultimate standard for moral assessment. According to Mill, people should be free to do what they wish unless others are harmed by their actions. Ronald Dworkin thinks that individual rights are fundamental, stemming from an abstract right to equality. He felt that individual rights should be superior to collective rights. Therefore, for Dworkin, even if society was of the view that a particular lifestyle was offensive, society ought not to override a person's individual right to the lifestyle of the individual's choice. John Finnis posited the natural law theory which asserts that positive or man-made law should be formulated and evaluated according to a higher moral law (natural law) that is not made by humans, but is inherent in the nature of the universe. He thought that laws should be grounded in morality and as such, homosexuality was wrong and immoral, as to him, such acts were not natural. This all signifies that the issue as to whether (LGBT) rights qualify as human rights could never be settled by reliance on philosophical theories.

The diversity of views among philosophers on the subject of rights is a clear indication that sociological and/or political theories on the subject of individual rights might not prove helpful to those who are charged with the challenge of making a definitive determination as to whether LGBT rights qualify as human rights

As far back as the year 2009, there was the admission by a Minister of the then Government that members of the LGBT community had been targets of mistreatment. The Honourable Esther Byer-Suckoo, the then Minister of Family, Youth and Sports of Barbados stated: “*We realize there’s not only violence against women but also violence against men, and then also, those persons who are transgender are also subjected to serious violence.*” The meeting held between the Ombudsman of Barbados and representatives of the LGBT community in July 2017 revealed that unfair treatment was at that time still being meted out to LGBT persons. I have no evidence that such circumstances have changed at this time of writing. Therefore, it would appear that members of the LGBT community in Barbados remain under a cloud of possible real and present danger. The nexus however between State laws and those atrocities committed by individuals is uncertain at this time.

With the increased global media attention on violent acts of persecution inflicted on LGBT persons, a crucial question before the world community today is whether LGBT rights should be included under our basic human rights. At the United Nations, this question has taken center stage, but it is not at all clear what the United Nations’ deliberations will yield concerning the linkage between gay rights and human rights.

As was stated earlier, Navi Pillay of South Africa, the then U.N. High Commissioner for Human Rights, appealed to United Nations Member States to decriminalize homosexuality and enact comprehensive anti-discrimination laws. At the heart of legal disabilities afflicting the LGBT community in Barbados is the lack of general recognition by the law of their relationships as well as the lack of buy-in by religious groups not favouring amendment or abolition of the anti-gay laws.

By contrast, homosexuality was decriminalized in the UK in 1967 whereby homosexual acts between two men, older than 21, in private were no longer illegal. In the United States of America, in the case of *Lawrence v. Texas* in 2003, the Supreme Court ruled that United States laws prohibiting private homosexual activity, sodomy, and oral sex between consenting adults were unconstitutional.

Some of the issues facing transgender individuals were highlighted at the aforementioned meeting with the Ombudsman of Barbados. Problems arising from treatment by both government institutions and private citizens were raised. Agencies such as the hospital, Immigration Department, Police, Prison and Mental Institutions were mentioned. Based on the cases of *R (on the application of Green) v Secretary of State for Justice* and *R (on the application of C) v Secretary of State for Work and Pensions*, recognition of rights in relation transgender persons has the potential to impose a duty on the various Governments to make adjustments in the way in which services are delivered by Government Ministries and Departments, either by providing extra equipment and/or the removal of what may be considered as physical barriers, like for example, the provision of washrooms in government facilities specifically designed for use by transgender persons. A duty is something someone must do, in this case because the law in relation to emerging rights dictates that governments must act in a particular way.

Governments however cannot be required to do more than is reasonable for them to do. What is reasonable depends on several factors, including the facilities or services being requested, or the public functions being carried out, or most importantly, the impact on Government's finances.

For centuries, homosexual acts have been regarded as 'unnatural' and thus condemned for both religious and moral reasons. Consequently, criminal prosecution of homosexual acts served as a notable example of the connection between morality and law, and the extent to which it was felt that the perceived scourge should be stamped out.

There was however a softening of the harsh stance taken by some notable church leaders. Archbishop Desmond Tutu stated, *inter alia*, that “*I could not myself keep quiet whilst people were being penalized for something about which they could do nothing, their sexuality. For it is so improbable that any sane, normal person would deliberately choose a lifestyle exposing him or her to so much vilification, opprobrium and physical abuse, even death.*”

The Bishop of Cork in relation to the atrocities meted out to those in the LGBT community stated, *inter alia*, “*The Church has been complicit in the resulting injustice and immense human suffering.*”

The dicta of Cameron J.A and Sachs J. have been cited previously in this work due to my belief that those comments aid in a better understanding of the issues related to the LGBT community which could be a determining factor in eliminating the uncertainty, finding common ground, and thereby minimizing the confrontation amongst those on both sides of the divide. By way of reminder, Sachs J would have commented, *inter alia*, that ‘the test, whether majoritarian or minoritarian positions are involved, must always be whether the measure under scrutiny promotes or retards the achievement of human dignity, equality and freedom.’ He added that ‘the test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting.’

Cameron J.A would have stated, *inter alia*, that ‘the sting of the past and continuing discrimination against both gays and lesbians lies in the message it conveys, namely, that viewed as individuals or in their same-sex relationships, they ‘do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships.’ Statements such as these can often appeal to ones humanity and inner decency, and have the potential to tone down the intensity of the rhetoric between those with opposing views.

The position offered by Senator John Rogers is worthy of further consideration. Educating the Clergy concerning the salient feature underlying the issue of non-binary being the fact that persons may biologically differ with respect to gender and sex for example, might alter the view held by many clerics that homosexuality and other sexual variants are as a result of a chosen desire for a deviant lifestyle.

Given the great public significance of the matter, the question becomes, since Barbados is the only Commonwealth Caribbean country that recognizes the binding jurisdiction of the Inter-American Court of Human Rights (IACHR), whether the IACHR would recommend that the Government of Barbados repeal sections 9 and 12 of the Sexual Offences Act in their entirety, so as to decriminalize private consensual same-sex sexual activity between those above the legal age of consent following the filing of the action against Barbados by Alexa Hoffman et al.

Bearing in mind that State actors and lawmakers in Barbados have a legal duty to comply with the terms of the international human rights conventions that Barbados has ratified or acceded to, based on the decision in the case of *Atala Riffo and Daughters v. Chile*¹⁷⁷, by retaining the anti-sodomy and serious indecency laws which disproportionately affect the LGBT community, Barbados might be ruled effectively in violation of its obligations under the Inter-American Convention.

In the case of *Dudgeon v. UK*, having evaluated available evidence from other democratic countries where sodomy laws were repealed, judges of the ECHR announced that "there was a better understanding, and consequently an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe, it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States¹⁷⁸.

The ECHR then recognized in *Dudgeon* the fact that, similar to the case which obtains in Barbados, the authorities refrained in recent years from enforcing the law, and that "no evidence has been adduced to show that this has been injurious to moral standards in Northern Ireland or that there was any public demand for stricter enforcement of the law"¹⁷⁹. The combination of this evidence and the experience of other countries where sodomy laws were revoked proved that the interests of the state in the maintenance of such laws were in fact not very significant.

For these reasons, the ECHR concluded in *Dudgeon*¹⁸⁰ that "such justifications as there are for retaining the law in force unamended are outweighed by the detrimental effects, which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant".

¹⁷⁷ City University of New York Law Review Vol.2

¹⁷⁸ *Dudgeon v. UK* (1981), 45 Eur. Ct. H.R. 21

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

Barbados is also a signatory to the International Covenant on Civil and Political Rights 1966 (ICCPR). Articles 2(1) and 26 of the ICCPR set out the non-discrimination standards to which signatories would be held.

Under Article 2(1) of the ICCPR, a state party “undertakes to respect and to ensure to all individuals within its territories and subject to its jurisdiction the rights recognized in the present Covenant, 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.”

Article 26 of the ICCPR recognizes that “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law,” prohibiting “any discrimination,” and “guarantee(s) to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.” As previously mentioned, it is arguable whether the term ‘other status’ could cover the LGBT community but that issue has never been raised in any of the Courts of Barbados.

Of particular significance is the fact that despite the practice in the Commonwealth countries of heavy reliance on guidance from decided cases in our jurisprudence, it is to be noted that in the case of *Pearce v. Governing Body of Mayfield School*, the House of Lords in 2003 laid down the principle that sex discrimination legislation could not be used where the principle discrimination was on the ground of sexual orientation. This decision however was not followed by the Belizean Court of Appeal in the case of *Attorney General of Belize v. Caleb Orozco*, where that Court ruled in 2019 that non-discrimination on the grounds of “sex” under sections 3 and 16 of the Belizean Constitution encompasses sexual orientation. This highlights the fact that regional Courts are not slavishly bound to follow the decisions of Courts from other jurisdictions as practiced under the principle of *stare decisis*.

In the Barbados Constitution, the word “sex” does not appear in section 23 (2) where the expression “discriminatory” is defined, a factor of inclusion which is standard to most if not all other Constitutions in the countries within the Caribbean region. As mentioned before, I have

found no authority to state whether that omission was or was not deliberate. This fact and its possible implications could be an issue for future research.

The Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy (CSME) signed by Heads of Government of the Caribbean Community on July 5, 2001 creates the possibility of free movement of persons across the region, abolishing discrimination on grounds of nationality in all member states.

In 2016, the Supreme Court in Belize declared that country's anti-sodomy law unconstitutional, and in 2018, the Trinidad and Tobago High Court declared that country's buggery law unconstitutional. It is however not expected that the presence of regional homosexuals on the Barbadian landscape would result in any fallout from the Barbadian society since the laws against homosexuality are not enforced by local law enforcement and also, same-sex marriages are not recognised in Barbados.

Therefore, the retention of the buggery laws on the statute books of Barbados is for now a panacea for the Barbados Government. Based on the recent public reaction to the Government's recognition of civil unions, I am persuaded to believe that the decriminalization of buggery in Barbados would have the impact of enraging the religious community and starting a wave of protests across the landscape where no unrest currently exists. To my mind, the fact that the laws against homosexuality in Barbados are not enforced by local law enforcement thereby manifesting a tacit tolerance of that lifestyle, should be considered by the LGBT community. I am of the opinion that for the LGBT community in Barbados to try to push the envelope at this time would have the potential to erode some of the tacit gains already made.

I am of the view that since the authorities in Barbados have refrained for many years from enforcing the law relating to homosexuality, the strange position in which Barbados finds itself is that the Barbadian society seems prepared to tolerate the existence of the LGBT community so long as the law which criminalizes buggery does not change in favour of that community. There is tremendous public support for the retention of those laws. It seems that the religious community

in Barbados would view a change in legislation in conformity with the wishes of the LGBT community as the morality battle having been lost.

Until there is a process which alters the mindset of many within the religious sect, whether it be through education or some other intervention, church leaders would continue to teach their current doctrine as outlined in the Windsor Report no matter how the State laws are adjusted. This in essence would constitute a conflict of messaging between Church and State. It is undoubtable that many in the religious community would feel compelled to make their voices heard in a more demonstrable manner as was done previously.

There is an old adage which states that one should leave well enough alone. Based on the recent marches in the streets of Barbados by the religious sect after the legal recognition to civil unions to facilitate the Barbados Welcome Stamp Initiative, it might prove unwise to make the sought after legislative changes with regards to the buggery laws any time in the near future. It may be argued that the effects of maintaining the law outweighs the benefits to be derived from any changes thereto.

Based on Barbados' responses over the years to the Universal Periodic Review on the issue of the repealing of Barbados' buggery laws, I am of the view that the benefits of maintaining the status quo is not lost on the island's political directorate. Hence the decision of the Prime Minister of Barbados the Honourable Mia Amor Mottley Q.C., M.P., to leave the issue of same-sex marriage to referendum.

I am therefore prepared to advance the view that bringing the laws of Barbados into conformity with many of the modern human rights instruments, and in particular, the repealing of the buggery laws, would be met with tremendous approval by the LGBT community. There are also some members of the religious sect in Barbados whose thoughts on the issue are *ad idem* with those of the LGBT community. There is the stated opinion of our own Roman Catholic Priest Father Clement Paul that the State ought not to legislate on the type of shared intimacy which could be enjoyed by married couples, and the position of Senator Reverend John A. Rogers that there is a need for the further educating of Church leaders on the subject of human sexuality.

However, despite the simple gains made by the LGBT community in Barbados over the years, the effect of the observance of the emerging rights relating to that community on the rest of the Barbadian society, in particular the heterosexual and religious sect, would be the possible eruption of unrest on the social and political landscape of Barbados.

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