

THE UNNATURAL CONNEXION

Creating societal conflict through legal tools

LAWS CRIMINALIZING SAME SEX SEXUAL BEHAVIORS AND IDENTITIES AND THEIR HUMAN RIGHTS IMPACT IN CARIBBEAN COUNTRIES

Report submitted by

Regional meeting of LGBTI activists from CARICOM states on the Inter-American Human Rights System.

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<i>Bahamas</i>	- SASH Bahamas- Society Against STIs and HIV
<i>Barbados</i>	- MOVADAC - Movement Against Discrimination Action Coalition, - UGLAAB- United Gays and Lesbians Against AIDS Barbados
<i>Belize</i>	- UniBAM- United Belize Advocacy Movement
<i>Dominica</i>	- Dominica CHAP-Dominica Caribbean HIV and AIDS Partnership
<i>Grenada</i>	- Gren CHAP (Caribbean HIV/AIDS Partnership)
<i>Guyana</i>	- SASOD- Society Against Sexual Orientation Discrimination , ILGA-LAC
<i>Jamaica</i>	- Women for Women, - JFLAG – Jamaican Forum for Lesbians All-sexuals and Gays / ILGA-LAC
<i>St. Lucia</i>	- United and Strong
<i>Trinidad and Tobago</i>	- CAISO- Coalition Advocating for the Inclusion of Sexual Orientation,
<i>ILGA-LAC</i>	-International Lesbian, Gay, Bisexual, Trans and Intersex Association- Latin American and the Caribbean

With the collaboration of:

*Global Rights – Partners for Justice
IGLHRC – International Gay & Lesbian Human Rights Commission.
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INTRODUCTION

Eleven (11) Caribbean countries have laws which criminalize same-sex sexual behaviors and identities across the Anglo-phone Caribbean but these laws vary in language, the types of acts prohibited and the punishments imposed.¹ The common thread among them is that they were imposed during the colonial period and have for the most part remained unchanged in spirit and intent despite centuries of development and decades of independence. Ironically, the continued existence of these anachronistic laws is now seen as representative of the ‘culture’ of the region. Yet, in fact, most regions from which Caribbean peoples originated² never had indigenous laws prohibiting same-sex conduct.

The laws normally address two categories of conduct ‘buggery’, which is anal intercourse, and ‘gross indecency’, which is any form of physical intimacy short of sex between males. Since 1986, seven of the eleven independent Caribbean countries have overhauled laws defining and governing sex crimes³ and five of the seven have specialized codes dealing with sexual offences. Only Jamaica, Grenada, Guyana and St. Vincent have substantially unreformed laws. Modern sexual offences law in the Anglophone Caribbean has sharpened ‘buggery’ as an offence targeting male homosexual sex. While in most places buggery still includes heterosexual as well as homosexual anal sex, the latest reforms in the 2004 St. Lucia criminal code have confined the offence to male-to-male conduct. Precisely because buggery has become a synonym of same sex intercourse these laws, even if not specifically meant to target same sex conducts, shifted the attention of the society to specific sectors of the populations-men who have sex with men- instead of conducts. This shows a shift away from punishing conduct to punishing a class of individuals.

Universally, the penalties for buggery have increased. They moved from a maximum of five years imprisonment prior to 1986 in Trinidad and Tobago to ten years under the Sexual Offences Act 1986. In the 2000 amendments to that Act, the maximum penalty rose to 25 years.⁴

There is a different discourse for most provisions on ‘gross indecency.’ In most cases these expressly target male same sexual conducts (and in some cases female same sexual conducts).

¹ See the Appendix for a list of the laws

² Most Caribbean people are descended from African slaves and East Indian and Chinese indentured servants who were brought to the Caribbean to work on the sugar plantations during the colonial period.

³ Antigua and Barbuda Sexual Offences Act 1995-9; The Bahamas Sexual Offences and Domestic Violence Act 1991, cap. 99; Barbados Sexual Offences Act 1992, cap. 154; Belize Criminal Code (Amendment) Act, 1999-36, 2001-42; Dominica Sexual Offences Act 1998-1; St. Lucia Criminal Code 2004, 2005 Rev., cap. 3:01; Trinidad and Tobago Sexual Offences Act 1986-27.

⁴ T Robinson ‘The Vagaries of Justice’ in *Sexualities in Conversation*, No 1 Caribbean Sexualities Part 1 March 2008

Records in the region show no criminal prosecutions of consenting adult same-sex activity under these laws in recent time. This fact, however, does not mitigate the illegal character of these laws.

Egregious acts of violence and other abuses experienced by LGBTI across the region (as highlighted by the Inter-American Commission after its 2008 visit to Jamaica)⁵ are directly related to the presence of the laws and not just the prevailing social environment. The laws in fact create the social environment for the violations of a range of other rights provided for in, *inter alia*, the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights. The small Caribbean societies take their cue from the state apparatus which regularly use the presence of the laws to deny the existence of and engage in outright attacks on the human rights of LGBTI citizens. In 2008, the new Prime Minister of Jamaica, Bruce Golding told a BBC interviewer⁶ that homosexuals would not form part of his cabinet. The Jamaica Forum for Lesbians, All-sexuals and Gays (JFLAG) reported that soon thereafter the phrase ‘not in my cabinet!’ became a popular refrain and persists today.⁷

The Caribbean’s growing HIV and AIDS epidemic (second only to sub-Saharan Africa’s)⁸ is also unfolding in the context of widespread violence and discrimination against people living with and at high risk of HIV and AIDS, especially men who have sex with men. Myths about HIV/AIDS persist. Many Caribbean citizens believe that HIV and AIDS is a disease of homosexuals whose “moral impurity” makes them vulnerable to it, or that HIV is transmitted by casual contact. Pervasive and virulent homophobia, coupled with fear of the disease, impedes access to HIV prevention information, condoms, and health care.

This report is part of larger process that started with a consultation among Caribbean LGBTI activists on the effects of laws which criminalize non-normative gender and sexual behavior and expression on the enjoyment of the human rights of the regional LGBTI communities. The report focused on nine Caribbean countries, namely Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Saint Lucia, and Trinidad and Tobago. The process involved development of a template to collect information about human rights violations based on sexual orientation, gender identity and gender expression and documentation of the laws which criminalized same-sex behavior around the region. In this context it was noticed that activists from many countries had a lot of challenges gathering information on abuses. This is not only because activists have no voice, but also because people in these small societies do not want to talk about the human rights violations they experience(d) for fear of recriminations on them and their families. Identification is simply much easier in the very small societies of the Caribbean islands, despite attempts at anonymity.⁹ Jamaica predominates because it has so much more incidents of

⁵ Press release 59/08: <http://www.cidh.org/comunicados/english/2008/59.08eng.htm>

⁶ BBC HARDtalk interview shown on 20th May 2008, Stephen Sackur:
<http://news.bbc.co.uk/2/hi/programmes/hardtack/7410382.stm>

⁷ Interview with Jason McFarlane of JFLAG September 8, 2010: Files with Global Rights.

⁸ UNAIDS Global Facts and Figures 2009:
http://data.unaids.org/pub/FactSheet/2009/20091124_FS_global_en.pdf

⁹ United and Strong, the main LGBTI lobby group in St. Lucia reported that only persons who had left this island of 170,000 were willing to make reports. Several persons in Barbados, after initially given reports asked that they not be used, even if their identities were concealed.

violence against LGBT and the local gay rights group (JFLAG) had to start documenting. There is also the possibility of greater anonymity in this the Anglo-phone Caribbean state with the largest population.

Status of Caribbean Criminalization of Same-Sex Sexual Conduct in International Human Rights Law

In eleven of the 15 members of Caribbean Community (CARICOM), private sexual conduct between consenting adults of the same sex is a criminal offence. Punishments range from ten (10) years in Jamaica, Belize, Grenada and St. Lucia to life imprisonment in Barbados and Guyana.¹⁰ The laws are mostly colonial legacies but criminal offences or stiffer penalties have been recently introduced in some states¹¹. The laws are often defended on the grounds of public morality.¹²

Do such laws violate rights guaranteed under international human rights instruments? In other words, does international law recognize the right of everyone to choose her or his sexual partner, regardless of sexual orientation or gender identity?

The short answer is yes. A review of international human rights standards and their authoritative interpretation by treaty bodies and human rights courts makes clear that the criminalization of same-sex sexual conduct is a violation of rights guaranteed under international law. Moreover, domestic courts, interpreting the same language or parallel provisions in domestic constitutions, have also found decriminalization of same-sex sexual conduct to be required under international law. International law protects individuals from discrimination based on fundamental personal characteristics. International law also protects individuals' private lives and their decisions to form intimate personal relationships, which includes the right to engage in sexual activity.

UNIVERSALITY OF HUMAN RIGHTS

Human rights apply to everyone simply because they are born human. This means that all human beings, regardless of whether they are heterosexual, lesbian, gay, bisexual or transgender or intersex (LGBTI), are entitled to the full enjoyment of all human rights. As the Vienna Declaration and Programme of Action, adopted unanimously by all States at the World Conference on Human Rights in 1993, states, "Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments."¹³ This principle of the universality of all human rights is

¹⁰ See Appendix for a list of the laws

¹¹ Trinidad and Tobago's penalty for buggery moved from five years imprisonment prior to 1986 to ten years under the Sexual Offences Act 1986.

¹² Statement made by Prime Minister Bruce Golding of Jamaica in answer to question 'when are homosexual acts illegal in Jamaica?': Recorded on September 25, 2010; Interviewed by David Hirschman <http://bigthink.com/ideas/24437>

¹³ A/CONF.157/23, 12 July 1993, at para. 1.

enshrined in the Universal Declaration of Human Rights and reflected in all other universal and regional human rights instruments.

- Article 1 of the Universal Declaration of Human Rights (UDHR): “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”
- Preamble of the International Covenant on Civil and Political Rights (ICCPR): “Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”
- Article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”
- Article 1(4) of the Arab Charter on Human Rights: “The present Charter seeks, within the context of the national identity of the Arab States and their sense of belonging to a common civilization, to achieve the following aims . . . To entrench the principle that all human rights are universal, indivisible, interdependent and interrelated.”
- Article 19 of the African Charter on Human and Peoples’ Rights: “All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.”

Laws that criminalize same-sex sexual activity¹⁴ carve out a category of humans for separate and discriminatory treatment. Although such laws purport to regulate conduct and not status, the reality is that criminalizing sexual conduct between partners of the same sex has the effect of marking individuals as criminal on the basis of their sexual orientation. Thus a conduct crime becomes a status crime. In *Leung v. Secretary for Justice*, the High Court of Hong Kong noted, “When a group of people, such as gays, are marked with perversity by the law then their right to equality before the law is undermined.”¹⁵ Or, as Justice O’Connor wrote in her concurrence in *Lawrence v. Texas*, in which the U.S. Supreme Court invalidated as unconstitutional a Texas state law criminalizing anal sex between men, “[T]here can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.”¹⁶

¹⁴These laws are sometimes referred to as “sodomy laws.” That name, however, is misleading because some of these laws prohibit sexual activity between consenting female partners and some laws prohibit any kind of sexual contact between consenting male partners, regardless of whether it is sodomy.

¹⁵ *Leung TC William Roy v. Secretary for Justice*, High Court of the Hong Kong Special Administrative Region, 24 August 2005, HCAL 160/2004, at para. 115.

¹⁶ *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (quoting *Romer v. Evans*, 517 U.S. 620, 641).

Even where laws criminalize the same conduct regardless of the sex of the partners – as is the case, for example, where anal sex between a man and a woman is criminalized – their true impact, in the words of Justice Ackermann of the Constitutional Court of South Africa, is to

punish[] a form of sexual conduct which is identified by our broader society with homosexuals. Its symbolic effect is to state that in the eyes of our legal system, all gay men are criminals.¹⁷

National courts also recognize that human rights are universal. In the 2008 case of *Victor Mukasa and Yvonne Oyo v. Attorney General*,¹⁸ the High Court of Uganda at Kampala heard the case of two individuals who were identified as lesbian and who had been subjected to arbitrary arrest, detention, and physical mistreatment by law enforcement officers. The High Court found that the police had violated a number of human rights instruments, including the Universal Declaration of Human Rights. The Court then quoted Article 1 in its entirety, thus reaffirming the universality of all human rights.

THE RIGHTS TO NON-DISCRIMINATION AND EQUALITY

Laws that criminalize same-sex sexual conduct treat individuals differently on the basis of their sexual orientation.¹⁹ Because this difference in treatment cannot be justified, as courts around the world have recognized, it amounts to discrimination.²⁰ The right to be free from discrimination is guaranteed by international law provisions on non-discrimination and equal protection of the law. While the right to nondiscrimination protects against discrimination in the enjoyment of other human rights, the right to equal protection of the laws is an autonomous right. It prohibits “discrimination in law or in fact in any field regulated and protected by public authorities.”²¹

This right to non-discrimination is not limited to enumerated grounds. Every international and regional human rights instrument that protects against discrimination includes “other status” or language equivalent thereto.

Non-discrimination in International Law

- Article 2 of the UDHR: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex,

¹⁷ *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, 1998 ZACC 15, at para. 28.

¹⁸ *Victor Juliet Mukasa and Yvonne Oyo v. Attorney General* (Misc. Cause No.247 of 2006)

¹⁹ The limitations of defining any person by reference exclusively to sexual behavior have been criticized elsewhere. The conflation of conduct with status, however, persists and it is a principal reason for courts finding that sexual activity laws are in fact discriminatory.

²⁰ See National Jurisprudence Section for examples of cases from the USA, South Africa, India, and Fiji

²¹ UN Human Rights Committee, General Comment No. 18, 10 November 1989, para. 12.

language, religion, political or other opinion, national or social origin, property, birth or other status.”

- Article 2(1) of the ICCPR: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory 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 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR): “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”
- Article 2 of the African Charter on Human and People’s Rights (African Charter): “Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.”
- Article 1 of the American Convention: “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.”
- Article 14 of the European Convention: “The enjoyment of the rights and freedoms set forth in this Convention shall 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, birth or other status.”

The Inter-American Commission Annual Report of 2008 made the following comment with regard to Ecuador:

The Constitutional Tribunal, in its Resolution No. 106 of 27 November 1997, abolished the crime of homosexuality, deeming it to constitute discrimination on the grounds of sexual orientation and in contravention of international human rights agreements.²²

Equal Protection in International Law

- Article 26 of the ICCPR: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee 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.”

²² Annual Report of the Inter-American Commission on Human Rights 1998, OEA/Ser.L/V/II.102 Doc.6 rev, April 16, 1999: Follow-up Report on Compliance by the Republic of Ecuador with the Recommendations offered by the Inter-American Commission on Human Rights in its 1997 Report on the Situation of Human Rights in Ecuador.

- Article 3 of the African Charter: “Every individual shall be equal before the law. Every individual shall be entitled to equal protection of the law.”
- Article 24 of the American Convention: “All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.”

Although the instruments listed above do not include “sexual orientation” among the enumerated categories, these categories are clearly intended to be illustrative and not exhaustive. The use of the phrase “or other status” means that the list of categories is open-ended. The Explanatory Report to Protocol 12 of the European Convention explains that the option of expressly including additional grounds, such as disability or sexual orientation, was rejected

not because of a lack of awareness that such grounds have become particularly important in today’s societies as compared with the time of drafting of Article 14 of the Convention, but because such an inclusion was considered unnecessary from a legal point of view since the list of nondiscrimination grounds is not exhaustive, and because inclusion of any particular additional ground might give rise to unwarranted a contrary interpretations as regards discrimination based on grounds not so included.

The UN Committee on Economic, Social and Cultural Rights offered a similar explanation of the term “other status:”

The nature of discrimination varies according to context and evolves over time. A flexible approach to the ground of “other status” is thus needed to capture other forms of differential treatment that cannot be reasonably and objectively justified and are of a comparable nature to the expressly recognized grounds in Article 2(2). These additional grounds are commonly recognized when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalization.²³

...

“Other status” as recognized in article 2(2) includes sexual orientation. States parties should ensure that a person’s sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor’s pension rights. In addition, gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the work place.²⁴

Decisions of UN treaty bodies interpreting international treaties and regional courts interpreting parallel non-discrimination provisions make clear that discrimination on the basis

²³ General Comment No. 20, Committee on Economic, Social and Cultural Rights, 10 June 2009, at para. 27.

²⁴ General Comment No. 20, Committee on Economic, Social and Cultural Rights, 10 June 2009, at para. 32.

of sexual orientation is prohibited under international law and, furthermore, that criminalization of same sex conduct is a form of prohibited discrimination.

In the 1994 case of *Toonen v. Australia*, the UN Human Rights Committee, the body mandated under ICCPR article 40 with monitoring states' compliance with its provisions, found that laws in Tasmania criminalizing consensual same-sex sexual conduct violated the privacy provision of the ICCPR. The Human Rights Committee further noted that the reference to "sex" in Articles 2 and 26 were taken as "including sexual orientation."²⁵ Later decisions of the Human Rights Committee have found that discrimination based on sexual orientation violated Article 26.²⁶ Since 1994, the Human Rights Committee has repeatedly called on countries to repeal laws that penalized consensual same-sex sexual activity.²⁷

The UN Committee on the Elimination of Discrimination against Women, which oversees the implementation of the Convention on the Elimination of All Forms of Discrimination against Women has also expressed concern about laws that classify sexual orientation as a sexual offence and has recommended that such penalties be abolished.²⁸ The Committee also adopted a detailed general recommendation on Article 2 of the Convention in which it reaffirmed that discrimination of women based on sex and gender was inextricably linked with other factors that affected women, such as race, ethnicity, religion or belief, sexual orientation and gender identity.²⁹

The UN Committee on the Rights of the Child, which monitors States' compliance with provisions of the Convention on the Rights of the Child, issued a General Comment in 2003 explaining that under the non-discrimination provision of Article 2, prohibited grounds of discrimination included "adolescents' sexual orientation."³⁰

²⁵ *Toonen v. Australia*, Communication No. 488/1992, UN Doc. CCPR/C/50/D/488/1992, 4 April 1994, at para. 8.7.

²⁶ *Edward Young v. Australia*, Communication No. 941/2000, UN Doc. CCPR/C/78/D/941/2000, 12 August 2003; *X v. Colombia*, Communication No. 1361/2005, UN Doc. CCPR/C/89/1361, 30 March 2007. Relying on Articles 17 and 26 of the Covenant, the Human Rights Committee has urged Kenya to repeal laws that criminalized homosexuality. See, e.g., UN Doc. CCPR/CO/83/KEN, 28 March 2005, at para. 27.

²⁷ UN Doc. CCPR/CO/83/KEN, 28 March 2005, at para. 27 (Kenya); UN Doc. CCPR/C/BRB/CO/3, 11 May 2007, at para. 13 (Barbados); UN Doc. CCPR/CO/76/EGY, 28 November 2002, at para. 19 (Egypt); UN Doc. CCPR/C/79/Add.111, 28 July 1999, at para. 16 (Romania); UN Doc. CCPR/C/79/Add.106, 18 April 1999, at para. 13 (Lesotho); UN Doc. CCPR/C/79/Add.104, 30 March 1999, at para. 20 (Chile); UN Doc. C/79/Add.85, 29 July 1997, at para. 8 (Sudan).

²⁸ Concluding Observations on Kyrgyzstan, UN Doc. A/54/38, 20 August 1999, at para. 128. CEDAW has also commended states for enacting laws protecting against discrimination on the basis of sexual orientation. Concluding Observations on Sweden, UN Doc. A/56/38, 31 July 2001, at para. 334; Concluding Observations on Ecuador, UN Doc. CEDAW/C/ECU/CO/7, 2 November 2008, at para. 28.

²⁹ <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10470&LangID=E>

³⁰ Committee on the Rights of the Child, General Comment 4, UN Doc. CRC/GC/2003/4, 1 July 2003, at para. 6.

The UN Committee against Torture, in General Comment No. 2, stated the following:

The principle of non-discrimination is a basic and general principle in the protection of human rights and fundamental to the interpretation and application of the Convention. . . States parties must ensure that, insofar as the obligations arising under the Convention are concerned, their laws are in practice applied to all persons, regardless of . . . sexual orientation, transgender identity . . . or any other status or adverse distinction.³¹

Most recently, the UN Committee on Economic, Social and Cultural Rights, which monitors implementation of the ICESCR, stated that “‘Other status’ as recognized in article 2(2) includes sexual orientation” and gender identity.³² The Committee had earlier noted that individuals were protected against discrimination based on sexual orientation in its general comments on the right to health and the right to water.³³

In the 1999 case of *Salgueiro da Silva Mouta v. Portugal*, the European Court of Human Rights concluded that the applicant had been discriminated against on the basis of his sexual orientation, “a concept which is undoubtedly covered by Article 14 of the [European] Convention. The Court reiterates in that connection that the list set out in that provision is illustrative and not exhaustive, as is shown by the words ‘any ground such as’ (in French ‘notamment’).”³⁴

In *Zimbabwe NGO Human Rights Forum v. Zimbabwe*, the African Commission on Human and Peoples’ Rights observed: “Together with equality before the law and equal protection of the law, the principle of non-discrimination provided under Article 2 of the Charter provides the foundation for the enjoyment of all human rights . . . The aim of this principle is to ensure equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation.”³⁵

At the domestic level, the reasoning of the Supreme Court of Canada is instructive. Section 15 of the Charter of Rights and Freedoms guarantees equality and prohibits discrimination on certain enumerated grounds. In a series of cases, the Supreme Court has identified analogous grounds that also qualify for protection against discrimination. In *Egan v. Canada*, the Court

³¹ Committee Against Torture, General Comment 2, UN Doc. CAT/C/GC/2, 24 January 2008, at para. 21.

³² Committee on Economic, Social and Cultural Rights, General Comment 20, UN Doc. E/C.12/GC/20, 10 June 2009, at para. 32.

³³ See General Comment No. 14, UN Doc. E/C.12/2000/4, 11 August 2000, at para. 18; and General Comment No. 15, UN Doc. E/C.12/2002/11, 20 January 2003, at para. 13. 20 Judgment of 21 December 1999, Case of *Salgueiro da Silva Mouta v. Portugal*, Application No. 33290/96, at para. 28.

³⁴ Judgment of 21 December 1999, Case of *Salgueiro da Silva Mouta v. Portugal*, Application No. 33290/96, at para. 28.

³⁵ Communication 245/2002 – *Zimbabwe Human Rights NGO Forum/Zimbabwe*, 21st Activity Report, EX.CL/322(X), Annexure III at para. 169.

held that sexual orientation was an analogous ground to the ones enumerated in section 15 of the Charter.³⁶ In *Corbiere v. Canada*, the Supreme Court explained:

[W]hat these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity. . . . To put it another way, s. 15 targets the denial of equal treatment on grounds that are actually immutable, like race, or constructively immutable, like religion.³⁷

Similar reasoning has been used by the Constitutional Court of South Africa. In addition to the grounds specified in the equality provision of the Constitution, a difference in treatment amounts to “discrimination on an unspecified ground if it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner.”³⁸

Furthermore, arresting or detaining someone under a provision that criminalizes same-sex sexual activity also violates rights under international law. Arrest or detention on the basis of sexual orientation constitutes an arbitrary deprivation of liberty. On several occasions, the UN Working Group on Arbitrary Detention has explained that the detention and prosecution of individuals “on account of their homosexuality” is arbitrary because it violates the ICCPR’s guarantees of “equality before the law and the right to equal legal protection against all forms of discrimination, including that based on sex.”³⁹

THE RIGHT TO PRIVACY

Just as individuals are protected from discrimination on grounds of sexual orientation, sexual activity between consenting adults is protected from interference by the right to privacy.

- Article 12 of the UDHR: “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”
- Article 17(1) of the ICCPR: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honour and reputation.”

³⁶ *Egan v. Canada*, [1995] 2 S.C.R. 513 at 528.

³⁷ *Corbiere v. Canada*, (1999), 2 S.C.R. 203, at para. 13.

³⁸ *Harksen v. Lane*, (19997) ZACC 12, at para. 46.

³⁹ Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/2004/3, 15 December 2003, para. 73; see also Working Group on Arbitrary Detention, Opinion No. 7/2002 (Egypt), para. 27, UN Doc. E/CN.4/2003/8/Add.1; Opinion No. 22/2006 (Cameroon), para. 19, UN Doc. A/HRC/4/40/Add.1.

- Article 11(2) of the American Convention: “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.”
- Article 8 of the European Convention: “Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as 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.”
- Article 21 of the Arab Charter: “No one shall be subjected to arbitrary or unlawful interference with regard to his privacy, family, home or correspondence, nor to unlawful attacks on his honour or his reputation.”
- Article 11(2) of the American Convention on Human Rights: “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.”

As long ago as 1981, the European Court found that such laws violated the privacy provision of the European Convention. Specifically, in *Dudgeon v. United Kingdom*, the European Court held that laws that criminalized sexual acts between consenting adult males constituted an “unjustified interference with [the applicant’s] right to respect for his private life” and thus breached Article 8 of the European Convention.⁴⁰ The European Court has consistently reaffirmed this holding.⁴¹

In 1994, in finding that the Tasmanian penal code was inconsistent with Australia’s human rights obligations under the ICCPR, the Human Rights Committee noted, “[I]t is undisputed that adult consensual activity in private is covered by the concept of ‘privacy.’”⁴²

It is important to recognize that privacy is both spatial – the home and the bedroom are places that the State may not invade without compelling cause – and also decisional. Thus a person is entitled to privacy for decisions he or she makes about personal relationships and activities. In *Lawrence v. Texas*, which held unconstitutional a Texas state law criminalizing sexual conduct between men, the U.S. Supreme Court explained that decisional privacy involves “the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy.”⁴³

In *National Coalition for Gay and Lesbian Equality*, the Constitutional Court of South Africa held:

⁴⁰ *Dudgeon v. United Kingdom*, Application No. 7525/76, Judgment dated 23 September 1981, at para. 63. Article 8 provides: “Everyone has the right to respect for his private and family life, his home and his correspondence.”

⁴¹ See, e.g., *Norris v. Ireland*, Application No. 10581/83, Judgment dated 26 October 1988; *Modinos v. Cyprus*, Application No. 15070/89, Judgment dated 22 April 1993.

⁴² *Toonen v. Australia* at para. 8.2.

⁴³ *Lawrence v. Texas*, U.S. Supreme Court, 539 U.S. 558, 574, 26 June 2003.

Privacy recognizes that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy.⁴⁴

NATIONAL JURISPRUDENCE

The European Court of Human Rights decided the case of *Dudgeon v. United Kingdom* in 1981 and the UN Human Rights Committee issued its decision in *Toonen v. Australia* in 1994. In more recent years, a number of national courts have heard challenges to laws criminalizing same-sex sexual activity.⁴⁵

National court decisions striking down these criminal laws share several common features. First, in addition to finding that such laws violate rights to privacy and equality, courts also pay attention to the concept of dignity. Dignity, which is closely related to privacy, is protected in many national constitutions as well as the African Charter on Human and Peoples' Rights. Article 5 of the Charter provides in part: "Every individual shall have the right to respect of the dignity inherent in a human being and to the recognition of his legal status."

In *National Coalition for Gay and Lesbian Equality*, the Constitutional Court of South Africa held that "the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society." The Court then concluded:

Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of section 10 of the Constitution.⁴⁶

Similarly, the High Court of Delhi at New Delhi recently found that Section 377 of the Indian Penal Code (IPC), which criminalized consensual same-sex sexual conduct, was unconstitutional. In explaining the concept of dignity, the Court stated, "At the root of the

⁴⁴ *National Coalition for Gay and Lesbian Equality*, at para. 32.

⁴⁵ See *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, South Africa Constitutional Court, 1998 ZACC 15, 9 October 1998; *Lawrence v. Texas*, U.S. Supreme Court, 539 U.S. 558, 26 June 2003; *Nadan & McCoskar v. State*, High Court of Fiji at Suva, 26 August 2005; *Naz Foundation v. Government of NCT of Delhi and Others*, High Court of Delhi at New Delhi, WP(C) No. 7455/2001, 2 July 2009. In Hong Kong, recent decisions have struck down as discriminatory provisions related to differing ages of consent and public sexual activity between same-sex partners. See *Leung v. Secretary for Justice*, CACV 317/2005, 20 September 2006, and *Secretary for Justice v. Yau and Another*, FACC No. 12 of 2006, 17 July 2007. In Nepal, the Supreme Court ruled that transgender individuals should be recognized as a third gender should be recognized and protected from discrimination. See Writ No. 917 (Blue Diamond Society), 21 December 2007.

⁴⁶ *National Coalition for Gay and Lesbian Equality* at para. 28.

dignity is the autonomy of the private will and a person's freedom of choice and of action."⁴⁷ The Court held that Section 377 "denies a person's dignity and criminalizes his or her core identity solely on account of his or her sexuality . . . As it stands, Section 377 IPC denies a gay person's right to full personhood which is implicit in the notion of life under Article 21 of the Constitution."⁴⁸

Second, the courts squarely confront and reject public morality as a claimed justification for laws that criminalize same-sex sexual activity. In general, the courts reason that public morality, when applied to behavior that is consensual and causes no harm, is a thin veil for prejudice. Writing for the majority in *Lawrence v. Texas* Justice Kennedy stated that considerations about morality "do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. Our obligation is to define the liberty of all, not to mandate our own moral code." In her concurrence, Justice O'Connor wrote: "[L]egal classifications must not be drawn for the purpose of disadvantaging the group burdened by the law. Texas' invocation of moral disapproval as a legitimate state interest proves nothing more than Texas' desire to criminalize homosexual sodomy. . . . And because Texas so rarely enforces its sodomy law as applied to private, consensual acts, the law serves more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behavior."⁴⁹

In *National Coalition for Gay and Lesbian Equality*, Justice Ackermann wrote: "The enforcement of the private moral views of a section of the community, which are based to a large extent on nothing more than prejudice, cannot qualify as such a legitimate purpose. There is accordingly nothing, in the proportionality enquiry, to weigh against the extent of the limitation and its harmful impact on gays. It would therefore seem that there is no justification for the limitation."⁵⁰

Likewise, in *Naz Foundation v. Union of India*, the High Court of Delhi at New Delhi rejected the argument that Section 377 had the legitimate purpose of protecting public morality. "The criminalization of private sexual relations between consenting adults absent any evidence of serious harm deems the provision's objective both arbitrary and unreasonable. The state interest 'must be legitimate and relevant' for the legislation to be non-arbitrary and must be proportionate towards achieving the state interest. If the objective is irrational, unjust and unfair, necessarily the classification will have to be held as unreasonable. The nature of the provision of Section 377 IPC and its purpose is to criminalize private conduct of consenting adults which causes no harm to anyone else. It has no other purpose than to criminalize conduct which fails to conform with the moral or religious views of a section of society."⁵¹

⁴⁷ *Naz Foundation* at para 26.

⁴⁸ *Naz Foundation* at para. 48.

⁴⁹ *Lawrence v. Texas*, 539 U.S. at 583.

⁵⁰ *National Coalition for Gay and Lesbian Equality* at para. 37.

⁵¹ *Naz Foundation* at para. 92.

In *Nadan and McCoskar v. State*, the High Court of Fiji held, “Despite the margin of appreciation given to the State to restrict sexual acts on the grounds of morality, the suggested limitations by criminal sanction are wholly disproportionate to the right of privacy. The criminalization of carnal acts against the order of nature between consenting adult males or females in private is a severe restriction on a citizen’s right to build relationships with dignity and free of State intervention and cannot be justified as necessary.”⁵²

A third common feature is the extent to which diverse national courts rely upon international human rights law in reaching their conclusions. Although none of the courts sit in Member States belonging to the Council of Europe, they quote cases from the European Court of Human Rights, including *Dudgeon v. United Kingdom*. They refer to the reasoning of the UN Human Rights Committee in *Toonen v. Australia*. They cite international instruments such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, in their analyses of non-discrimination and privacy. In short, the courts view their obligation to interpret domestic law in conformity with international human rights law as requiring the invalidation of laws that criminalize same-sex sexual activity. For these courts, the fact that international instruments do not explicitly contain the words “sexual orientation” is of no moment. To them it is clear that international human rights law, in practice, protects individuals from discrimination on the basis of their sexual orientation.

CONCLUSION

The argument that sexual orientation and private sexual activity are not protected by international human rights law is based on a series of false assumptions. The first is that the listing of prohibited grounds of discrimination contained in international instruments is a closed one. To the contrary, in every international and regional human rights treaty, the drafters were careful to ensure that the lists were open-ended. The second is that treaty bodies and courts play no role in the development of international law. Yet just as constitutional courts contribute to our understanding of national constitutions as “living” texts that must be interpreted in light of present-day conditions, so too do treaty bodies and regional human rights courts. The authoritative jurisprudence of these bodies is part of international law. Finally, the argument that sexual orientation is not part of “universally recognized” human rights ignores the first principle of human rights law – which is that human rights are universal.

‘Same-sex’ laws in the Caribbean: How consensual homosexual conduct between adults is criminalized

The laws which criminalize same-sex sexual behaviors and identities across the Anglo-phone Caribbean vary in language, the types of acts prohibited and the punishments imposed.⁵³ The common thread among all these laws is that they were imposed during the colonial period and have for the most part remained unchanged in spirit and intent despite centuries of development and decades of independence. Ironically, the continued existence of these anachronistic laws is now seen as representative of the ‘culture’ of the region. Yet, in fact,

⁵² *Nadan and McCoskar v. State* [2005] FJHC 500 .

⁵³ See the Appendix for a list of the laws

most regions from which Caribbean peoples originated⁵⁴ never had indigenous laws prohibiting same-sex conduct. The continued justification for these laws is also ostensibly to be found in the morality provisions of the constitutions, statements about the ‘Christian’ nature of the societies⁵⁵ and pronouncements about the need to ‘defend’ the family.⁵⁶

The modern reality that all Caribbean states have adopted secular constitutions which guarantee freedom of conscience, the presence of large non-Christian groups such as Muslims and Hindus in Trinidad and Tobago and Guyana and the absence of any deleterious impact on children raised in gay families,⁵⁷ have not dulled these justifications.

The words with which the laws describe what they punish are various and often vague. For example, in some ‘buggery’ is left undefined, while in others, ‘unnatural’ connection,’ or crimes ‘against the order of nature’ may punish any ‘non-natural’ sexual intercourse between any two people, heterosexual couples included, regardless of the orifice(s) used. Bestiality and sexual intercourse with ‘any living creature’ are also covered in some Acts. In yet others ‘gross indecency’ or ‘serious indecency’ targets gay men exclusively and criminalize the innocuous act of two men kissing in private. There are also cross-dressing laws which criminalize the wearing of clothes for an ‘improper purpose’ and laws which prohibit the entry of ‘known homosexuals’ into the territory.

Antigua and Barbuda, Barbados, Dominica, Guyana, Jamaica, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines and Trinidad and Tobago still retain the crime of ‘buggery’ as part of their law. Belize, has the crime ‘against the order of nature’ and Grenada has the crime of ‘unnatural connexion [sic].’ The Bahamas criminalized private same sex intimacy up until 1991 when the Sexual Offences and Domestic Violence Act criminalized ‘unnatural connection’ between same-sex adults and minors or two same-sex adults in public.

Antigua and Barbuda, Dominica, Guyana, Jamaica, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines have laws which are silent on lesbianism (though Trinidad and Tobago’s immigration law bans the entry of all homosexuals), while in the Bahamas all forms of public homosexuality are criminalized and in Belize, Grenada, and Trinidad and Tobago all forms of homosexuality are criminalized (with Belize and Trinidad and Tobago also banning the entry

⁵⁴ Most Caribbean people are descended from African slaves and East Indian and Chinese indentured servants who were brought to the Caribbean to work on the sugar plantations during the colonial period.

⁵⁵ In a September 25, 2010 interview the Jamaican Prime Minister and current Chairman of CARICOM said that homosexual acts are illegal in Jamaica because ‘Firstly, we are a predominately a Christian country and a fervently Christian country.’

⁵⁶ ‘There are some real fears. The basic unit of a society is a family, and there is a passionate concern in Jamaica about protecting the integrity of the family. And it is felt that encouragement or recognition of the appropriateness of the homosexual lifestyle is going to undermine the effectiveness of that family unit and, in that process, undermine the basic fabric of a society.’ *ibid*

⁵⁷ Charlotte J. Patterson, PhD: Lesbian & Gay Parents & Their Children: Summary Of Research Findings American Psychological Association website: <http://www.apa.org/pi/lgbt/resources/parenting.aspx>

of homosexuals). Punishments range from ten (10) years in Jamaica, Belize, Grenada and St. Lucia to life imprisonment in Barbados and Guyana.⁵⁸

Records show there are no prosecutions of consenting adult same-sex activity under these laws in recent time, however their existence constitute violations of, *inter alia*, the rights to privacy and non-discrimination as interpreted in International human rights jurisprudence⁵⁹ while creating the social environment for the violations of a range of other rights provided for in, *inter alia*, the American Declaration and American Convention (as will be demonstrated below). Precisely because buggery has become a synonym for same sex intercourse these laws, even if not specifically meant to target same sex conducts, shifted the attention of the society on specific sectors of the populations instead of conducts. The existence of these laws create the conditions for state and not state actors to terrorize, extort and even murder people, and reinforces the societal stigma that induce those targeted for abuse to be fearful and/ashamed to report violations.

Three types of same sex legislation are those found in Jamaica, Grenada and St. Lucia which show the progressive refining of the Acts to target a class of persons (men who have sex with men).

Jamaica Offences Against the Person Act 1864

Section 76

Unnatural crime

Whosoever shall be convicted of the abominable crime of buggery committed either with mankind or with any animal shall be liable to be imprisoned and kept to hard labour for a term not exceeding ten years.

Section 77

Attempt

Whosoever shall attempt to commit the said abominable crime, or shall be guilty of any assault with intent to commit the same, or of any indecent assault upon any male person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be imprisoned for a term not exceeding seven years, with or without hard labour.

Section 79

Outrages on decency

Any male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for a term not exceeding 2 years, with or without hard labour.

⁵⁸ See Appendix for a list of the anti-sodomy/buggery laws

⁵⁹ *Nicholas Toonen v. Australia*, Human Rights Committee, 50th Session, Case no. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (April 4, 1994).

Grenada Criminal Code, 1958

Section 435

Unnatural crime

If any two persons are guilty of unnatural connexion, or if any person is guilty of unnatural connexion with any animal, every such person shall be liable to imprisonment for ten years.

St. Lucia Criminal Code, 2005

Section 132

Gross indecency

132.— (1) Any person who commits an act of gross indecency with another person is guilty of an offence and liable on conviction on indictment to imprisonment for ten years or on summary conviction to five years.

(2) Subsection (1) does not apply to an act of gross indecency committed in private between an adult male person and an adult female person, both of whom consent.

(3) For the purposes of subsection (2) —

(a) an act shall be deemed not to have been committed in private if it is committed in a public place; and

(b) a person shall be deemed not to consent to the commission of such an act if —

(i) the consent is extorted by force, threats or fear of bodily harm or is obtained by false and fraudulent representations as to the nature of the act;

(ii) the consent is induced by the application or administration of any drug, matter or thing with intent to intoxicate or stupefy the person; or

(iii) that person is, and the other party to the act knows or has good reason to believe that the person is suffering from a mental disorder.

(4) In this section “gross indecency” is an act other than sexual intercourse (whether natural or unnatural) by a person involving the use of the genital organs for the purpose of arousing or gratifying sexual desire.

Section 133

Buggery

133.— (1) A person who commits buggery is guilty of an offence and liable on conviction on indictment to imprisonment for —

(a) life, if committed by an adult on a minor; or

(b) ten years, if committed by a minor;

and, if the Court thinks it fit, the Court may order that the convicted person be admitted to a psychiatric hospital for treatment.

(2) Any person who attempts to commit buggery, or is guilty of an assault with intent to commit buggery, is guilty of an offence and liable to imprisonment for five years and, if the Court thinks it fit, the Court may order that the convicted person be admitted to the psychiatric hospital for treatment.

(3) In this section “buggery” means sexual intercourse per anus by a male person with a male or by a male person with a female person.

For more detail on the related laws of other Caribbean countries, please see the Appendix.

Buggery laws and similar legislation

On September 25, 2010, Bruce Golding, Prime Minister of Jamaica and current Chairman of the 15 nation CARICOM group was asked why homosexual acts are illegal in Jamaica. His response was:

It is rooted in a number of things. Firstly, we are a predominately Christian country and a fervently Christian country. It may not be reflected entirely in terms of how we live sometimes, but we are passionately committed to certain basic Christian principles... We are tolerant provided that homosexual lifestyle does not invade our space. And what do I mean by that? Persons who wish, because of their own inclination, to live in a homosexual relationship, do so in Jamaica and there are many such persons in Jamaica. The society in Jamaica in general does not want to be... do not want it to be flaunted. They don't want it to be sort of thrown into the face, because there are some real fears. There are some real fears. The basic unit of a society is a family, and there is a passionate concern in Jamaica about protecting the integrity of the family. And it is felt that encouragement or recognition of the appropriateness of the homosexual lifestyle is going to undermine the effectiveness of that family unit and, in that process, undermine the basic fabric of a society.

But I think much of what has been carried in the international media in terms of homophobia in Jamaica is grossly exaggerated. Homosexuals in Jamaica, they live and they enjoy their relationship. They are intermingled with heterosexuals, they have normal relations with heterosexuals, but they do have their private relationships. And so long as that is so, I don't believe that the people in Jamaica are going to be particularly perturbed.

What is illegal in Jamaica is buggery, which is in fact making homosexual acts illegal. There have been very, very few prosecutions; very, very few. And in most instances, there are prosecutions because there is a complaint by a victim. So that it's not the flashpoint issue that many people in the international media claim that it is.⁶⁰

A close reading of the Prime Minister's statement reveals much about the relations between law, stigma, and identity in Jamaica as elsewhere.

The Prime Minister was right on one matter: 'buggery' is illegal in Jamaica. However, buggery is not specific to same-sex conduct and, in Jamaica at least, includes opposite-sex conducts as well as acts of bestiality. In the wider Caribbean there are also 'crimes against the order of nature' and 'unnatural connection,' laws which include the criminalizing of consensual, non-commercial adult homosexual sex and which have been held by the United Nations Human Rights Committee to violate basic rights to privacy and non-discrimination.⁶¹ Nonetheless, these laws persist in 11 of the independent Anglo-phone Caribbean countries. Their language rarely mentions homosexuality *per se*: they usually far pre-date the coinage of that term. Buggery is a word created in the 16th century, while the word homosexual has been created in the 19th century. It is precisely when the homosexual became a subject with an identity, states started to use criminal provisions that punish behaviors to target individuals with a specific (real or perceived) sexual orientation and gender identity.

⁶⁰ Recorded on September 25, 2010; Interviewed by David Hirschman <http://bigthink.com/ideas/24437>

⁶¹ *Nicholas Toonen v. Australia*, Human Rights Committee, 50th Session, Case no. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (April 4, 1994).

Prime Minister Golding is technically correct: 'homosexuality' is not a crime in Jamaica or in the rest of CARICOM for that matter. The letter of the laws criminalizes *conduct*, not the *condition* of being "homosexual." Only in Belize and Trinidad and Tobago where homosexuals are banned from entry is there a specific reference to a banned condition. And yet the Prime Minister is incorrect in another sense. On paper, buggery laws simply punish certain sexual acts (however vaguely defined), including consensual acts that usually take place in private. However, the state apparatus rarely confines itself to seeking out the secretive conduct itself and catching offenders: instead it extends to identifying and singling out the *kinds* of people presumed to be prone to, or proselytizers for, the criminalized behaviors. The buggery laws create un-apprehended felons. The public is encouraged and co-opted into this effort.

Buggery laws thus impute to people not just the commission of an act, but the propensity to commit it. They invite authorities to assume that a single characteristic points to a habitual condition. That condition in turn ultimately justifies judgment on a person's nature: a nature which must then be legible in mannerism, appearance, dress. The laws collude with other forces-social prejudice and stereotype, and religious teaching-to generate an atmosphere of stigma, in which certain outward marks signal the presence of a certain kind of person, and certain identities and groups become automatic targets of the law.

All buggery laws were originally aimed at targeting any form of non-procreative sex, some of them being more specific on the definition of what sexual intercourse is, meaning the requirement of penetration. With time, even when the definition did not change, the provisions became focused on same sex conducts. Tracy Robinson, Senior Lecturer in Law at the University of the West Indies stated:

Since 1986, seven of the eleven independent Caribbean countries have overhauled laws defining and governing sex crimes.⁶² Only Jamaica, Grenada, Guyana and St. Vincent have substantially unreformed laws. And five of the seven have specialized codes dealing with sexual offences... Modern sexual offences law in the Anglophone Caribbean has sharpened buggery as an offence targeting male homosexual sex... In most places it still includes heterosexual as well as homosexual anal sex, but the latest reforms in the 2004 St. Lucia criminal code have distilled the offence to being capable of being committed only by a man in relation to another man. Universally, the penalties for buggery have increased. They moved from a maximum of five years imprisonment prior to 1986 in Trinidad and Tobago to ten years under the Sexual Offences Act 1986. In the 2000 amendments to that Act, the maximum penalty rose to 25 years.⁶³

The effect of buggery laws thus goes beyond the legal penalties they provide. They create and maintain prejudice and stigma. They separate out people variously called "sodomites," "gays and lesbians," "homosexuals," or other names and define them as objects of contempt and

⁶² Antigua and Barbuda Sexual Offences Act 1995-9; The Bahamas Sexual Offences and Domestic Violence Act 1991, cap. 99; Barbados Sexual Offences Act 1992, cap. 154; Belize Criminal Code (Amendment) Act, 1999-36, 2001-42; Dominica Sexual Offences Act 1998-1; St. Lucia Criminal Code 2004, 2005 Rev., cap. 3:01; Trinidad and Tobago Sexual Offences Act 1986-27.

⁶³ T Robinson 'The Vagaries of Justice' in *Sexualities in Conversation*, No 1 Caribbean Sexualities Part 1 March 2008

hatred. The language of the law itself does not justify a call to "eliminate" certain kinds of persons from the land but logic connects them.

Other legislation criminalizing same sex conducts/identities or non normative sexualities

There are also a range of other unique legislations (most of which had their genesis in the colonial period) which continue to criminalize same-sex conducts/identities or non-normative sexualities across the region. Prime Minister Golding's statement above was therefore incorrect in another sense as 'buggery is not the only act of same-sex intimacy which is criminalized in Jamaica. So called acts of 'gross indecency' between men (not defined in the Act but understood to mean physical intimacy short of sex, whether committed in private or public) are also criminalized. 'Gross indecency' (or 'serious indecency' as it is known in other territories) laws usually target gay men exclusively and criminalize the innocuous act of two men kissing in private.

Other Acts have provisions prohibiting the entry of 'known homosexuals'⁶⁴ into the territory. This reflects the Victorian concept of using the law to keep people who will corrupt public morals out of the country. Homosexuals are therefore equated with other 'undesirables' such as prostitutes. The performance of Sir Elton John, a 'public homosexual,' in a local music festival in Tobago in 2007 was nearly thwarted by the Archdeacon of Trinidad and Tobago, the Venerable Philip Isaac who suggested that the singer and anti-Aids activist should be banned from the Plymouth Jazz Festival, because his presence may tempt islanders into homosexuality.⁶⁵ According to the island's immigration law, self-confessed prostitutes and homosexuals can be barred from entering the country. The law was never enforced, no doubt because of the status of Sir Elton John and the economic importance of the festival to the island.

There also exists an cross-dressing law in Guyana which provides :
Section 153 (1) (xlvii)

Wearing of female attire by man; wearing of male attire by woman

(1) Every person who does any of the following acts shall, in each case, be liable to a fine of not less than seven thousand nor more than dollars⁶⁶-

On May 15, 2006, Ronell Trotman, a self-confessed, male homosexual sex worker was charged and fined in Guyana for wearing female attire and vagrancy. In February 6 and 7, 2009, two groups of seven male-to-female transgender persons were taken into police custody in what appeared to a crackdown against transgender sex workers, and fined for wearing female attire by the Acting Chief Magistrate, Melissa Robertson at the Georgetown

⁶⁴ Belize Immigration Act, 2000 Chapter 156 s 5(1)(e); Trinidad and Tobago Immigration Act 1969 Chapter 18:01 s8(1)

⁶⁵ <http://www.independent.co.uk/news/world/americas/elton-john-concert-will-corrupt-tobago-archdeacon-claims-440449.html> accessed October 4, 2010.

⁶⁶ Chapter 8:02 Summary Jurisdiction (Offences) Act

Magistrate's Court Guyana on February 9, 2009. Unrepresented and with no access to legal advice at the time, they all pleaded guilty and paid the fine.

Savings Law Clause

Section 26(8) of the Jamaican Constitution prevents any laws which pre-dated the country's independence from being reviewed by local courts. This is regardless of how draconian and violative of human rights these laws are. Therefore, s. 76, 77 and 79 of the 19th century Offences Against the Person Act which directly contributes to violations of the rights of LGBTI through the criminalization of private same-sex intimacy is immune from review by local courts. This 'Savings Law Clause' is to be found and continues to operate in other constitutions of the region except Belize whose Savings Law Clause lapsed five (5) years after independence. The effect of the Savings Law Clause is questionable in several countries where the colonial legislation has been amended or transferred to a consolidating legislative text after independence, which is the case of the legislation examined in several cases for this report (such as Jamaica where the penalty for buggery was increased 7 years after independence). In such instance it is debated whether the Clause still applies. Challenges with standing, 'special legislative majorities' which preclude judicial review and poorly defined rights also combine to make domestic judicial challenge of these archaic laws highly problematic.

Effects of same-sex laws on Societal Attitudes

Across the Caribbean, laws criminalizing non-normative sexual and gender behaviors and identities, even when not applied, establish and reinforce a social standard about what is right and wrong, what is legal and illegal, what it is possible to do and what shouldn't be done. In the first place, these laws were introduced as a tool of domination and social control, exploiting divisions within the society based on questionable moral perception. This social tension has been progressively increasing and generated discriminatory standards of rule of law. Under those standards anybody in the society may feel entitled to perform any discriminatory act, which can range from homophobic songs to hate crimes.

The part of society that is affected and targeted does not feel, under the circumstances, entitled to the enjoyment of their human rights. Individuals, who are exposed to human rights violations and abuses on grounds of their real or perceived sexual orientation and gender identity or expression, not only are often unaware of their entitlement to their fundamental rights, but also feel they are not entitled to any remedy.

As a trans activist puts it: "We walk around, thinking we are proud of ourselves, we are proud of who we are... I think I am proud of me, I am an activist, I fight for the right to be free, but the reality is that I am not really proud of me, because I am a trans person who hides behind the fact that I can pass, I don't want anybody to know I'm trans, because I am ashamed of it... I don't feel I am ashamed, I am afraid of repercussion... So it's just a façade, a self-defense mechanism that I walk around with this confidence... But it's not real confidence; it's my self-defense mechanism... It is me trying to protect me really, because we are such a broken people, we are people who have always been told to hate ourselves, we have been

socialized to think we are wrong, and because of stigma and discrimination, because of how fear is instilled in us, because of who we are, it is difficult for me as an individual to really be proud of who I am, to walk in the road and be confident, and really be confident and not to be afraid, not to always be afraid”⁶⁷.

As a consequence, this denial of the right to citizenship makes it impossible for civil society, as well as for state authorities, to assess the real impact of this situation of stigma and exclusion. What is visible, on the contrary is only the tip of the iceberg, constituted by brutal murders, mob attacks and other public explosions and exposures of violence.

Blackmails (both by state and non state actors), corrective rape, domestic violence, discrimination in access to social services or to employment, and the consequent exploitation of prostitution, as well as many other act of physical and psychological violence are the non visible consequences of the social vulnerability that individuals and communities experience in countries where these laws are still in existence.

This legally supported social system of vulnerability is reinforced by governmental and religious hate speech.

Religious and political leaders exploit discriminatory public opinion to generate a spiral of negative rhetoric and inciting to hatred for their own benefit, regardless of societal consequences, even if it implies violence and murder.

Hate speech is particularly common during electoral campaigns, when candidates use this violent language as a tool to create political constituency.

As an example, in February 2010, the President of the Islamic Council of Jamaica said:

It is illegal and in the Sharia law the punishment is death. If you follow Christianity it is a crime in the sight of God. He destroyed a whole city because of this thing. It is an ungodly practice and I apologise to no one for this.⁶⁸

High level political leaders also foster an atmosphere of violence toward men who sex with men. During the 2001 elections, for example, the Jamaica Labour Party (then in opposition and now the government) adopted ‘Chi Chi Man,’ which celebrates burning and killing gay men, as its theme song. This was seen as a reference to the then Prime Minister P.J. Patterson who was unmarried and about whom claims of homosexuality had been made. The ruling People’s National Party responded by adopting as its campaign slogan for the 2002 national elections ‘Log On to Progress’ a reference to a popular song and dance (‘log on’) involving kicking and stomping on gay men.

Caribbean Parliaments have also been a site for expression of the homophobia which is reflected and expressed within wider society. One Senator in debating the Sexual Offences (Amendment) Bill of Trinidad and Tobago stated that:

⁶⁷ Interview with trans activist on August 27th, 2010, files with Global Rights.

⁶⁸ Karl Walker, ‘Muslim leader blasts gay lifestyle’ *Jamaica Observer* February 1, 2010

... there are five types of people that I really stay away from. One is a man who says that he does not believe in God; The second is the man who commits incest, a man who interferes with his own children... the man who does not maintain his children... The sexual offender... he is the fourth person. The fifth person, and I say this with regard to people's sexual orientation, the homosexual male... I do not like to associate with him because by liming with him, I get a certain kind of tarnishing too, that I really do not like.⁶⁹

In Guyana, there is a growing North-American fueled 'ex-gay' movement,⁷⁰ even though the American Psychology Association and other groups have condemned these practices as ineffective and harmful to the mental state of gays.⁷¹

The extent of human rights abuses faced by gays as a result of the social environment created by these laws is difficult to measure. This is because many LGBTI individuals in the region do not report and/or the level of social stigma they experience leads to internalized homophobia and a feeling that they 'deserve' this kind of treatment. As one activist interviewed for this process reported, 'as trans activists we can portray strength but we are wearing a mask. We have to be strong to resist the abuse, but we feel impotent and powerless to really assert for our rights legally.' This statement from a leader explains the lack of information from other members of the LGBTI communities in the islands.

Jamaican dancehall music, a powerful cultural force in the Caribbean, reflects and reinforces popular prejudices against lesbians and gay men. Many dancehall musicians perform songs that glorify brutal violence and killing of men and women who do not conform to stereotypical gender roles, and celebrate their social cleansing.⁷²

The legal and societal context above is manifested in concrete human rights violations as protected in the American Declaration on the Rights and Duties of Man, the American Convention on Human Rights and the International Covenant on Civil and Political Rights.

⁶⁹ Hansard Senate Debate of the Sexual Offences (Amendment) Act (7 Dec 1999) 94
<http://www.ttparliament.org/hansards/hs20000928.pdf> (last accessed 20th November, 2009)

⁷⁰ <http://www.hiswayout.com/#Main%20Article> Website of His Way Out Ministries, Guyana, South America trip report.

⁷¹ Resolution on Appropriate Affirmative Responses to Sexual Orientation Distress and Change Efforts
 American Psychology Association website: <http://www.apa.org/about/governance/council/policy/sexual-orientation.aspx>

⁷² Elephant Man's "A Nuh Fi Wi Fault," in which he sings that "When yuh hear a Sodomite get raped/but a fi wi fault/it's wrong/two women gonna hock up inna bed/that's two Sodomites dat fi dead" ["When you hear a lesbian getting raped/it's not our fault/it's wrong/two women in bed/that's two sodomites who should be dead"], Beenie Man's "I'm dreaming of a new Jamaica, come to execute all the gays," and Baby Cham and Bounty Killer's "Bun a fire pon a kuh pon mister fagoty, ears ah ben up and a wince under agony, poop man fi drown a yawd man philosophy" ["burn gay men 'til they wince in agony, gay men should drown, that's the yard man's philosophy"] are typical of the exhortations to kill and maim lesbians and gay men in many popular dancehall songs. For further discussion of homophobia in Jamaican dancehall and in popular culture, see Cecil Gutzmore, "Casting the First Stone," Tara Atluri, "When the Closet is a Region," working paper no. 5, Centre for Gender and Development Studies, University of the West Indies, 2001; on dancehall and cultural formation, including the use of homophobia by dancehall artistes, see also Norman C. Stolzoff, *Wake the Town and Tell the People: Dancehall Culture in Jamaica* (Durham, N.C.: Duke Univ. Press, 2000).

Right to Equal Protection.

Article II of the American Declaration on the Rights and Duties of Man (the Declaration) provides that all persons are equal before the law and have the rights and duties established in the Declaration, without distinction as to race, sex, language, creed or **any other factor** [emphasis added]. Article 1 of the American Convention on Human Rights (the Convention) provides that States Parties undertake to respect the rights and freedoms recognized therein 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** [emphasis added]. Article 24 of the Convention further provides that all persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law. Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR) provides that the rights guaranteed by the ICCPR are guaranteed to all individuals within a state party's territory and subject to its jurisdiction, "without distinction of any kind such as race, colour, [or] sex." The Human Rights Committee has interpreted 'sex' to include 'sexual orientation.'⁷³ Article 26 of the ICCPR further guarantees the right of all people to equality before the law and equal protection of the laws and legal systems of each signatory country; discrimination in the law "on any ground such as race, colour [or] sex" is prohibited.

Despite these international pronouncements against discrimination on the basis of sexual orientation, gender identity and gender expression, there is across the region, no Constitutional or legislative protection from discrimination on these grounds. All Caribbean countries are guilty of maintaining legislative provisions which violate this fundamental right. Even when politicians make oblique calls for tolerance,⁷⁴ they do not follow through with legislative reform to enshrine this right into law. The result is that societal acts of discrimination go unchallenged and underreported.

After its 2008 visit to Jamaica the Inter-American Commission stated the following with regard to discrimination based on sexual orientation:

The Commission strongly condemns the high level of homophobia that prevails throughout Jamaican society. This homophobia has resulted in violent killings of persons thought to be gay, lesbian, bisexual or transsexual, as well as stabbings, mob attacks, arbitrary detention and police harassment. The resulting fear in turn makes it difficult for people within this group to access certain basic services, for example, medical services that might reveal their sexual orientation.

⁷³ *Toonen*

⁷⁴ In his Emancipation Day Message on August 1, 2010, Prime Minister Golding said 'In the final analysis, emancipation goes beyond the unshackling of the chains of slavery and the inscribing of equal rights in constitutions and universal declarations. It comes down to a question of respect for each other and the dignity with which we treat each other. That, ultimately, is what emancipation is all about': http://www.jis.gov.jm/PMspeeches/html/20100801T130000-0500_24866_JIS_EMANCIPATION_DAY_MESSAGE_BY_THE_PRIME_MINISTER_OF_JAMAICA_THE_HON_BRUCE_GOLDING_AUGUST_1_2010.asp accessed October 12, 2010

Defenders of the rights of gays, lesbians, bisexuals and transsexuals have been murdered, beaten and threatened, and the police have been criticized for failing in many instances to prevent or respond to reports of such violence. The State must take measures to ensure that people within this group can associate freely, and exercise their other basic rights without fear of attack.

During its visit, the Commission received reports on four murders in circumstances suggesting homophobia over a period of a year and a half. One such murder was reportedly a consequence of the firebombing of the house of a person thought to be homosexual, and another man perceived to be homosexual was chopped to death by machete. The IACHR reminds the government and the people of Jamaica that the right of all persons to be free from discrimination is guaranteed by international human rights law, specifically the American Convention on Human Rights. The IACHR urges Jamaica to take urgent action to prevent and respond to these human rights abuses, including through the adoption of public policy measures and campaigns against discrimination based on sexual orientation, as well as legislative reforms designed to bring its laws into conformity with the American Convention on Human Rights.⁷⁵

The criminalization of buggery has the effect of amounting per se to discrimination against homosexuals' private sexual behavior for no good reason. In Jamaica, ss. 76, 77 and 79 of Jamaica's 19th Century Offences Against the Person Act (OAPA) criminalize anal sex, the private sex act of consenting adult males as well as any form of same-sex male intimacy termed 'gross indecency.' The laws can be easily engineered to target and prosecute homosexuals and, more generally, all non-reproductive sexual behaviour. The laws also strengthen social stigma against homosexuals. Section 79 is particularly troublesome because of its vague definition of gross indecency.

Further, the proposed Charter of Rights and Freedoms which will amend the Jamaican Constitution makes no references to non-discrimination on the grounds of 'sexual orientation' and 'gender identity.' These laws strengthen social stigma against homosexuals. The Jamaican Prime Minister was therefore able to openly declare his discrimination against gays when he stated in the now infamous BBC interview that he would not appoint any cabinet minister who he knew to be gay.⁷⁶

This status as criminals has founded the basis of and justified a structure of inequality and differential treatment between persons in de facto opposite sex relationships and those in same-sex relationships. There is therefore discrimination in a raft of other legislation across the region, including the Matrimonial Causes Act which declares any same-sex marriage void,⁷⁷ the Domestic Violence Acts which excludes same-sex partners and the Cohabital Relationships Act and the Family Property (Rights of Spouses) Act of Trinidad and Tobago and Jamaica respectively which create property and financial rights for persons in opposite sex "common law" relationships but excludes same-sex couples. Amended succession laws have a similar discriminating effect.

⁷⁵ Press release 59/08: <http://www.cidh.org/comunicados/english/2008/59.08eng.htm>

⁷⁶ BBC interview with Peter Sackur, May 20, 2008

⁷⁷ Matrimonial Causes Act, Jamaica s. 4(1)(d)

In 2000, in order to make the right to non-discrimination actionable as between citizens, Trinidad and Tobago passed the Equal Opportunity Act. However, this Act specifically excluded sexual orientation as a possible ground of nondiscrimination. In justifying the exclusion of sexual orientation as a prohibited ground of discrimination in the Equal Opportunity Bill of Trinidad and Tobago, the Attorney General who was the promoter of the bill commented that:

... inasmuch as homosexuality has not been decriminalized in Trinidad and Tobago, it cannot be recommended that the legislation extends to protect homosexuals at this time.⁷⁸

After strong opposition to the discriminatory provision by three members of the Senate, the Attorney General again flatly rejected the objections by taking recourse to the prohibition of buggery and serious indecency stating that:

... when we also talk about homosexuality and other matters like this, we cannot at this stage, in light of our Constitution, in light of our laws, take steps in order to give protection to matters which are offences against the criminal law and may be offences against the divine law.⁷⁹

The Attorney General went on to explicitly state that discrimination against homosexuals was indeed contemplated and is intended to be allowed against citizens on the basis of their sexual orientation:

... this Bill does not discriminate against anybody. What it does say is – just try and picture it. If there is an employer... and there is a situation where somebody, who is a known homosexual, applies for a job and there are five other persons, the employer would be entitled to say, “Well listen, I do not want this person to work in this restaurant.” [That] person would not be able to say that he or she was discriminated against because... one must have consideration for customers and other members of staff... this legislation cannot command the private sector to employ persons who may be offending the law.⁸⁰

Recommendation 28 following Belize’s UPR report of 2009 called for the government to put an end to any discrimination of same-sex sexual activity between consenting adults, in particular to review any discriminatory legislation and to adopt measures to promote tolerance in this regard. The government responded in the following way to recommendation (28):

While there is no political mandate at this time to amend the relevant legislation, the Government is nonetheless committed to protecting all members of society from discrimination. Indeed protection from discrimination is protected by the Belize Constitution.⁸¹

⁷⁸ Hansard Senate Debate of the Equal Opportunity Bill (No.2) (29 September 2000), 752
<<http://www.ttparliament.org/hansards/hs19991207.pdf>> (last accessed 20th November, 2009)

⁷⁹ *Ibid.* 888

⁸⁰ *Ibid.*

⁸¹ UPR Statement Belize: <http://www.ohchr.org/EN/HRBodies/UPR/PAGES/BZSession5.aspx>

Right to Juridical Personality.

Article XVII of the Declaration provides that every person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights and Article 3 of the Convention provides that every person has the right to recognition as a person before the law. Similarly, Article 16 of the ICCPR provides that everyone shall have the right to recognition everywhere as a person before the law.

However, nowhere in the Anglo-phone Caribbean Can a person be legally recognized as whatever gender they choose regardless of sex at birth. The 1970 English case *Corbett v Corbett (otherwise Ashley)*⁸² which fixed gender at birth is still considered good law and is highly persuasive in the Anglo-phone Caribbean

The case was a divorce case which set a legal precedent regarding the status of transsexuals in the United Kingdom. It was brought at a time when the UK did not recognise mutual consent as reason enough to dissolve a marriage and Arthur Corbett, the plaintiff, sought a method of dissolving his marriage to the model April Ashley without the issue of inheritance rights.

His case was brought under the premise that, as Ashley was born male (and should therefore be treated as male in perpetuity despite her change of sex) the marriage was illegal. At the time, medical opinion on transsexuality was divided and no consensus on whether Ashley should be legally seen as male or female could be reached.

As a consequence, the judge (Lord Justice Ormrod, who was himself a medical doctor) created a medical 'test' and definition to determine the legal status of April Ashley and, by extension, all transsexual people. The result of this test (which defined Ashley, a successful female model, as a man) was then taken up and used to define the sex of transsexual people for many purposes until the introduction of the UK Gender Recognition Act 2004 which ultimately defined the sex of transsexual people as whatever is on their birth certificate, until such point as a Gender Recognition Certificate corrects the birth certificate. However, the Anglo-phone Caribbean which inherited its legal systems from the UK still recognizes the highly persuasive nature of this case in its jurisprudence. The United Kingdom Privy Council, which acts as the final appellate body for most Anglo-phone countries has stated that where there is no common law precedent in the Caribbean, the common law of Britain as decided by judges in that jurisdiction will be applied. Only a specific statute can overrule this point. So even though the case has been overturned by the European Court of Human Rights it continues to have persuasive precedential value in the Caribbean.

Right to Life.

Article I of the Declaration similarly provides that every human being has the right to life while Article 4 of the Convention provides that every person has the right to have his life respected and this should not be arbitrarily taken away. Article 6 of the ICCPR provides that

⁸² [1971] P 83

every human being has the inherent right to life; this right shall be protected by law and no one shall be arbitrarily deprived of his life.

In September 4, 2003, the Inter-American Commission granted precautionary measures on behalf of Elkin Johalby Suarez Mejia, a member of the organization Comunidad Gay Sampedrana (Gay Community of San Pedro). The information available indicates that members of this gay community have been subject to constant harassment and violence, indicating approximately 14 murders from June to September 2003.⁸³

Similarly, homicides motivated by the victims' sexual orientation or gender identity have been perpetrated across the Caribbean region. While Jamaica has recorded the most such killings, seemingly peaceful states such as St. Lucia have also witnessed killings based on real or perceived sexual orientation, gender identity or expression of the deceased. The police have either incited violence which led to such killings, or have failed to act to resolve such deaths. The 'gay-panic' defense has also been accepted⁸⁴ to reduce the sentence of murderers of gay citizens or acquit them altogether on the basis that gay advances were a reasonable justification/provocation for murderous retaliation.

Marvin Marcano, the accused killer of Christopher Lynch, a 58-year old fashion designer, walked free although he'd been found guilty of participating in the chopping of Mr. Lynch to death (42 times with a Chinese chopper) and had been sentenced to hang. The judge ruled that 'The acts [of the deceased] themselves were so unnatural that they would have caused a certain reaction.'

The main LGBTI group in St. Lucia, United and Strong, reported the following murders of LGBTI since 2005:

The violent deaths of three perceived gay men in St. Lucia sparked debate on *Criminal Code* reform and hate crimes legislation. In February 2005, Verne widely perceived as a homosexual was found in a precipice over 400 feet deep off the Dennery highway close to the entrance of the Bordelais Correctional Facility. In March 2006, Germaine was discovered along the Pigeon Island Causeway, gagged and bound to a tree. In July 2007, Marcellus was found alive in a house at Touya with multiple stab wounds. Most recent in August of 2010 Romeo was found with multiple stab wounds on the beach just off the Bordelais Correctional Facility. The gay community remains resolute that the crimes were perpetrated because of the individuals' perceived sexual orientation.⁸⁵

In Jamaica, there have been a series of homicides of LGBTI and very few have been resolved. On the afternoon of June 18, 2004, a mob chased and reportedly "chopped, stabbed and

⁸³ Precautionary Measures, Elkin Johalby Suarez Mejia (Honduras), September 4, 2003 (Annual Report of the Inter-American Commission on Human Rights – OEA/Ser.L/V/II.118 Doc, 70 rev 2, December 29, 2003)

⁸⁴ <http://www.gaytoday.com/world/080702wo.asp>, accessed October 12, 2010

⁸⁵ Email communication with United and Strong; September 8, 2010, files kept at Global Rights

stoned to death” Victor Jarrett, a man perceived to be gay in Montego Bay.⁸⁶ Several witnesses reported that police participated in the abuse that ultimately led to this mob killing, first beating the man with batons and then urging others to beat him because he was homosexual.



Memorial for Victor Jarrett – June 18, 2010 Dump-up Beach Montego Bay
Killed by police instigated mob attack .
Accused of sitting and watching men on the beach.



Steve Harvey, Murdered in 2005. Taken away from his home after confirming he was gay.

In 2004, Brian Williamson, a co-founder of Jamaican Forum for Lesbians, All-sexuals and Gays, was found murdered at his home with multiple stab wounds to his neck and face and his throat cut. Within an hour after his body was discovered, a Human Rights Watch researcher witnessed a crowd gathered outside the crime scene. A smiling man called out, “Battyman [homosexual] he get killed!” Many others celebrated Williamson’s murder, laughing and calling out, “let’s get them one at a time,” “that’s what you get for sin,” “let’s kill all of them.” Some sang “boom bye bye,” a line from a popular Jamaican song about killing and burning gay men.⁸⁷

In November 2005, gunmen invaded the home of noted Jamaican gay activist Steve Harvey. Three men were in the house and when questioned if they were gay, two (2) denied but Steve said he was. The other men were tied up and left in the house and Steve was taken away by car. He was later found shot to death.⁸⁸

In November 2006, police found the nude body of Rev. Richard Johnson in the rectory of St. Jude’s Anglican Church in Kingston. The priest was viciously stabbed 25 times and witnesses reported seeing a man flee the scene who was “known to pay frequent visits” to his dwelling, detectives said. 22 year-old Prince Vale later turned himself in and admitted to the murder, claiming that acted in self-defense: “The Rector invited [Vale] into his bedroom and told him that he wanted him to try on a pair of pants he had for him. According to the attorney, Mr.

⁸⁶ Henry Bucknor, “Alleged Gay Man Chopped to Death in MoBay,” *Western Mirror*, vol. 24, no. 72, June 19, 2004, p. 1.

⁸⁷ Human Rights Watch Report ‘Hated to Death: Homophobia, Violence and Jamaica’s HIV/AIDS Epidemic’ Novemeber 2004 Vol. 16, No. 6 (B) <http://www.hrw.org/reports/2004/jamaica1104/>

⁸⁸ <http://www.guardian.co.uk/world/2005/dec/06/gayrights.garyyounge> accessed October 12, 2010

Vale was trying on the pants when he was attacked by the rector in a sexual manner. This led to a fight during which the rector was stabbed several [25] times."⁸⁹ Vale was eventually convicted of the lesser charge of manslaughter and sentenced to 12 years.

In September 2009 John Terry, the British honorary consul, was found murdered in his home in St. James in an apparent homophobic attack. Terry, 65, was found lying on his bed with a cord round his neck and severe head injuries and a handwritten note on his body describing him as a 'batty man', local slang for a homosexual.

Right to Humane Treatment.

Article I of the Declaration speaks to protection of the right to liberty and the security of the person and Article 5 of the Convention provides, inter alia, that every person has the right to have his physical, mental, and moral integrity respected and no one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment; all persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person. Article 7 of the ICCPR provides that No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

On February 3, 2006, the IACHR granted precautionary measures in favour of Kevin Josue Algeria Robles and 11 members of Organization to Support Integrated Sexuality (OASIS) in Guatemala arising out of an incident on December 16, 2005 when two trans-sexual employees of OASIS were shot and injured in an incident allegedly involving four uniformed policemen. The Commission requested that the government of Guatemala adopt the measures necessary to protect the life and physical integrity of the beneficiaries and report on action taken to investigate judicially the events that gave rise to the precautionary measures.⁹⁰

Within the Anglo-phone Caribbean, the right to humane treatment of LGBT citizens is notoriously ignored with often tragic circumstances. While state agents have been less active in their participation in these abuses in recent times, they have also been passive in following up on claims of abuse which have been presented to them.

Jamaica has been labeled as being the most dangerous place for gays in the Western Hemisphere.⁹¹ Jamaican security personnel as well as private citizens, acting under the provisions of s. 76, 77 and 79 of the OAPA regularly abuse, extort and harass Men who have Sex with Men (MSM) and Lesbians. Section 80 of the Offences Against the Person Act and section 4 of the Towns and Communities Act, which grant broad latitude for arrest and detention without warrant or an order from a magistrate are also used to incarcerate MSM and Lesbians.

⁸⁹ K Walker 'Anglican Priest Brutally Murdered' *The Jamaica Observer* November 14, 2006
http://www.jamaicaobserver.com/news/115294_Anglican-Priest-brutally-murdered

⁹⁰ Precautionary Measures, Kevin Josue Algeria Robles and members of OASIS (Guatemala), February 3, 2006 (Annual Report of the Inter-American Commission on Human Rights 2006, OEA/Ser.L/V/II.127, Doc. 4 rev.1, March 3, 2007)

⁹¹ T Padgett 'The Most Homophobic Place on Earth' *Time* Wednesday April 12, 2006
<http://www.time.com/time/world/article/0,8599,1182991,00.html>

Examples of attacks on MSM in Jamaica are:

- April 2006 students rioted at the University of the West Indies in Jamaica and attacked an alleged gay student;
- February 14, 2007, a group of gay men, including gay-rights activist Gareth Williams, were stoned by a mob of over 2000 in Kingston while shopping in a mall. The police failed to arrest anyone for the attack and instead took the gay men into custody and subsequently abused them even as they sought to secure them from the mob;
- April 8, 2007, approximately 100 men attacked a church where 150 people were attending the funeral of a gay man in Mandeville. When called, the police made no arrests and instead are reported to have joined the mob in jeering the gay men;
- In July of 2010 an MSM was walking to the local AIDS office in Montego Bay when he was set upon and pistol whipped until his face swelled to twice its normal size. When the matter was reported to the police, they asked him to point out his attacker which he refused to do for fear of his and his family's life.⁹²

In August 2010 an MSM was walking along Lady Musgrave Road in Kingston when he was followed into a supermarket by a group of five (5) men and women from a nearby construction site and clobbered. When the matter was reported to the police, instead of arresting the perpetrators, they advised the MSM that if he was attacked again he should point out the perpetrators.⁹³

⁹² Email with JFLAG September 8, 2010, files kept at Global Rights.

⁹³ Ibid.



February 14, 2007 attack of gay men, including gay-rights activist Gareth Williams, by a mob of over 2000 in Half-Way Tree, Kingston while shopping in a mall

There have also been regular attacks on Jamaican lesbians by both state and non-state actors:

- In 2007 a 17 year old lesbian was held captive by her own mother and pastor for 18 days and raped repeatedly day after day by different religious men in the attempt to ‘make her take man’ and ‘live as god instructed.’
- In 2008 four (4) cases of ‘corrective rape’ of lesbians and transgendered women ‘to set them straight’ were reported to Woman for Women (WfW) the main lesbian advocacy group on the island. The women refused to report the matter to the police for fear of further victimization by the police.
- In September 2010, two lesbians were subject to ‘corrective rape’ within days of each other. One woman was gang raped by four (4) men from her community who had complained about and were seemingly tired of her ‘butch’ or manly attire, as well as the fact that ‘she had all the good-looking women.’ After the rape the men cut her with a knife so she could ‘better tek man.’ The other female, a known friend of the first, was driven away at knifepoint and brutally raped then dumped half-naked with a promise that ‘the next time he [her assailant] would use a condom.’ The women refused to go to the police because of the perceived ineffectual nature of their response.⁹⁴

⁹⁴ Ibid

In an article appearing in the *St. Lucia Star*, it is stated that "[w]hile the government does not go around arresting people who are suspected to be gay, a climate of fear and intolerance prevails."⁹⁵ One gay Saint Lucian, who wanted to remain anonymous, stated that he was "legally defenseless against discrimination, harassment, and violence."⁹⁶

Cameron Wells, an MSM in St. Lucia, gave this statement to United and Strong, the major LGBTI group in the island.

On the afternoon of September 15th 2009 my friend John and I decided to take a walk through Castries which is the capital of St Lucia. As we got closer to the Derek Walcott Square which situated in Castries basin, we noticed there were a group of men sitting at a certain corner of the Square. As we got closer to what seem to be just a group of men sitting together we heard one guy said "them men are fagots you know" then in about less than 30 seconds we were already surrounded by the guys.

As my friend John tried to break out from the circle by trying to rush his way through the group, we started receiving blows and kicks to our body. I got blows to my face and my back as well as John. In the midst of our rumble which seemed unstoppable I heard the guys shouting "all batty Men should die and have to die!"

I felt my life had come to an end during this ordeal. Then suddenly it all stopped and the guys left. A passer by then called the ambulance. When we got to the hospital we asked to make a report to police station by the nurse who attended us, but when we got to the police station to file a report the police officer at the time told us they have no vehicles to use at that moment and we should be thanking the lord that we are still alive. We pleaded with them to at least try to go find the guys but he only kept telling us that when they do get vehicles they will do the best they can but not guaranteeing nothing.

To this date I am still fearful for my life as a gay man, I am fearful of society at large, community members, police and family. St Lucia is not a safe place any gay man should be living and at this moment I am in the process of migrating to England.⁹⁷

The Coalition Advocating for the Inclusion of Sexual Orientation (CAISO), the major LGBT group in Trinidad and Tobago reported that there have been many transgender sex workers who have been persecuted, beaten with batons and taunted about their gender expression. CAISO reports that in 2009, a number of trans sex workers were occupying an abandoned house and police would kick open the door, hold the girls at gunpoint and beat people and destroy any few appliances that were there.⁹⁸

Trans women are also placed in male wards which is in itself a harrowing, dehumanizing experience that arouses anxiety and as described by one member of the community, seriously impairs the mental aspect of healing. In addition, one person reported that nurses would come

⁹⁵ R Stern 'Caribbean AIDS Outreach Efforts Hampered by Homophobic Violence: *St. Lucia Star* July 30 2003: <http://stluciarstar.com/content/archives/14838>

⁹⁶ Ibid

⁹⁷ Email with United and Strong September 8, 2010, files kept at Global Rights.

⁹⁸ Email from CAISO September 12, 2010, files kept at Global Rights.

just to see who “that person” is. They are not trained or sensitized to deal with trans persons. The expectation that this treatment will be meted out to them creates a deep sense of fear and has the result that most trans persons prefer not to access healthcare. In the words of one trans community member, “I have friends who would rather stay home and die than have to go to the hospital.”⁹⁹

CAISO also indicates that persecution on the basis of gender identity and gender expression by police officers is commonplace. Some trans sex workers report that they were falsely arrested and carried to a dark, undisclosed, lonely swampy location by the police. They were made to strip naked and perform sexual acts on each other. The officers forced a baton up one individual’s anus. When this episode was finished, the officers actually taunted the victims to ‘report it nah.’ They did not report it because as they said ‘what’s the point?’¹⁰⁰

Some report that the police take away their wigs, break up their make up and tell them that they ‘too ugly to be playing woman.’ Some have been made to do push-ups with bricks on the back, because ‘they is man want to play woman.’¹⁰¹

Apart from that stated above, the best documented case of a person being subjected to harmful psychological treatment, is that of Kennty Mitchell who was detained by the Police without cause, made to strip naked, taunted, harassed and otherwise subjected to degrading and humiliating treatment about and because of his sexual orientation.¹⁰²

⁹⁹ Email with CAISO September 12, 2010, files kept at Global Rights.

¹⁰⁰ Ibid

¹⁰¹ Ibid

¹⁰² S Wilson, ‘Man gets \$200,000 for Wrongful Arrest’ *Trinidad and Tobago Guardian* April 15, 2010
<http://guardian.co.tt/news/crime/2010/04/15/man-gets-200000-wrongful-arrest>



The existence of laws criminalizing same-sex conducts implies that states fail to protect individuals from pressure and violence that occur within the family. This is mostly the case for young people. For example there are several accounts of young women who are perceived to be lesbians in Barbados who are heavily pressured to ‘change their lifestyle’ including having sex with men, even if unmarried, and also to get married.¹⁰³

¹⁰³ Interview with Patsy Grannum, October 20, 2010, records on file with Global Rights.

Right to Personal Liberty.

Article I of the Declaration provides for the right to liberty and the security of the person while Article 7 of the Convention provides that every person has the right to personal liberty and security and no one shall be subject to arbitrary arrest or imprisonment. Similarly, Article 9 of the ICCPR provides that everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.

While there are no known cases of convictions of consensual same-sex buggery in the Anglo-phone Caribbean in recent times, the extent of the convictions matters less than the power of example. A buggery arrest is a rude reminder that the state respects neither the private spaces nor the intimate experiences of stigmatized populations. The arrest brings the threat not only of fines or jail, but of public shame. Arbitrary detention of Caribbean LGBTI persons is therefore done under the guise of ‘public morality.’

LGBTI across the region are also easy targets for extortion by both police and private actors. Discriminatory police practices, the wide powers of arrest found in the various criminal legislations, fear that their homosexuality might be publicized, the paucity of available legal assistance, and the possibility of being prosecuted themselves combine to keep LGBTI from filing complaints or seeking redress when they are victims of extortion. Once arrested, many LGBTI have to demand that they be told what charges they are being held for and are intimidated into waiving their rights. In court, the abuse continues and Magistrates will usually quote the bible to charged LGBTI or ridicule their gender expression and gender identity. The Victorian gross indecency law on which most of the current ant-homosexual laws in the region are based was called the ‘blackmailer’s charter’: it encouraged entrepreneurial initiatives to exploit the stigma it imposed. One of its most famous victims was the noted British novelist, Oscar Wilde.

The following examples from Guyana, St. Lucia, Trinidad and Tobago and Jamaica are not atypical and demonstrate the battery of prejudices with which the criminal justice system confronts homosexuality.

Police detained eight people between February 6-10 2009 under Chapter 8:02 of the Laws of Guyana, section 153 (1) (xlvii) of the Summary Jurisdiction (Offences) Act, which criminalizes as a minor offense the “wearing of female attire by man; wearing of male attire by women.”

On February 6, 2009, plainclothes policemen detained three people in downtown Georgetown near Stabroek Market, on the grounds that the defendants were men “wearing female attire.” On February 7, 2009, police detained five other people, charging them under the same provision. On February 10, 2009 police detained four more people; three had been arrested in the previous crackdowns. On February 9, 2009 Acting Chief Magistrate Melissa Robertson fined eight of the nine arrested persons GY\$ 7,500 for wearing “women’s clothes.”

Defendants told human rights organizations that, while they were detained, police did not allow them to make phone calls. All the defendants also claimed that police refused to inform them of the charges against them. Police also reportedly photographed all the detainees and then demanded that they take off all of their “female clothes” in front of them. One defendant told rights organizations that after stripping, the police asked them to bend down to “search” them, as means to mock the men with regards to their sexual orientation. Police placed several of the defendants in solitary confinement (lockdown), a punitive measure allegedly imposed for their own safety.

United and Strong of St. Lucia reports that Adam and Caleb have been targets of police profiling and harassment for some time. A recent attack occurred in June 2010 when on that occasion a police vehicle pulled up next to Adam while he was walking on a public road. The police asked him where he was off to and if he was looking for man. They further taunted him that if he knows that being man and looking for man is wrong. Adam recounted being pulled into the vehicle and questioned over and over, then given a severe beating and released with the words ‘I am watching you.’ Caleb recalled the last time when the police held him with a gun to his head and told him his life is not accepted and illegal and he deserve to be dead. He was then released and told to run for his life.¹⁰⁴

CAISO reports being aware of one case where two individuals were told to accompany a police officer to the police station to assist with an investigation of an alleged robbery. When they reached the station they were told that they were under arrest and charged with solicitation. They were detained for the weekend and released after the charges weren’t pressed.¹⁰⁵

In the Kenty Mitchell¹⁰⁶ case, Mitchell was arbitrarily detained for hours in a filthy cell without cause. He was never charged.

Jamaican law provides broad latitude for police to detain individuals on ill-defined charges, including suspicion of buggery or gross indecency. In December 2009 a Jamaican police officer was in fact held in lock-up for 12 days for alleged acts of gross indecency with another police officer. He was never charged and eventually released. Furthermore, section 80 of The Offences against the Person Act permits a police officer to arrest without warrant any person found “loitering in any highway, yard, or other place” between 7 p.m. and 6 a.m. the following morning whom the constable has “good cause to suspect of having committed, or being about to commit any felony” proscribed by the Act. Jamaican police are also empowered to arrest without warrant and based on charges made by any “credible person” any person loitering in a public place to solicit another for prostitution.¹⁰⁷ It is impossible to say how frequently sodomy laws are enforced against men engaged in consensual same sex contact in Jamaica.

JFLAG reports that in November 2009 and in May 2010 two (2) separate incidents of extortion/blackmail were reported by Jamaican MSM based on their sexual orientation and gender identity.¹⁰⁸ There are undoubtedly other cases where LGBTI caught in compromising positions simply pay the blackmail in order to prevent their identities being revealed in the newspapers. The Star newspaper, the most popular evening tabloid on the island, regularly carries headlines which are unflattering of gays. The police are particularly guilty of extortion and one lawyer interviewed in this process, Maurice Tomlinson, was personally asked in 2006 to serve as a mediator between police officers and an MSM who was caught engaging

¹⁰⁴ Email with United and Strong, September 8, 2010, files kept at Global Rights

¹⁰⁵ Email with CAISO, September 12, 2010, files kept at Global Rights.

¹⁰⁶ Ibid

¹⁰⁷ Towns and Communities Act, sections 3(r), 4 (empowering police to arrest without warrant based on charges made by any “credible person” that certain offences committed within view of charging party).

¹⁰⁸ Email with JFLAG, September 8, 2010, files kept at Global Rights.

in anal sex with a young man. The police demanded payment in return for dropping the buggery charge. The family of the MSM agreed to pay.¹⁰⁹

Right to Privacy.

Article V of the Declaration provides that every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life. Article 11 of the Convention provides that everyone has the right to have his honor respected and his dignity recognized; 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; and everyone has the right to the protection of the law against such interference or attacks. Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation and everyone have the right to the protection of the law against such interference or attacks.

The consequence of lack of legal recognition of gender identity, and denial of change of sex on documents, has as an implication the fact that Caribbean trans individuals are constantly and daily exposed to invasion of their private life. One trans activist indicates that she is always ‘looking over her shoulder’ to see if people can figure out her ‘secret.’ She said that even though she walks upright and tries to put on a front of being unafraid, inside she is very troubled that one day someone will out her in a public place where she will have nowhere to run/hide.

In the case of *B. v. France*¹¹⁰ the European Court of Justice reached the conclusion, that a trans woman finds herself daily in a situation which, taken as a whole, is not compatible with the respect due to her private life.

Violations of the right to privacy of persons with a non-conforming sexual orientation and/or gender identity, including their sexual lives, have been committed by State agents and private actors across the region. This is facilitated through the continued presence of the laws which criminalize their consensual acts even when done in private. The state takes no role in making society more knowledgeable about the privacy rights of gays and public officials reinforce these sentiments through their public rhetoric.

In Jamaica on the morning of June 24, 2004, a group of armed men forced their way into a Kingston home, beating up six occupants while shouting homophobic threats. The dancehall musician Buju Banton (Mark Anthony Myrie) was one of the assailants, reportedly denouncing the occupants for being homosexual and kicking one man in his mouth and beating him with a board. The man is now blind in one eye. At least two of the men were

¹⁰⁹ Email with Maurice Tomlinson, September 5, 2010, files kept at Global Rights

¹¹⁰ (ECHR) 1992

beaten seriously enough to require medical treatment. All nine residents of the house were forced to abandon their home and possessions that same day, warned by the attackers that they would be killed if they returned.¹¹¹

Also in Jamaica, in January, 2008, three gay men were attacked in the privacy of their dwelling by an angry mob who had days before threatened them if they did not leave the community in Mandeville. Two men were hospitalized, one with serious injuries. In February 2010 two homes of gay men were invaded by angry mobs in the parishes of Clarendon and St. Catherine. When called to the scene, the police failed to disburse the mob. In the Clarendon case the gay men were able to repel the attack while in the St. Catherine case the police took the gay men into custody while no members of the mob were arrested.¹¹²

Freedom of Conscience and Religion.

Article III of the Declaration provides that every person has the right freely to profess a religious faith, and to manifest and practice it both in public and in private. Article 12 of the Convention provides that everyone has the right to freedom of conscience and of religion and this right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private. Article 18 of the ICCPR provides that everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

The forming of faith groups in most Caribbean countries is subject to state approval for the granting of tax exempt status. LGBTI faith groups have largely avoided seeking such status for fear of rejection of their application. However, underground LGBT churches do exist¹¹³ and are roundly condemned by leaders of other faith groups. The state does not actively support the right of the groups to establish. The February 12, 2010 edition of the Jamaica Star newspaper quoted head of the Kingston-based Faith Cathedral Deliverance Centre and the country's Political Ombudsman, Bishop Herro Blair, speaking on behalf of the nation's religious leaders, stating that Jamaica was a homophobic society that grew up to dislike homosexuals and to hate homosexuality. He said that God's concept was an Adam and an Eve for the continuity of the human race and that homosexuality in and of itself, has the potential to hinder that God-intended process.¹¹⁴

¹¹¹ Interview with JFLAG: September 10, 2010, files kept at Global Rights.

¹¹² Interview with JFLAG: September 10, 2010, files kept at Global Rights.

¹¹³ <http://worldfocus.org/blog/2009/11/11/gays-in-jamaica-worship-in-underground-church/8316/> accessed October 2, 2010

¹¹⁴ 'Jamaica Has Gay Church' *The Star* February 12, 2010, <http://www.jamaica-star.com/thestar/20100212/news/news1.html>

As for the request that a gay pastor made for local ministers to stop preaching against homosexuality, Blair said: "To do that would be a compromise of our faith ... If they have a right to be wrong, then we have a right to be right."¹¹⁵



Gay Jamaican Parishioners worship in underground church

The Jamaica Online
STAR

BURIAL RIOT - Church stoned at alleged homo's funeral - Pastor, mourners duck for cover (**Byron McDaniel, STAR Writer**) 10 April 2007.

Freedom of Thought and Expression.

Article IV of the Declaration provides that every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever. Article 13 of the Convention provides that everyone has the right to freedom of thought and expression and this right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice. Article 19 of the ICCPR provides that everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Despite these provisions, the major Caribbean LGBT organizations operate 'below the radar' and cannot publish their address for fear of reprisals. The sharing of information on issues relevant to the LGBTI community is thus restricted. As described above, an anti-cross-dressing law exists in Guyana and in other jurisdictions, the very real threat of violence, prevents individuals from openly dressing in the manner appropriate to their gender thus undermining the right to freedom of expression.

¹¹⁵ ibid



Crossdresser attacked & beaten in Falmouth, Trelawny, Jamaica

In July 2010, a young man was attacked in Jamaica in broad daylight because he appeared effeminate and in September 2010 there were two corrective rapes of lesbians because they looked too butch. The Jamaica Star newspaper also regularly reports effeminate looking men or trans women being chased from the popular Half-Way-Tree square in Kingston.

SASOD reported that in Guyana, the anti-cross dressing law (Section 153 of the Criminal Code) violates the right to freedom of expression, the right to privacy and personal dignity. Frequently, cross-dressers are attacked in the streets, especially in the nights. Police have been accused by cross-dressers of harassment and physical violence SASOD stated that:

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of the defendants in solitary confinement (lockdown), a punitive measure allegedly imposed for their own safety.¹¹⁶

Right to Assembly.

Article XXI of the Declaration provides that every person has the right to assemble peaceably with others in a formal public meeting or an informal gathering, in connection with matters of common interest of any nature while Article 15 of the Convention provides that the right of peaceful assembly, without arms, is recognized. Article 21 of the ICCPR provides that the right of peaceful assembly shall be recognized.

Caribbean LGBTI groups have traditionally been too afraid of violent backlash to publicly campaign for their rights. The fear has been justified based on the response to some public stands that JFLAG has mounted since the start of 2010.



Public Stand in Jamaica to protest homophobia

¹¹⁶ Email with SASOD: September 14, 2010, files kept at Global Rights

After a 'Stand Against Violence' held on September 24, 2010 to protest, inter alia, the violent rape of 2 Jamaican lesbian women, the following comments were posted on a popular social networking site¹¹⁷:

[Shannon Williams](#) i think they should just gather them in the park, lock the both gates so they cant escape and start shoot up inside until everyvody ded, dem can protest all them want but i will always say this battyman fi ded, no matter if 99percent of jamaicans switch i will never ever bow to the nastiness. FREE BUJU! THE MAN WEH seh: boom bye bye inna battyboy head

September 24 at 10:40am

[Chris Marsh](#) FYAH BUN RASTA!!!! GAY RIGHTS!!!! FROM YUH GAY U LOSE ALL A YUH RIGHTS!!!!

September 24 at 11:16am

[Nancy Evans](#) Lava splash pon a sadamite and a battyman...ole sewage guh dung. Wan some poison gas fi done di ole bomboclaat lat a dem....or some criptonite fi freeze dem and let dem remain there fi reminder fi di rest a dem whe want come protest to...battymen and lesbian child molester rapist fi guh whe by ALL MEANS NECESSARY!!!!!!

September 24 at 11:28am

[Karen Anderson](#) dem want I come with my machete!!

September 24 at 11:34am

[Javaughn Reid](#) dem dead yet.... wah bad man need fi do is stop war wid each oda and kill oman and children and start kill dem jflag people ya....dat mi seh..dis wasnt even new worth.....wam to buju???

September 24 at 11:35am

[Artnel P Specialist Crosby](#) Weh me gun dem deh???

September 24 at 10:00am

[Annakay Lue-Cooper](#) them need fi go ina a firing squadd

September 24 at 10:02am

[Andre Ramtulla](#) gas dem and light dem!

September 24 at 10:08am

These public events therefore have to be shrouded in extreme secrecy. The police were initially reluctant to provide security for these events. Gay parties also have to be held in secret and no known gay club exists in any country.

¹¹⁷ <http://www.facebook.com/#!/onthegroundnews> accessed September 25, 2010

Freedom of Association

Article XXII of the Declaration provides that every person has the right to associate with others to promote, exercise and protect his legitimate interests of a political, economic, religious, social, cultural, professional, labor union **or other nature** [emphasis added]. Article 16 of the Convention provides that everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, **or other purposes** [emphasis added]. Article 22 of the ICCPR provides that everyone shall have the right to freedom of association with others for the protection of his interests.

Registration of companies in the Caribbean is subject to the approval of the Registrar of Companies or other similar agency. Entities which seek to promote an ‘immoral’ purpose can be denied registration. This has led many Caribbean LGBTI groups to mask their objects and purpose and even not register thus inhibiting the right to freedom of association.

In Jamaica, JFLAG has registered but without declaring its full objectives for fear that the organization would run afoul of the provision in the Companies Act which grants the Registrar of Companies the right to deny registration of a company that is promoting an ‘immoral’ purpose. In 2009, Ernest Smith, a government Member of Parliament, called for the organization to be outlawed. In Trinidad and Tobago, one organization was subjected to heightened scrutiny when the objectives related to “promoting homosexuality.”



Ernest Smith, a Jamaican government Member of Parliament, calling for the Jamaica Forum for Lesbians, All-sexuals and Gays (JFLAG) to be outlawed.

Rights of the Family.

Article VI of the Declaration provides that every person has the right to establish a family, the basic element of society, and to receive protection therefore. Article 17 of the Convention provides that the family is the natural and fundamental group unit of society and is entitled to protection by society and the state; Article 23 of the ICCPR provides that the family is the

natural and fundamental group unit of society and is entitled to protection by society and the State.

Across the region, the rights of families formed by same-sex couples are violated insofar as individual rights, such as, among others, the right to hospital visits and to medical decision, funeral and burial arrangements, the entitlement to make organ and tissue donation, the right to leave work to care for an ill partner, property and inheritance rights, tenancy rights and protection in the states' domestic violence laws. While in many Caribbean countries these rights are sanctioned by provisions recognizing common-law marriage, that is to say the situation of unmarried opposite-sex partners living together for a certain period of time, the same rights are denied to same-sex couples.

This contravenes international human rights law obligations established, among others, by the UN Human Rights Committee in *Young v. Australia*¹¹⁸ and *X v. Colombia*¹¹⁹, in which the denial to unmarried same-sex couples of rights recognized to unmarried opposite sex couples was interpreted as a violation of the right of non discrimination as established by articles 2 and 26 of the ICCPR.

Right to family is also “the right freely to choose a spouse and to enter into marriage only with their free and full consent”¹²⁰, that states should guarantee. This right is violated when families force individuals to marriage as a way of hiding or “curing” their family members’ sexual orientation or gender identity. Although this is a common problem for both young men and women, lesbian women experience particular vulnerability because of sexism and, often, lack of economic independence, as well as because of the consequences of unwanted pregnancies. These phenomena, which occur within the privacy of the home, are undetected because of the social impact of the laws.

Rights of the Child.

Article XII of the Declaration provides that every person has the right to an education, which should be based on the principles of liberty, morality and human solidarity. Likewise every person has the right to an education that will prepare him to attain a decent life, to raise his standard of living, and to be a useful member of society. The right to an education includes the right to equality of opportunity in every case, in accordance with natural talents, merit and the desire to utilize the resources that the state or the community is in a position to provide. Every person has the right to receive, free, at least a primary education. Article 19 of the Convention provides that every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state. Article 24 of the ICCPR provides that every child shall have, without any discrimination as to race, colour, **sex** [emphasis added]¹²¹, language, religion, national or

¹¹⁸ (Communication No. 941/2000), CCPR/C/78/D/941/2000.

¹¹⁹ 1361/2005, 30 March 2007

¹²⁰ Convention on the Elimination of All Forms of Discrimination against Women, art. 16(1)(b).

¹²¹ As indicated before, the Human Rights Committee has declared ‘sex’ to include ‘sexual orientation.’

social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

The bullying and harassment of youth based on their real or perceived sexual orientation, gender identity and expression is an almost daily occurrence across the region according to the activists who have been interviewed in this process. Educators and peers consider these persons abnormal. In some cases, actual expulsions from schools have occurred.

JFLAG reports that there are many cases of bullying but students do not report the matter to the school administrators.¹²² In 2004 a lesbian couple in Belize had to challenge a Muslim school principal for refusing their child entrance into primary school. In 2009 the principal of a fundamentalist school tried to deny Jose Garcia access to the school based on his sexual orientation and gender identity. It took the intervention of United Belize Advocacy Movement (UNIBAM) which wrote a letter to the principal and the Minister of Education quoting the OAS Resolutions 2435 and 2504 'Human Rights Sexual Orientation and Gender Identity' to get the expulsion order rescinded. In the end, the young man was too traumatized to return to that school.¹²³

Children with parents having different sexual orientation or gender identity are affected by the socio-legal environment. Their rights not to be separated from their parents is often challenged when they are used as tool of extortion when families threaten to use one parent's sexual orientation or gender identity to obtain custody, financial support or other benefits.

Freedom of Movement and Residence

Article VIII of the Declaration provides that Every person has the right to fix his residence within the territory of the state of which he is a national, to move about freely within such territory, and not to leave it except by his own will. Article 22 of the Convention provides that every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it. Article 12 of the ICCPR provides that everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

It is a fact of life for most LGBTI across the region that they cannot move about or live in some communities of their small islands.

After a Walk for Tolerance on April 7, 2010 to promote awareness for persons infected by and vulnerable to HIV/AIDS, 4 Jamaican MSM were forced to flee their homes in the parish of St. Ann because the television coverage of the event provided by TVJ news (the major television station in Jamaica) portrayed the Walk as a gay march. One MSM was forced out at gunpoint, another after his house was stoned by neighbours and the others fled after violent homophobic threats issued by neighbours.¹²⁴

¹²² Email with JFLAG: September 8, 2010, files kept at Global Rights.

¹²³ Email with UNIBAM: September 15, 2010, files kept at Global Rights.

¹²⁴ Email with JFLAG: September 8, 2010, files kept at Global Rights.

Gays Blocked from Tourist ‘Hip Strip’ in Montego Bay.

On Friday, July 9, about 8:10 p.m. a group of men and women, some gay, some not, were blocked from walking along the Gloucester Avenue ‘Hip Strip’ in Montego Bay Jamaica by District Constables called ‘Courtesy Corps’ after the constables hurled homo-phobic insults at the group and insisted that they were gay and thus not allowed to proceed along the popular tourist route. The matter was reported to the police but no action was taken against the constables.¹²⁵

On July 16, 2010 the Jamaica Star newspaper in Jamaica reported that twenty-nine-year-old Kenneth Parchment (name changed) was made homeless, after he was beaten and chased from his community because rumours were being circulated that he is gay.¹²⁶

In Trinidad and Tobago, CAISO reports many reported instances of discrimination by non-state actors in the area of accommodation. Although the Equal Opportunity Act granted an actionable right as between private citizens to non-discrimination in the provision of accommodation, this right has not been extended to include discrimination on the basis of sexual orientation. Therefore it is pertinent that many members of the community have experienced discrimination in the provision accommodation because of their sexual orientation or gender identity.

Some advertisements in the newspapers advertise accommodation available for “male/female couples only,” “married couples only.” CAISO reports a case where an individual was evicted *immediately* when the landlord received reports from the neighbours that his same-sex partner was visiting. There is another instance where a person was evicted immediately; with no notice, when his landlord illegally entered his apartment and discovered his collection of gay pornography. One individual reports that when his landlord became aware that his same-sex partner was visiting, he advised them that he wished to do renovation. After they vacated, the landlord did not do any renovations. One individual whose gender expression is non-normative reported that his landlord called him with complaints from his neighbours that there were “colourful characters” about whom they were concerned. When the landlord was informed by the tenant of the situation, the landlord suggested that he change into drag elsewhere if he could.¹²⁷

Right to Participate in Government

Article XX of the Declaration provides that every person having legal capacity is entitled to participate in the government of his country, directly or through his representatives, and to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free. Article 23 of the Convention provides that everyone has the right to, inter alia, have access, under general conditions of equality, to the public service of his country. Article 25 of the ICCPR provides that everyone shall have access, on general terms of equality, to public service in his country.

The right of LGBTI to participate in government is limited by the fact that they are ‘un-apprehended felons.’ If convicted for their private consensual adult sexual practice they would invariably be stripped of their office. Any openly LGBTI individual who stood for

¹²⁵ Ibid

¹²⁶ <http://www.jamaica-star.com/thestar/20100716/ent/> accessed October 3, 2010.

¹²⁷ Email with CAISO: September 10, 2010, files kept at Global Rights.

election would fare very poorly at the polls in the Anglo-phone Caribbean. This is because of the almost unbreakable link between the church (which condemns homosexuality as an ‘abomination’) and the state. While there are no laws which specifically prohibit LGBTI from holding high office, some statements by political leaders have made it clear they will not promote LGBTI to positions of legislative or executive power.

In May 2008, in an interview with Stephen Sackur of the BBC, the Prime Minister of Jamaica declared that any cabinet formed by him would exclude any parliamentarian whom he knew to be gay.



‘No gays in my cabinet.’

Jamaican Prime Minister, O. Bruce Golding in May 2008 BBC interview stating that gays would not be welcome in his cabinet.

2.2 Consequences on HIV/AIDS

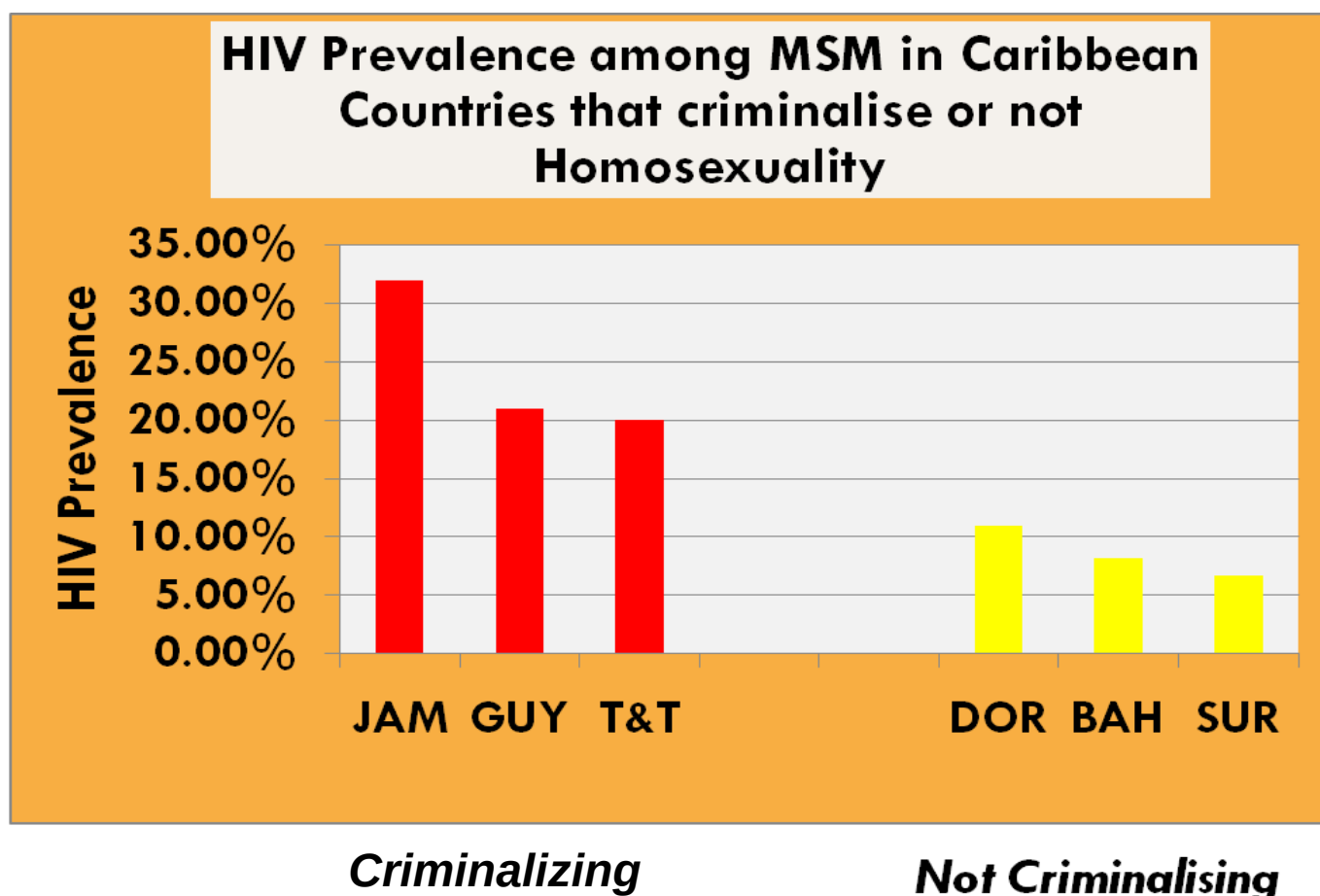
Homophobic violence and discrimination, and state failure to respond to these abuses, violate internationally recognized human rights, including rights to privacy, nondiscrimination, and protection against violence.¹²⁸ These abuses are also closely linked to the spread of HIV/AIDS. Buggery/Sodomy laws, which violate human rights to privacy and nondiscrimination,¹²⁹ undermine HIV/AIDS outreach to men who have sex with men (MSM).

The table below demonstrates the impact of criminalization of buggery/sodomy on the high HIV prevalence among MSM in Jamaica Guyana and Trinidad and Tobago, as against the much lower prevalence rates among MSM in the Dominican Republic, the Bahamas and Suriname which have decriminalized.

¹²⁸ Several of the Caribbean Countries have ratified international and regional treaties proscribing these actions, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, and the American Convention on Human Rights.

¹²⁹ *Nicholas Toonen v. Australia*, Human Rights Committee, 50th Session, Case no. 488/1992, U.N. Doc.

Table 1



Impact of Criminalization of same-sex activity on HIV/AIDS prevalence in the Caribbean
Source: UNAIDS Caribbean Regional Support Team 2009

State failure to protect lesbian, gay, transgender, and bisexual people from violence and abuse by police and private citizens marginalizes them and inhibits them from seeking treatment for HIV and other sexually transmitted diseases that increase the risk of HIV transmission. The association of HIV/AIDS with homosexuality compounds the marginalization of many people living with HIV/AIDS, who face additional stigma and abuse through the presumption that they have engaged in illegal sex. It also keeps those at highest risk of the disease—including people who do not engage in homosexual sex—from seeking HIV-related information and health services.

The Jamaican Ministry of Health has acknowledged that homophobic violence and discrimination, and deep stigma associated with homosexuality, are among the factors driving

the epidemic.¹³⁰ High-level officials from the Ministry of Health's HIV/AIDS program also recognize that Jamaica's sodomy laws create significant barriers to government provision of HIV services to men who have sex with men. A publication of the Department of Information Services of Saint Lucia stated that "in illegal situations, there's a natural tendency for persons to go underground. Then there's stigmatization and discrimination which too can drive people at risk ... underground to avoid ridicule."¹³¹ The Government of Guyana has also acknowledged that men who have sex with men are also a vulnerable group. The problem is that there is an inconsistent response to LGBT persons who are in need of health care and related social services since there is an accepted norm of discrimination. There are some health care professionals who would exercise their own discretion in terms of how they treat LGBT persons. The persons who are discriminated against do not have recourse to any remedies within the health system.¹³²

Providing HIV education and prevention services to men who have sex with men is extremely difficult because they are forced to remain invisible due to prejudice and abuse.¹³³ According to studies conducted by Jamaican and Caribbean regional health bodies, many Jamaican men who have sex with men lead dual lives and marry, have girlfriends, and have children while also engaging in same sex relationships.¹³⁴ Fear of being identified as homosexual may keep many people from seeking HIV testing and also from disclosing homosexual conduct as a possible risk factor if they test positive for HIV.¹³⁵ The invisibility of men who engage in homosexual conduct makes effective communication difficult, even

¹³⁰ See, e.g., Jamaican Ministry of Health, *Jamaica HIV/AIDS/STI National Strategic Plan 2002-2006*, January 2002, p. 10;

see also Zadie Neufville, "Fear Among Gay Men Said to Fuel HIV/AIDS Cases," *Inter Press Service*, March 5, 2002;

Garwin Davis, "Homophobia Remains High. Gays Remain in Seclusion, Health Officials Worry," *The Jamaica Gleaner*,

July 26, 2001.

¹³¹ (Saint Lucia, 12 July 2003).

¹³² Guyana SASOD interview

¹³³ Human Rights Watch interview with Dr. Yitades Gebre, executive director, Ministry of Health Program Coordination Unit, Kingston, June 23, 2004; Human Rights Watch interview with Dr. Peter Figueroa, chief, Ministry of Health Epidemiology Unit, Kingston, June 23, 2004. Hated to Death PAGE #

¹³⁴ See Caribbean Regional Epidemiology Center, "Homosexual Aspects of the HIV/AIDS Epidemic in the Caribbean: A Public Health Challenge for Prevention and Control," 2000; Heather Royes, "Jamaican Men and Same-Sex Activities: Implications for HIV/STD Prevention," 1993. The subject of a Jamaican study of men who have sex with men and HIV/AIDS explained, "Society demands that a man should have a woman. To be labeled as gay or homosexual is a name no man likes. So as a result, men resort to play the game with same-sex and opposite sex activities." "Jamaican Men and Same-Sex Activities," p. 11.

¹³⁵ Ministry of Health, "Report of the Behaviour Change and Communication Task Force," 2001 (cited in Patricia Watson, "Coping in the Dark: HIV Prevention among the MSM Community in Jamaica," *The Jamaica Gleaner*, May 5, 2002).

among the men themselves. And the lack of information about their lives, practices, and community to guide public health interventions compromises an effective response to the epidemic.

In 1997, the mere suggestion that a task force was considering whether condoms should be issued to inmates and staff as part of HIV/AIDS prevention efforts in Jamaican prisons prompted a violent rampage and derailed HIV education efforts for years. After then Commissioner of Corrections John Prescod proposed that condoms be distributed to prisoners and correctional officers, correctional officers—apparently offended by the implication that by distributing condoms they, themselves, were also having sex with men—walked off their jobs. The officers did not return for several days, until they received an apology from the Commissioner and an agreement that condoms would not be distributed in prisons. Following the walkout by the correctional officers, inmates at two of Jamaica’s largest prisons rioted. Sixteen prisoners were killed and more than fifty injured, apparently targeted because other prisoners believed that they were homosexuals.¹³⁶

The popular misperception that HIV/AIDS is a homosexual disease impedes effective HIV prevention and poses serious risks for people living with HIV/AIDS. Health workers and AIDS outreach workers interviewed by Human Rights Watch reported that people with whom they worked—including hospital staff—did not believe that HIV was an issue for them personally because they were not homosexuals.¹³⁷ A hospital-based health worker who provided HIV/AIDS prevention information and services to hospital staff and people in her town told Human Rights Watch, “When I tell them about HIV, they say . . . that HIV does not concern them, because it is a battyman [homosexual] disease.”¹³⁸

The conflation of HIV/AIDS with homosexuality exposes people living with HIV/AIDS and HIV/AIDS educators to the same treatment meted out to men who have sex with men.¹³⁹

¹³⁶ The riots were at the Tower Street Adult Correctional Centre in Kingston (Kingston general penitentiary) and St. Catherine’s District Prison. See Ministry of National Security and Justice, “Report of the Board of Enquiry into Disturbances at the Tower Street Adult Correctional Center and the St. Catherine Adult Correctional Centre Between 20th- 23rd August, 1997,” March 9, 1998; Commission on Human Rights, Report of Special Rapporteur on Torture, “Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” U.N. Doc. E/CN.4/2002/76/Add.1, March 14, 2002, par. 829.; Amnesty International, “A Summary of Concerns: A Briefing for the Human Rights Committee,” October 1997, p. 14.

¹³⁷ HRW Hated to death, page 15

¹³⁸ Human Rights Watch interview, St. Ann’s Bay, June 16, 2004. A 1993 study of Jamaican men who have sex with men and HIV/AIDS suggested that older bisexual men did not believe themselves at risk of HIV because they believed that HIV was a “gay” disease, and they did not identify as gay. Heather Royes, “Jamaican Men and Same-Sex Activities: Implications for HIV/STD Prevention,” 1993, p. 12.

¹³⁹ Robert Carr, “Stigmas, Gender and Coping: A Study of HIV+ Jamaicans,” *Race, Gender & Class*, vol. 9, no. 1 (2002), pp. 122-44.

ASHE Caribbean Performing Arts Foundation, an NGO that works with youth, includes HIV/AIDS and sexuality education as an important part of its work. Its work on HIV/AIDS, however, subjected it to threats, as the following note sent to the Jamaica Forum for Lesbians, All-Sexuals and Gays (J-FLAG) in July 2004 illustrates:

The nasty act of homosexuality will not be tolerated here in Jamaica. Let me say it quick. One notable battyman have died recently [Brian Williamson] we will be killing more as the days go by. To make it easy for you we will tell you where you can pick them up and who it was that we gunned down. It will not be robbery just purification. No batty man down here in Jamaica. . . . Fire burn them and them nasty living. JFLAG must crash. We declare war on all Gays and Homosexual. **Ashe dance group needs a bit of clean up now.** We will be killing gays and homosexuals daily now. War we say.¹⁴⁰

Lesbians and HIV risk

A woman without a man can be a target of both community disrespect and rape.

— Horace Levy, *They Cry 'Respect'! Urban Violence and Poverty in*

*Jamaica*¹⁴¹

Although the risk of female-to-female HIV transmission is generally estimated to be small,¹⁴² many women who have sex with women also have sex with men. Many Jamaican lesbians face strong pressure to establish relationships with men and to have children because doing so is a critical part of establishing their identity as adult women.¹⁴³

Sexual violence against women and girls, a problem of grave proportions in Jamaica, has been identified by the World Health Organization as an important factor contributing to increased HIV incidence among women in the region. Sexual violence may increase the risk of HIV and other sexually transmitted diseases for all survivors.¹⁴⁴ Forced or coerced sex creates a risk of trauma: when the vagina or anus is dry and force is used,

¹⁴⁰ E-mail communication from anotherkiller1@hotmail.com to J-Flag, July 14, 2004.

¹⁴¹ (Kingston, Jamaica: University of the West Indies Press, 2001), p. 37.

¹⁴² See Helena A. Kwakwa and M.W. Ghobrial, "Female-to-Female Transmission of Human Immunodeficiency Virus," *Clinical Infectious Diseases*, vol. 35, no. 3 (February 2003), pp. 40-41.

¹⁴³ See Robert Carr, "Stigmas, Gender and Coping: A Study of HIV+ Jamaicans," *Race, Gender & Class* (2002), vol. 9, no. 1, pp. 122-144 (discussing gender socialization in Jamaica).

¹⁴⁴ Women and girls are physiologically more vulnerable than men and boys to HIV infection during unprotected heterosexual vaginal sex. Factors that contribute to this increased risk include the larger surface area of the vagina and cervix, the high concentration of HIV in the semen of an infected man, and the fact that many of the other sexually transmitted diseases that increase HIV risk are often left untreated (because they are asymptomatic or because health care is inaccessible). Girls and young women face even greater risk than adult women, because the vagina and cervix of young women are less mature and are less resistant to HIV and other sexually transmitted infections, such as Chlamydia and gonorrhea, that increase HIV vulnerability; because changes in the reproductive tract during puberty make the tissue more susceptible to penetration by HIV; and

genital and anal injuries are more likely, increasing the risk of HIV transmission. Forced oral sex may cause tears in the skin of the mouth, also increasing the risk of transmission. The presence of other sexually transmitted diseases also heightens HIV transmission risk.¹⁴⁵

Women who are or are perceived to be lesbians are at an even greater risk of rape, as they may be targeted for sexual violence based on both their gender and sexual orientation.¹⁴⁶ In September 2010, two (2) Jamaican lesbians were raped by knife wielding thugs. The first woman was gang raped by four men who had complained about and had seemingly been tired of her 'butch' attire as well as the fact that she had 'all the good looking women.' The men also cut her with a knife so she could better 'tek man.' The second female was raped and then dumped with a promise from her attacker that the next time he would use a condom. Neither incident was reported to the police because of the fear that the police would not take action.¹⁴⁷

because young women produce less of the vaginal secretions that provide a barrier to HIV transmission for older women. See, e.g., Global Campaign for Microbicides, "About Microbicides: Women and HIV Risk," <http://www.global-campaign.org/womenhiv.htm> (retrieved August 28, 2003); UNAIDS, "AIDS: Five Years since ICPD—Emerging Issues and Challenges for Women, Young People, and Infants," Geneva, 1998, p. 11; The Population Information Program, Center for Communications Programs, The Johns Hopkins University, "Population Reports: Youth and HIV/AIDS," vol. 23, no. 3, Fall 2001, p. 7 (citing studies). 35 See United States Centers for Disease Control and Prevention, Fact Sheet: Prevention and Treatment of Sexually Transmitted Diseases as an HIV Prevention Strategy [online], <http://www.cdc.gov/hiv/pubs/facts/hivstd.htm> (retrieved October 27, 2003).

¹⁴⁵ See United States Centers for Disease Control and Prevention, Fact Sheet: Prevention and Treatment of Sexually Transmitted Diseases as an HIV Prevention Strategy [online], <http://www.cdc.gov/hiv/pubs/facts/hivstd.htm> (retrieved October 27, 2003).

¹⁴⁶ See discussion in Section V, below; see also Makeda Silvera, "Man Royals and Sodomites: Some Thoughts on the Invisibility of Afro-Caribbean Lesbians," *Feminist Studies*, vol. 18, no. 3, Fall 1992, pp. 521-532 (reporting gang rape of women "suspected" of lesbianism in 1950s Jamaican towns).

¹⁴⁷ Email with JFLAG: September 8, 2010

RECOMMENDATIONS

RECOMMENDATIONS TO THE COMMISSION

- Promote the signature and ratification by all English speaking Caribbean countries of the American Convention on Human Rights, as well as other regional human rights instruments, such as the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women;
- Conduct a thematic study at the hemispheric level on human rights violations based on sexual orientation and gender identity, as indicated by the Resolution “Human Rights, Sexual Orientation and Gender Identity” AG/RES 2600 (LX-O/10);
- Denounce and condemn the provisions criminalizing non normative sexual and gender behaviors and identities, such as buggery laws, offences against nature, gross indecency laws, cross-dressing laws, immigration restrictions, as well as any related human rights violation or abuse;
- Condemn and monitor serious human rights, discriminatory and hate speech, as well as incitation to violence and hatred violations on grounds of sexual orientation and gender identity and expression;
- Demand that English-speaking Caribbean member states ensure that all allegations of excessive use of force and other human rights violations by law enforcement officials based on real or perceived sexual orientation and gender identity or expression are investigated promptly and thoroughly;
- Demand that English-speaking Caribbean member states train all law enforcement and criminal justice officials on international human rights standards and nondiscrimination;
- Demand that English-speaking Caribbean member states conduct awareness raising programs, especially through education system, to address social stigma and exclusion of individuals and communities on grounds of their sexual orientation and gender identity and expression;
- Demand that English-speaking Caribbean member states facilitate access to social services, and especially health services, regardless of the individual’s sexual orientation, gender identity and expression, and/or HIV status;
- Endorse the current version of the draft Inter-American Convention against Racism and all forms of Discrimination and Intolerance, which includes the prohibition of

discrimination on grounds of sexual orientation and gender identity and expression, and encourage the member states to approve it.

APPENDIX

ANGLO-PHONE CARIBBEAN LAWS CRIMINALIZING SAME SEX SEXUAL BEHAVIORS AND IDENTITIES

Antigua and Barbuda

The Sexual Offences Act, 1995

No. 9 of 1995

Section 12

Buggery

12. (1) A person who commits buggery is guilty of an offence and is liable on conviction to imprisonment-

- (a) for life, if committed by an adult on a minor;
- (b) for fifteen years, if committed by an adult on another adult;
- (c) for five years, if committed by a minor.

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

Section 15

Serious indecency

15. (1) A person who commits an act of serious indecency on or towards another is guilty of an offence and is liable on conviction to imprisonment -

- (a) for ten years, if committed on or towards a minor under sixteen years of age;
 - (b) for five years, if committed an or towards a person sixteen years of age of more,
- (2) Subsection (1) does not apply to an act of serious indecency committed in private between -
- (a) a husband and his wife; or
 - (b) a male person and a female person each of whom is sixteen years of age or more;
- both of whom consent to the commission of the act.

(3) An act of "serious indecency" is an act, other than sexual intercourse (whether natural or unnatural), by a person involving the use of the genital organ for the purpose of arousing or gratifying sexual desire.

Bahamas

Chapter 99

Sexual Offences and Domestic Violence Act, 1991

No. 9 of 1991

Section 16

Unnatural crime.

16. (1) Any person who commits an act of unnatural connection with any animal is guilty of a sexual offence and liable to imprisonment for twenty years; and an offence under this subsection is complete upon penetration.

(2) Any adult male who-

- (a) has sexual intercourse with another male who is a minor; or
- (b) has sexual intercourse, in a public place, with another male, whether with or without the consent of that other male, is guilty of a sexual offence and liable to imprisonment for twenty years.

(3) Any female adult who-

- (a) has sexual intercourse with another female who is a minor, or
- (b) has sexual intercourse, in a public place, with another female, whether with or without the consent of that other female, is guilty of a sexual offence and liable to imprisonment for twenty years.
- (4) Notwithstanding the commission by any person of an act which amounts to an offence under this section, that person is not guilty of the offence if he committed the act under restraint, duress or fear.
- (5) No prosecution shall be commenced for an offence under this section without the consent of the Attorney-General.

Barbados

Sexual Offences Act, 2002

Chapter 154

Section 9

Buggery

9. Any person who commits buggery is guilty of an offence and is liable on conviction on indictment to imprisonment for life.

Section 12

Serious indecency

12. (1) A person who commits an act of serious indecency on or towards another or incites another to commit that act with the person or with another person is guilty of an offence and, if committed on or towards a person 16 years of age or more or if the person incited is of 16 years of age or more, is liable on conviction to imprisonment for a term of 10 years.

(2) A person who commits an act of serious indecency with or towards a child under the age of 16 or incites the child under that age to such an act with him or another, is guilty of an offence and is liable on conviction to imprisonment for a term of 15 years.

(3) An act of —serious indecency|| is an act, whether natural or unnatural by a person involving the use of the genital organs for the purpose of arousing or gratifying sexual desire.

Belize

Criminal Code, 2000

Chapter 101

Section 53

Unnatural crime

53. Every person who has carnal intercourse against the order of nature with any person or animal shall be liable to imprisonment for ten years.

Immigration Act, 2000

Chapter 156

Section 5(1)(e)

Categories of prohibited immigrants

5.-(1) Subject to section 2 (3), the following persons are prohibited immigrants-
(...)

(e) any prostitute or homosexual or any person who may be living on or receiving or may have been living on or receiving the proceeds of prostitution or homosexual behaviour;

Dominica

Sexual Offences Act, 1998

Section 14

Gross indecency

14. (1) Any person who commits an act of gross indecency with another person is guilty of an offence and liable on conviction to imprisonment for five years.

(2) Subsection (1) does not apply to an act of gross indecency committed in private between an adult male person and an adult female person, both of whom consent.

(3) For the purposes of subsection (2) –

(a) an act shall be deemed not to have been committed in private if it is committed in a public place; and

(b) a person shall be deemed not to consent to the commission of such an act if –

(i) the consent is extorted by force, threats or fear of bodily harm or is obtained by false and fraudulent representations as to the nature of the act;

(ii) the consent is induced by the application or administration of any drug, matter or thing with intent to intoxicate or stupefy the person; or

(iii) that person is, and the other party to the act knows or has good reason to believe that the person is suffering from a mental disorder.

(4) In this section —gross indecency|| is an act other than sexual intercourse (whether natural or unnatural) by a person involving the use of genital organs for the purpose of arousing or gratifying sexual desire.||

Section 16

Buggery

16. (1) A person who commits buggery is guilty of an offence and liable on conviction to imprisonment for –

(a) twenty-five years, if committed by an adult on a minor;

(b) ten years, if committed by an adult on another adult; or

(c) five years, if committed by a minor;

and, if the Court thinks it fit, the Court may order that the convicted person be admitted to a psychiatric hospital for treatment.

(2) Any person who attempts to commit the offence of buggery, or is guilty of an assault with the intent to commit the same is guilty of an offence and liable to imprisonment for four years and, if the Court thinks it fit, the Court may order that the convicted person be admitted to the psychiatric hospital for treatment.

(3) 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.||

Grenada

Criminal Code, 1958

Section 435

Unnatural crime

If any two persons are guilty of unnatural connexion, or if any person is guilty of unnatural connexion with any animal, every such person shall be liable to imprisonment for ten years.

Guyana

Chapter 8:01

Criminal Law (Offences) Act, 1893

Section 352

Committing act of gross indecency with male person

352. Any male person, who in public or private, commits, or is a party to the commission, or procures or attempts to procure the commission, by any male person, of an act of gross indecency with any other male person shall be guilty of misdemeanour and liable to imprisonment for two years.

Section 353

Attempt to commit unnatural offences

353. Everyone who -

- (a) attempts to commit buggery; or
 - (b) assaults any person with the intention to commit buggery; or
 - (c) being a male, indecently assaults any other male person,
- shall be guilty of felony and liable to imprisonment for ten years.

Section 354

Buggery

354. Everyone who commits buggery, either with a human being or with any other living creature, shall be guilty of felony and be liable to imprisonment for life.

Chapter 8:02

Summary Jurisdiction (Offences) Act

Section 153 (1) (xlvii)

Wearing of female attire by man; wearing of male attire by woman

(1) Every person who does any of the following acts shall, in each case, be liable to a fine of not less than seven thousands not more than dollars-

(...)

(xlvii) being a man, in any public way or public place, for any improper purpose, appears in female attire, or being a woman, in any public way or public place, for any improper purpose, appears in male attire;

Jamaica

The Offences Against the Person Act, 1864

Section 76

Unnatural crime

76. Whosoever shall be convicted of the abominable crime of buggery [anal intercourse] committed either with mankind or with any animal, shall be liable to be imprisoned and kept to hard labour for a term not exceeding ten years.

Section 77

Attempt

77. Whosoever shall attempt to commit the said abominable crime, or shall be guilty of any assault with intent to commit the same, or of any indecent assault upon any male person, shall be guilty of a

misdemeanour, and being convicted thereof shall be liable to be imprisoned for a term not exceeding seven years, with or without hard labour.

Section 79
Outrages on decency

79. Any male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for a term not exceeding 2 years, with or without hard labour.

Saint Kitts and Nevis

Offences Against the Person Act, 1990
Chapter 56

Section 56
Buggery

56. The abominable crime of buggery|| - up to 10 years imprisonment, with or without hard labour.

Section 57
Attempt to commit buggery and Indecent assault

57. Whosoever attempts to commit the said abominable crime, or is guilty of any assault with intent to commit the same, or of any indecent assault upon any male person, is guilty of misdemeanour, and being convicted thereof shall be liable to be imprisoned for any term not exceeding four (4) years with or without hard labour.

Saint Lucia

Criminal Code, 2005

Section 132
Gross indecency

132.— (1) Any person who commits an act of gross indecency with another person is guilty of an offence and liable on conviction on indictment to imprisonment for ten years or on summary conviction to five years.

(2) Subsection (1) does not apply to an act of gross indecency committed in private between an adult male person and an adult female person, both of whom consent.

(3) For the purposes of subsection (2) —

(a) an act shall be deemed not to have been committed in private if it is committed in a public place; and

(b) a person shall be deemed not to consent to the commission of such an act if —

(i) the consent is extorted by force, threats or fear of bodily harm or is obtained by false and fraudulent representations as to the nature of the act;

(ii) the consent is induced by the application or administration of any drug, matter or thing with intent to intoxicate or stupefy the person; or

(iii) that person is, and the other party to the act knows or has good reason to believe that the person is suffering from a mental disorder.

(4) In this section “gross indecency” is an act other than sexual intercourse (whether natural or unnatural) by a person involving the use of the genital organs for the purpose of arousing or gratifying sexual desire.

Section 133 Buggery

133.— (1) A person who commits buggery is guilty of an offence and liable on conviction on indictment to imprisonment for —

(a) life, if committed by an adult on a minor; or

(b) ten years, if committed by a minor;

and, if the Court thinks it fit, the Court may order that the convicted person be admitted to a psychiatric hospital for treatment.

(2) Any person who attempts to commit buggery, or is guilty of an assault with intent to commit buggery, is guilty of an offence and liable to imprisonment for five years and, if the Court thinks it fit, the Court may order that the convicted person be admitted to the psychiatric hospital for treatment.

(3) In this section “buggery” means sexual intercourse per anus by a male person with a male or by a male person with a female person.

Saint Vincent and the Grenadines

Criminal Code, 1990

Section 146 Buggery

—Any person who —

(a) commits buggery with any other person;

(b) commits buggery with an animal; or

(c) permits any person to commit buggery with him or her;

is guilty of an offence and liable to imprisonment for ten years.||

Section 148 Gross indecency

Any person, who in public or private, commits an act of gross indecency with another person of the same sex, or procures or attempts to procure another person of the same sex to commit an act of gross indecency with him or her, is guilty of an offence and liable to imprisonment for five years.

Trinidad and Tobago

Sexual Offences Act, 1986

Chapter 11:28

Act 27 of 1986 (Amended by 20 of 1994; 31 of 2000)

Section 13 Buggery

13. (1) A person who commits buggery is guilty of an offence and is liable on conviction to imprisonment—

(a) if committed by an adult on a minor, for life;

(b) if committed by an adult on another adult, for twenty-five years;

(c) if committed by a minor, for 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.

Section 16
Serious indecency

16. (1) A person who commits an act of serious indecency on or towards another is guilty of an offence and is liable on conviction to imprisonment—

(a) if committed on or towards a minor under sixteen years of age for ten years for a first offence and to imprisonment for fifteen years for a subsequent offence;

(b) if committed on or towards a person sixteen years of age or more for five years.

(2) Subsection (1) does not apply to an act of serious indecency committed in private between—

(a) a husband and his wife; or

(b) a male person and a female person each of whom is sixteen years of age or more, both of whom consent to the commission of the act.

(3) An act of —serious indecency|| is an act, other than sexual intercourse (whether natural or unnatural), by a person involving the use of the genital organ for the purpose of arousing or gratifying sexual desire.

Immigration Act, 1969

Chapter 18:01

Act 41 of 1969 (Amended by 7 of 1974)

Section 8(1)
Prohibited classes

8. (1) Except as provided in subsection (2), entry into Trinidad and Tobago of the persons described in this subsection, other than citizens and, subject to section 7(2), residents, is prohibited, namely-
(...)

(e) prostitutes, homosexuals or persons living on the earnings of prostitutes or homosexuals, or persons reasonably suspected as coming to Trinidad and Tobago for these or any other immoral purposes;

(f) persons who are reasonably suspected of attempting to bring into Trinidad and Tobago or of procuring prostitutes or other persons for the purpose of prostitution or homosexual or other immoral purposes;

Section 9(4)
Permitted entrants

(4) Where a permitted entrant is in the opinion of the Minister a person described in section 8(1)(k), (l), (m) or (n), or a person who-

(a) practises, assists in the practice of or shares in the avails of prostitution or homosexuality;

(...)

the Minister may at any time declare that such person has ceased to be a permitted entrant and such person shall thereupon cease to be a permitted entrant.

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