

Chapter 7

Same-Sex Marriage in the Commonwealth Caribbean: Is It Possible?

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Abstract Respect for LGBTI rights in the Commonwealth Caribbean is a fast-moving target. However, human rights advocates are working tirelessly to generate both legal reform and social tolerance for sexual minorities. LGBTI rights, or lack thereof, is evident in several bodies of law, including but not limited to sodomy law and marriage law. Additionally, a dialogue on LGBTI rights would be incomplete without an honest account of ongoing violence and other manifestations of homophobia and transphobia in the region. This chapter seeks to give as comprehensive a perspective as possible on the current state of LGBTI rights in the Caribbean regarding marriage. It looks at specific regulations in each country of the region and it shows that heteronormativity in family law is a vestige of British colonialism. Today Great Britain as other European countries, are moving away of the heterosexual paradigm in family law. Post colonialist Caribbean is not following this trend, at least not yet.

This chapter explores the development of same sex marriage rights in the Commonwealth Caribbean. Importantly, this chapter examines only the Commonwealth Caribbean countries, not the entire Caribbean region.¹ However, because same sex marriages may not be performed legally in the Caribbean, the bulk of this discussion will examine factual and legal contexts within which same sex marriage may eventually gain recognition.

¹The Commonwealth is a voluntary association of sovereign nations who either share the common former colonial power, the United Kingdom, or have voluntarily joined the association. The Commonwealth Caribbean refers to those Commonwealth nations in the Caribbean. These include Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Guyana, Jamaica, St Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, and Trinidad and Tobago. See The website of The Commonwealth of Nations (available at www.commonwealthofnations.org) (last visited Dec. 1, 2013).

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The chapter opens with a description of the existing hostile atmosphere toward Lesbian, Gay, Bisexual, Trans, and Intersex (LGBTI) communities in the Caribbean, paying specific attention to incidents of violence, sociocultural trends, and state complicity. An overview of the heteronormative character of marriage laws in the Commonwealth Caribbean will then be discussed, followed by a more in-depth look at the marriage laws of The Bahamas, Jamaica, and Trinidad and Tobago. For many Commonwealth Caribbean countries, sexual activity between consenting adults of the same sex is proscribed by anti-sodomy or anti-buggery laws; these laws will also be discussed. After examining the landscape of local marriage and sexuality laws, the chapter looks at regional jurisprudence around LGBTI rights, specifically the jurisprudence of the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights, the Caribbean Court of Justice, and the United Kingdom’s Judicial Committee of the Privy Council (hereafter “United Kingdom Privy Council” or “Privy Council”).

7.1 Current Atmosphere of Hostility Toward LGBTI Communities in the Commonwealth Caribbean

A discussion of same sex marriage in the Caribbean must necessarily account for the hostile and often dangerous environment in which sexual minorities exist and with which LGBTI rights advocates must contend. The charged social and political atmosphere is indicative of the challenges ahead for same sex marriage advocates and the seemingly insurmountable obstacles to legislative recognition of same sex relationships. In the region, hostility toward sexual minorities manifests itself most vociferously through violence, sociocultural resistance, and state complicity. To be clear, the three categories are not discrete. Violence and sociocultural resistance are perpetrated largely by private actors, but state complicity implicates the government’s responsibility, capacity, and (un)willingness to protect LGBTI persons from these private actions.

7.1.1 Violence Against LGBTI Persons

Although widely acclaimed for its scenic beaches and carefree attitude, the Caribbean has earned equal infamy for its violence toward LGBTI persons. This section discusses homophobic and transphobic violence in the Commonwealth, with special attention to Jamaica, whose notoriety for violence far surpasses other Commonwealth nations.

Across the Caribbean, sexual minorities experience actual and persistent threats of physical harm and even death. This violence may take the form of mob attacks, corrective rapes, murder, or destruction of real property thought to be occupied by

LGBTI persons. Tourists to the region are not immune to these attacks. As recently as 2012, two gay male tourists were arrested in Dominica on suspicion of having committed sexual conduct with each other. The two were purportedly seen engaged in intercourse by someone on the dock.² Similarly, in 2008, St. Lucian tourism authorities scrambled to do damage control after three gay tourists were robbed and assaulted while vacationing on the island. The attackers yelled profanities and demanded that the men leave the island because they were not welcome.³ In 2004, a gay cruise hosting about 1,150 passengers confronted about 100 angry protestors on the island of Nassau in The Bahamas. The protestors hurled anti-gay slurs at the visitors.⁴ Again, in 2010, a gay cruise was turned away from the Cayman Islands, in response to local protests by religious groups.⁵

Although the entire Caribbean region has gained notoriety, Jamaica stands head and shoulders above its neighbors with an astonishing record of homophobic and transphobic violence. In 2006, Time Magazine boldly declared the island paradise, “the most homophobic place on earth.”⁶ In 2004, Brian Williamson, a vocal Jamaican gay rights activist was murdered in his home. Upon discovering his body, his neighbors gathered to celebrate around the mutilated corpse, hailing the murder as a step in the right direction and an elimination of sinful behavior.⁷ More recently, in June 2012, the bodies of two men believed to be gay were found chopped and mutilated, with blood stained rocks nearby. According to the Inter-American Commission on Human Rights, the double murder came on the heels of a frenzy of homophobic violence—eight gay men had been murdered within the prior 3 months, in addition to other non-fatal attacks.⁸ In what was perhaps the most egregious act of defilement, the 2007 funeral of a gay businessman was brashly interrupted by an angry mob outside the church.⁹ The mob of protestors barged into the church and demanded that the service be called to an end. No prosecutions were made against members of the mob.¹⁰ These and countless other incidents of violence against LGBTI persons demonstrate the caustic atmosphere within which same sex marriage rights must not only emerge, but also survive.

²Carlisle Jno Baptiste, *2 US men arrested on gay cruise in Caribbean*, MSNBC, Mar. 22, 2012.

³Guy Ellis, *St. Lucia Responds To Attack On 3 Gay American Tourists*, Huffington Post, Mar. 14, 2012.

⁴Associated Press, *Rosie O’Donnell Cruise for Gay Families Cuts Bermuda Stop, Fearing Protests*, FoxNews.com, Apr. 18, 2007.

⁵Carlisle Jno Baptiste, *2 US men arrested on gay cruise in Caribbean*, MSNBC, Mar. 22, 2012.

⁶Tim Padgett, *The Most Homophobic Place on Earth?*, Time World, Apr. 12, 2006.

⁷Human Rights Watch, *Hated to Death: Homophobia, Violence and Jamaica’s HIV/AIDS Epidemic 2* (November 2004).

⁸*IACHR Condemns Murder of Two Gay Men in Jamaica*, Organization of American States, Jul. 9, 2012.

⁹Mark Lacey, *Anti-gay violence defies laid-back image of Jamaica*, New York Times, Feb. 24, 2008.

¹⁰*Ibid.*

7.1.2 *Sociocultural Resistance to Sexual Minorities*

Beyond incidents of violence, there also exists a culture of hate toward LGBTI persons in the Caribbean. In 2011, the University of the West Indies – Mona, Department of Sociology, Psychology, and Social Work issued a report on the attitudes of Jamaicans toward same sex relationships. The report’s findings illustrate the deep-rooted and pervasive cultural aversion of Jamaican citizens to sexual minorities. The authors designate as their most important finding the fact that strong negative perceptions of homosexuality transcend social classes, gender, and social groups in Jamaica. In other words, homophobia is not culturally isolated; it runs the gamut of society.¹¹ Additionally, the study found that the overwhelming majority of respondents (85.2 %) did not think that homosexuality between consenting adults should be legalized.¹² This cultural resistance tends to manifest itself through fundamentalist religious discourse as well as homophobic and transphobic music.

As with most regions and countries across the globe, resistance to LGBTI rights, and especially same sex marriage rights, often stems from the religious community. For example, when the United Kingdom Privy Council demanded that the Caribbean repeal its various anti-gay laws, the region rejected the plea in a unified voice, claiming that homosexuality was against their religion.¹³ As another example, in Belize, the religious right has held steadfast in its opposition to LGBTI rights advocacy, refusing to “surrender [their] moral foundations [. . .] to predatory foreign interests.”¹⁴

The region’s faith-based resistance to LGBTI rights can be traced to colonialism, during which a tradition of Christianity was imposed upon the Caribbean by the British Empire. Much of British common law finds its roots in the Christian Bible and as a result, the laws of the British territories were similarly ruled by a de facto theocracy.¹⁵ The colonial rulers invoked their Christian belief systems in ruling the territories, using Biblical references to instill discipline and subordination in the region.¹⁶

¹¹Department of Sociology, Psychology, and Social Work – University of the West Indies, Mona, National Survey of Attitudes and Perceptions of Jamaicans Towards Same Sex Relationships 3 (September 2011).

¹²*Ibid.*

¹³*Caribbean Rejects UK Justice*, British Broadcasting Corporation, Feb. 15, 2001.

¹⁴*Global campaign to decriminalise homosexuality to kick off in Belize court*, The Guardian, Nov. 16, 2011.

¹⁵James Wilets, *Conceptualizing Private Violence against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective*, 60 Alb. L. Rev. 989, 1,028 (1997) (“In Asia and Africa the extensive list of countries with anti-sodomy laws can be traced back to the lingering effects of colonialism and Christianity, Islam, and Marxist-Leninism.”).

¹⁶*Ibid.*

With regard to the region's music, the Caribbean's iconic dancehall¹⁷ music has grown notorious for its homophobic and transphobic lyrical content. Ironically, the genre otherwise embraces sexual freedom, with little censorship for sexually provocative content. Perhaps most notorious, is Jamaican artist Buju Banton. Early in his career, Banton penned the song, Boom Bye Bye, advocating fatal violence against gay men.¹⁸ Similarly, the artist Capleton also released a song, chanting "All boogaman and sodomites fi get kill," which means all gays and lesbians should be killed.¹⁹ Banton and Capleton stand among numerous other musicians who advocate violence against LGBTI persons in their lyrics, including Elephant Man, Bounty Killa, and Capleton.²⁰ As a result of the blatant and violent lyrical content of their music, many dancehall artists have been banned or boycotted by international LGBTI groups.²¹

However, the dynamic between gay rights groups and dancehall artists seems to have grown more amicable in recent years. In 2007, three artists, Beenie Man, Capleton, and Sizzla, signed the Reggae Compassionate Act, which rejects homophobic and transphobic musical lyrics.²² The Act reportedly came in response to an estimated £2.5 million loss suffered by the artists as a result of boycotts across Europe.²³ Also in 2012, gay and transgender rights groups in Belgium agreed to let up on their protest activities, after dancehall artist Beenie Man released a video apologizing for his homophobic lyrics and committed to respecting all persons, regardless of sexual orientation.²⁴

The impact of homophobic and transphobic music is unclear. Many dancehall artists will profess to be simply voicing the views of the public, absolving themselves of culpability for homophobic violence; in their view, the violence came before the music, not vice versa.²⁵ Although the causative direction is unclear, the correlation is likely. The earlier noted study by the University of the West Indies

¹⁷Note that homophobic lyrics plague dancehall music, which is a subgenre of reggae music. The distinction is important because several reggae artists have decried getting lumped together with the homophobic lyrics of dancehall artists, when they themselves have not espoused a homophobic view. See for example, Teino Evans, *Artistes not 'compassionate' to the act – Reggae artistes want clauses changed*, Jamaica Star, Jun. 29, 2007.

¹⁸Eric Kreindler and Frank Heinz, *Homophobic Lyrics Lead to Concert Cancellations*, NBC Chicago, Aug. 31, 2009.

¹⁹Christopher Thompson, *Curbing Homophobia in Reggae*, Time Entertainment, Aug. 7, 2007.

²⁰*Ibid.*

²¹See for example Stephen Jackson, *Reggae Artists Blacklisted*, Jamaica Observer, Feb. 28, 2010. (Germany blacklisted at least 11 dancehall albums between 2008 and 2010 because of their homophobic and violent content).

²²Teino Evans, *Artistes not 'compassionate' to the act – Reggae artistes want clauses changed*, Jamaica Star, Jun. 29, 2007.

²³Rosie Swash, *Beenie Man, Sizzla and Capleton renounce homophobia*, The Guardian, Jun. 14, 2007.

²⁴*Belgian gays grant reprieve to Beenie, Sizzla and Shabba*, Jamaica Observer, May 18, 2012.

²⁵Christopher Thompson, *Curbing Homophobia in Reggae*, Time Entertainment, Aug. 7, 2007.

revealed that homophobic views were most prominent among male respondents in lower socioeconomic groups who were not university educated and listened mostly to dancehall and reggae music.²⁶

7.1.3 State Complicity in Violence and Discrimination Against LGBTI Persons

The violence and sociocultural expressions of homophobia and transphobia discussed in the two previous sections are activities carried out by private actors and members of the general public. This section addresses state action (or inaction), which creates, perpetuates, or tolerates homophobia and transphobia.

The most frequent complaint of state activity centers on the unresponsiveness of local police forces to pleas from the LGBTI community. For example, in Trinidad, LGBTI groups expressed a reluctance to report violence and harassment to the local authorities for fear of re-traumatization by members of the police force, who frequently harass LGBTI persons.²⁷ In Jamaica, police officers have turned the issue of violence against LGBTI persons on its head by blaming gay men for the murder rate against gays. In 2012, the Jamaican Assistant Police Commissioner, Les Green, stated that the majority of murders of gay men were committed by intimate partners and these murders are therefore not indicative of homophobic violence.²⁸ Green also suggested that Jamaica's LGBTI community invites harassment by "cross-dressing," and asks "do they do that to create a media blitz?"²⁹ Prominent LGBTI and AIDS activist, Maurice Tomlinson, can attest to the police apathy toward sexual minorities. On one instance, Tomlinson sought protection from the local police force, but was greeted with a sharp refusal. The officer in charge turned him away, saying, "I hate gays, they make me sick."³⁰ Tomlinson was later contacted for an investigation, but the police force has not followed up.³¹

In other instances, members of the police force themselves engage in homophobic or transphobic violence. As recently as November 2012, two security guards stationed at Jamaica's University of Technology were involved in an assault of a student thought to be gay. The male student was allegedly found in a compromising position with another male and after fleeing an angry mob, the young man wound up

²⁶Department of Sociology, Psychology, and Social Work – University of the West Indies, Mona, National Survey of Attitudes and Perceptions of Jamaicans Towards Same Sex Relationships 3 (September 2011).

²⁷U.S. Department of State, 2010 Human Rights Report: Trinidad (Apr. 2011).

²⁸Julie Bolcer, *Jamaica Police Commissioner Blames Gays for Violence*, Advocate.com, Jul. 13, 2012.

²⁹*Ibid.*

³⁰Human Rights Watch, *Jamaica: Combat Homophobia*, July 18, 2012.

³¹*Ibid.*

in a room with the security guards. A YouTube video shows that, instead of offering protection, one guard punched, kicked, and slapped the student, while another held the student in place.³² The two guards had reportedly been fired since the incident.³³

Officials higher on the governmental totem pole can sometimes be equally damaging; Caribbean state leaders have often been complicit in discrimination against LGBTI communities. For example, the Antiguan Attorney General once told the press, “Being gay is morally wrong, and to be honest personally, I am still homophobic.”³⁴

However, some state leaders have taken notable steps to ameliorate their state’s homophobic reputation. In Jamaica and Trinidad, featured above in the examples of police apathy or violence, state leaders have actually voiced pro-LGBTI rhetoric. During her run for office, Jamaica’s Prime Minister, Portia Simpson Miller stated, “no one should be discriminated against because of their sexual orientation.”³⁵ Simpson Miller further stated that her cabinet was open to be filled by LGBTI persons, so long as they were qualified.³⁶ Not only did Simpson Miller accomplish a landslide victory in the upcoming election, she was recently named one of Time Magazine’s 100 Most Influential People for 2012. Among other attributes and accomplishments, the magazine took notice of her courageous battle against homophobia.³⁷

Trinidadian Prime Minister, the Hon. Kamla Persad-Bissessar, was similarly supportive of LGBTI rights in a recent statement. Persad-Bissessar vowed to end discrimination based on sexual orientation, stating, “The stigmatization of homosexuality in Trinidad and Tobago is a matter which must be addressed on the grounds of human rights and dignity to which every individual is entitled under international law.”³⁸ Therefore, although some state actors may demonstrate homophobic tendencies, this perspective is not necessarily indicative of a statewide policy of homophobia.

To briefly conclude, the factual context of LGBTI rights in the region demonstrates the hostility and resolute resistance of local interest groups and the broader public. Although some state leaders demonstrate support for LGBTI rights, the

³² *UTech, Marksman Condemn Beating Of Alleged Gay Student*, Jamaica Gleaner, Nov. 2, 2012. See also Associated Press, *2 guards in Jamaica accused of beating gay student*, Fox News, Nov. 3, 2012.

³³ *Ibid.*

³⁴ U.S. Department of State, 2010 Human Rights Report: Antigua and Barbuda (May 2012).

³⁵ Sarah Boseley, *Jamaican gay rights activists hopeful of repealing anti-homosexuality law*, The Guardian, Feb. 10, 2012.

³⁶ Toni Holness, *Jamaica’s Portia Simpson Miller: Out with the Old and in with the New*, Intlawgrl.com, Jan. 18, 2012.

³⁷ Yvette D. Clarke, *2012 Time 100: The Most Influential People in the World – Portia Simpson Miller*, Time Magazine, Apr. 18, 2012.

³⁸ *IACHR Welcomes Anti-Discrimination Statement by the Prime Minister of Trinidad and Tobago*, Organization of American States, Dec. 20, 2012.

frequency of homophobic and transphobic acts of violence and discrimination evidence a widely held sentiment of hostility toward LGBTI persons. This hostility must be accounted for in any legislative or other advocacy efforts to recognize same sex marriages in the region.

7.2 Overview of Marriage Laws in the Commonwealth Caribbean

Currently, same sex unions are not recognized in the domestic legal system of any Commonwealth Caribbean country. In fact, recognition and respect for broader sexual minority rights has been a long, slow, and often painful process for LGBTI rights activists. This section will first discuss the heteronormative trends in Commonwealth Caribbean marriage laws, followed by a closer examination of the domestic laws of The Bahamas, Jamaica, and Trinidad and Tobago.

7.2.1 *Heteronormative Trends in the Domestic Marriage Laws of Commonwealth Caribbean Countries*

As an initial matter, same sex marriage is not recognized in the domestic jurisprudence of any Commonwealth Caribbean country. This trend against recognizing same sex relationships stems largely from residual colonial influences. The legacy of the former British colonial power endures and is evident in the marriage laws of many Caribbean countries. In fact, many of the Caribbean's early legislatures enacted marriage laws with an eye toward achieving likeness with the British laws.³⁹ For example, the Barbadian legislature is said to have enacted its first Marriage Act of 1734, "An Act to Prevent Clandestine Marriage," with the hope of bringing the domestic jurisprudence "on the same footing as the law in England."⁴⁰ Despite gaining independence, many Commonwealth Caribbean countries retain heteronormative norms in their marriage laws.

The marriage laws of many Commonwealth states employ deceptively gender-neutral language. For example, the Marriage Act of Antigua and Barbuda uses language such as "the consent of each party to accept the other as his or her wife or husband."⁴¹ However, the official Form of Notice of Marriage reveals that marriage is in fact reserved for heterosexual couples. The form consists of two slots for the marrying parties, with directions, "The names and particulars relating to the

³⁹Andrew Bainham Ed., *The International Survey of Family Law*, (1995), p. 52.

⁴⁰*Ibid.*

⁴¹Marriage Act, Part V: Solemnization or Celebration of Marriage, 1925, Cap. 261, Sec. 47(b) (Antigua and Barbuda) (available at <http://www.laws.gov.ag/acts/chapters/cap-261.pdf>)

man should be first entered in the several columns, and then the names, etc. of the woman placed below.”⁴² The Barbadian Marriage Act also appears gender-neutral on its face.⁴³ Again, however, the Application for Marriage Certificate offers slots for the names of the “husband” and “wife.”⁴⁴ Similarly, the Guyanese Marriage Act requires that at some point during the marriage ceremony, “the consent of each party to accept the other as *his or her wife or husband* is clearly expressed in the presence of the marriage officer and the witnesses.”⁴⁵ (emphasis added). The Guyanese Form of Notice of Marriage, however, requires that “the names and particulars relating to the man should be first entered in the several columns, and then the names and particulars of the woman placed below.”⁴⁶

Although same sex marriage has not yet gained legal recognition, the LGBTI advocates in many Commonwealth Caribbean countries have pressured their citizenry and legislatures to adopt more LGBTI friendly norms and laws. For example, in 2011, Sir Errol Walrond, a Knight, called on this fellow Barbadians to end discrimination on the basis of sexual orientation. Anticipating sharp criticism, Walrond stated, “I know I have been abused for saying so, but there is absolutely no reason why we as a free community should be discriminating against any minority in our community.”⁴⁷

LGBTI activists in other countries proceed more cautiously. For example, with a heightened awareness of the domestic hostility toward sexual minorities, LGBTI activists in Antigua and Barbuda strategically omit same sex marriage from their current advocacy agenda. One local advocate explained that it would be reckless to promote same sex marriages given the tense atmosphere, “For you to just jump on same sex marriage without educating people and getting people to understand who they are, why they exist and how they infringe on people’s rights would be senseless.”⁴⁸

7.2.2 *Same-Sex Marriage in Non-Commonwealth Caribbean Nations*

Although this chapter’s focus is the Commonwealth Caribbean, it is also relevant to review the state of affairs in the Commonwealth’s neighboring states. Although

⁴²Marriage Act, 1925, Cap. 261 (Antigua and Barbuda) (available at <http://www.laws.gov.ag/acts/chapters/cap-261.pdf>)

⁴³Marriage Act, 1995, Cap. 218A (Barbados).

⁴⁴Application for Marriage Certificate, Barbados (available at <http://www.lawcourts.gov.bb/Documents/Application%20for%20Marriage%20Certificate.pdf>)

⁴⁵Marriage Act, 1998, Cap. 45:01 (Guyana) (available at <http://www.jafbase.fr/DocAmeriques/Guyana/LoiMariage.pdf>)

⁴⁶*Ibid.*

⁴⁷*Gay laws an obstacle*, Nation News, Dec. 2, 2011.

⁴⁸Martina Johnson, *Same sex marriages off the radar*, Antigua Observer, Dec. 21, 2012.

same sex unions have not been recognized in the Commonwealth Caribbean, some non-Commonwealth Caribbean states have taken steps toward protecting the rights of sexual minorities. Consider for example, the French Overseas Departments of Guadeloupe and Martinique. The 1999 French Pacte civil de solidarité (PACS) permits civil unions between same sex couples, offering many of the legal protections and tax benefits of marriage.⁴⁹ As French overseas departments, Guadeloupe and Martinique also recognize civil unions under the French law.⁵⁰

The Dutch Caribbean has a similar story. In 2001, the Netherlands became the first country to recognize same sex marriages.⁵¹ Nonetheless, LGBTI rights were greeted with a less-than-warm welcome in the Dutch Caribbean territories. For example, Aruba is an autonomous country within the Dutch Kingdom and therefore has substantial autonomy from the Netherlands. As a result, Aruba does not have to legalize same sex marriages, but must recognize those same sex marriages performed in the Netherlands.⁵² Despite this advancement, local resistance to LGBTI rights remains vociferous. In 2005, the Aruban Justice Minister refused to recognize same sex marriages formed in the Netherlands, invoking the Christian argument that such unions were unnatural and deviant.⁵³

7.3 Same-Sex Marriage in the Bahamas

Bahamian marriage law consists of a host of different pieces of legislation, including the Marriage Act,⁵⁴ the Marriage of British Subjects Act,⁵⁵ the Marriage of Deceased Wife's Sister Act,⁵⁶ and the Matrimonial Causes Act.⁵⁷ For the purpose of our discussion, the Marriage Act and Matrimonial Causes Act are most relevant. The Bahamian Marriage Act does not expressly state that marriage must be between a man and a woman.⁵⁸ In fact, the law, titled "An Act Relating to Marriage" uses

⁴⁹Loi n° 99-944 du 15 novembre 1999 relative au pacte civil de solidarité. *See also* Scott Sayare and Maia De Law Baume, *In France, Civil Unions Gain Favor Over Marriage*, *New York Times*, Dec. 15, 2010.

⁵⁰Vanessa Agard-Jones, *Le Jeu de Qui? Sexual Politics at Play in the French Caribbean*, *Caribbean Review of Gender Studies* (Issue 3 – 2009).

⁵¹*Popularity of Caribbean island soars after gay wedding*, *Jamaica Observer*, Dec. 15, 2012.

⁵²*Ibid.*

⁵³Boris O. Dittrich, *Gay marriage's diamond anniversary*, *Los Angeles Times*, Apr. 17, 2011.

⁵⁴Marriage Act, 1907, Cap. 106 (The Bahamas) (available at http://laws.bahamas.gov.bs/cms/images/LEGISLATION/PRINCIPAL/1908/1908-0004/MarriageAct_1.pdf)

⁵⁵*Ibid.*

⁵⁶Marriage with Deceased Wife's Sister Act, 1907, Cap. 122 (The Bahamas).

⁵⁷Matrimonial Causes Act, 1879, Cap. 125 (The Bahamas).

⁵⁸Marriage Act, *Supra* note 55.

alternative gender phrases, such as “his or her,” and “he or she,” quite frequently.⁵⁹ The Act calls upon the officiating officer to declare, “I call upon these persons here present to witness that I, A.B., do take (or have now taken) C.D. to be my lawful wife (or husband).”⁶⁰ However, the heteronormative norm is evident in the Bahamian 1879 Matrimonial Causes Act.⁶¹ Subsection (c) of paragraph 21 contains the relevant language:

21. (1) A marriage shall be void on any of the following grounds:

- (a) that it is not a valid marriage in accordance with the provisions of the Marriage Act;
- (b) that at the time of the marriage, either party was already lawfully married;
- (c) *that the parties are not respectively male and female* (emphasis added); or
- (d) that in the case of a polygamous marriage entered into outside The Bahamas, either party was domiciled in The Bahamas.⁶²

The application for a Bahamian Marriage Certificate also reveals the heteronormativity of the local marriage law. The form requests the “name of husband” and the “maiden name of wife.”⁶³

One would expect that the Bahamian marriage law would find its grounding in Christianity, in light of its heteronormative character. To the contrary, the marriage law offers broad latitude to the marrying parties to conduct religious marital ceremonies of their choosing. The Act states, “If the parties to a marriage contracted before the registrar or a marriage officer desire that there shall be separately performed any religious service of marriage between them, they may present themselves to any acknowledged minister of religion, and such minister upon the production of the certificate of marriage of the parties before the registrar or a marriage officer may, if he thinks fit, perform such religious service.”⁶⁴ According to the Act, a religious ceremony may or may not coincide with the marriage.

The future of Bahamian policy regarding marriage equality is difficult to decipher. In 2011, the Bahamian legislature passed a Maritime Marriage Bill to legalize marriages performed in Bahamian waters.⁶⁵ During the bill’s amendment phase, an unsuccessful attempt was made to remove from the bill the clause which defines marriage as being between a man and a woman. The result of this amendment would

⁵⁹Marriage Act, *Supra* note 55.

⁶⁰Marriage Act, *Supra* note 55, Cap. 106, ¶23.

⁶¹Matrimonial Causes Act, 1879, Cap. 125 (The Bahamas).

⁶²*Ibid.*

⁶³Bahamian Application for Marriage Certificate (available at http://www.bahamas.com/sites/bahamas.com/files/pdf/APPLICATION_FOR_MARRIAGE_CERTIFICATE.pdf) (last visited Feb 1, 2013).

⁶⁴Marriage Act, *Supra* note 55, Cap. 106, ¶25.

⁶⁵Glen Ferguson, *Bahamas Cruise Weddings to Get Boost from Maritime Marriage Legislations*, *The Bahamas Weekly*, Jul. 14, 2011.

have been to permit same sex marriages in Bahamian waters.⁶⁶ Speaking in relation to the bill, Bahamian Minister of State for Finance, Zhivargo Laing expressed, “As a community in The Bahamas we believe that a marriage must and should be and is between a man and a woman.”⁶⁷ However, Laing’s position stood in stark contrast to the sentiment offered by Deputy Prime Minister and Minister of Foreign Affairs, Brent Symonette, only a month before Laing’s statement. Symonette expressed the Bahamian support for the recently passed United Nations Resolution on LGBTI rights.⁶⁸ Symonette stated, “[We] continue to support freedom of expression and the right for people to express their opinions.”⁶⁹ To briefly conclude, Bahamian marriage laws remain heteronormative and while there are glimmers of hope for more LGBTI friendly policies, substantial roadblocks remain.

7.4 Same-Sex Marriage in Jamaica

Like The Bahamas, Jamaica’s marriage law is a patchwork of several pieces of legislation.⁷⁰ This discussion will consider the two most relevant, being the Marriage Act and the Matrimonial Causes Act.⁷¹ Like the Marriage Acts of neighboring Caribbean countries, Jamaica’s Marriage Act is largely gender-neutral.⁷² However, the Matrimonial Causes Act enumerates the homosexuality of a couple as a ground for nullifying the marriage:

4(1) Decrees of nullity of marriage may be pronounced by the Court on the ground that the marriage is void on any of the following grounds, that is to say-

...

⁶⁶*The FNM Attempted to Make Same Sex Marriage Legal Last Night in the House*, Bahamas Press, Jul. 8, 2011.

⁶⁷Chester Robarbs, *Government against gay marriages*, The Nassau Guardian, Jul. 8, 2011.

⁶⁸*UN rights body hits out against violence based on sexual orientation*, UN News Center, Jun. 17, 2011.

⁶⁹Juan McCartney, *Bahamas backs gay rights*, The Nassau Guardian, Jun. 18, 2011.

⁷⁰Marriage Act, 1897, Cap237 (Jamaica) (available at <http://www.moj.gov.jm/sites/default/files/laws/Marriage%20Act.pdf>); Maintenance Act, 2005 (Jamaica) (available at <http://www.moj.gov.jm/sites/default/files/laws/Maintenance%20Act.pdf>); Muslim Marriage Act, 1957 (Jamaica) (available at <http://www.moj.gov.jm/sites/default/files/laws/Muslin%20Marriage%20Act.pdf>); Property (Rights of Spouse) Act, 2006 (Jamaica) (available at <http://www.moj.gov.jm/sites/default/files/laws/Property%20%28Rights%20of%20Spouse%29%20Act.pdf>); Deceased Wife’s Sister or Brother’s Widow Act, 1914 (Jamaica).

⁷¹Marriage Act, 1897, Cap 237 (Jamaica) (available at <http://www.moj.gov.jm/sites/default/files/laws/Marriage%20Act.pdf>); Matrimonial Causes Act, 1989 (Jamaica) (available at <http://www.moj.gov.jm/sites/default/files/laws/Matrimonial%20Causes%20Act.pdf>)

⁷²Maintenance Act, 2005 (Jamaica) (available at <http://www.moj.gov.jm/sites/default/files/laws/Maintenance%20Act.pdf>)

*(d) the parties to the marriage were, at the time of the marriage, of the same sex.*⁷³

In 2011, Jamaica dug its heels further in with the passage of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act. According to Section 18 of the Charter, marriage is limited to heterosexual couples. Section 18 states:

18(1) Nothing contained in or done under any law in so far as it restricts

- (a) marriage; or
- (b) any other relationship in respect of which any rights and obligations similar to those pertaining to marriage are conferred upon persons as if they were husband and wife,

to one man and one woman shall be regarded as being inconsistent with or in contravention of the provisions of this Chapter.

(2) No form of marriage or other relationship referred to in subsection (1), other than the voluntary union of *one man and one woman* may be contracted or legally recognized in Jamaica.⁷⁴

In light of the hostile sociocultural and legislative atmosphere surrounding LGBTI rights in Jamaica, it is unsurprising that same sex marriage fails to make the advocacy agenda. With astonishing levels of homophobic and transphobic violence as well as firmly grounded and reiterated anti-sodomy laws, Jamaican LGBTI rights advocates have their proverbial hands full, and same sex marriage is likely a long way down the road.

7.5 Same Sex Marriage in Trinidad and Tobago

Trinidad and Tobago's marriage regulations also consist of a host of marriage laws.⁷⁵ Most relevant for our discussion of same sex marriage are Trinidad's Marriage Act and Matrimonial Proceedings and Property Act. Trinidad's Marriage Act is also drafted in deceptively gender-neutral terms, using alternative phrases such as "he or she" throughout the legislation.⁷⁶ However, Trinidad's Matrimonial Proceedings and Property Act state, under paragraph 13, titled "Nullity, Judicial Separation and Presumption of Death":

⁷³Matrimonial Causes Act, 1989 (Jamaica) (available at <http://www.moj.gov.jm/sites/default/files/laws/Matrimonial%20Causes%20Act.pdf>). Emphasis added.

⁷⁴The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 (Jamaica). Emphasis added.

⁷⁵*Including* Muslim Marriage and Divorce Act, 1961, Cap 45:02 (Trinidad and Tobago) (available at http://rgd.legalaffairs.gov.tt/laws2/alphabetical_list/lawspdfs/45.02.pdf; Hindu Marriage Act, 1945, Cap 45:03 (Trinidad and Tobago) (available at http://rgd.legalaffairs.gov.tt/laws2/alphabetical_list/lawspdfs/45.03.pdf)

⁷⁶Marriage Act, 1923, Cap 45:01 (Trinidad and Tobago) (available at http://rgd.legalaffairs.gov.tt/laws2/alphabetical_list/lawspdfs/45.01.pdf)

13. (1) A marriage which takes place after the commencement of this Act shall be void on the following grounds only:

...

(c) *that the parties are not respectively male and female.*⁷⁷

Also, in its 1998 Cohabitation Relationships Act, Trinidad expressly reserves cohabitation benefits for heterosexual couples. Under the Act, “A man and a woman who are not married to each other may enter into a cohabitation agreement or a separation agreement for the purpose of facilitating their affairs under this Act.”⁷⁸ According to the legislative history, the Act’s purported purpose was “redress some of the injustices and hardships caused when parties to common-law unions do not recognize their obligations to each other.”⁷⁹ Nowhere in the legislative discussion, does the legislature consider extending these benefits to same sex couples.⁸⁰

Although Trinidadian LGBTI activists have not yet lobbied aggressively for same sex marriage, they will likely find a key ally in the current administration.⁸¹ Prime Minister, Kamla Persad-Bissessar has vowed to end discrimination against LGBTI persons.⁸² Speaking in regard to the country’s immigration law, which currently bars the entry of homosexuals, Persad-Bissessar addressed the issue as a human rights concern and emphasized the importance of equality under law.⁸³

7.6 Anti-Sodomy Laws of the Caribbean: The Colonial Legacy

The Caribbean’s amenability or resistance to same sex marriage must be considered in light of other legal spheres in which the rights of LGBTI communities are implicated, particularly the region’s anti-sodomy statutes.

The uphill legal battle for LGBTI rights in the Commonwealth Caribbean stems largely from the region’s colonial history, which left behind egregious anti-sodomy

⁷⁷Matrimonial Proceedings and Property Act, 1972, Cap 45:51 (Trinidad and Tobago) (available at http://rgd.legalaffairs.gov.tt/laws2/alphabetical_list/lawspdfs/45.51.pdf). Emphasis added.

⁷⁸Cohabitation Relationships Act, 1998, Cap 45:55 (Trinidad and Tobago) (available at <http://www.ttparliament.org/legislations/a1998-30.pdf>)

⁷⁹Parliamentary Legislative Session, Jun. 12, 2008 (Trinidad and Tobago) (available at <http://www.ttparliament.org/hansards/hh19980612.pdf>)

⁸⁰*Ibid.*

⁸¹Gyasi Gonzales and Julien Neaves, *Govt to make decision on gay and lesbian marriages*, Trinidad Express, May 11, 2012.

⁸²Yvonne Baboolal, *PM promises rights for gays in gender policy*, Trinidad and Tobago Guardian Online, Dec. 18, 2012.

⁸³*Ibid.*

laws.⁸⁴ These British imperial laws are therefore a key point of reference when discussing sexual rights in the region.

During its colonial rule, the British imperial power imposed a range of laws to govern its territories, including anti-sodomy laws. Section 377 of the British Penal Code proscribes “unnatural offences.”⁸⁵ Under this section, “Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for term which may extend to 10 years, and shall also be liable to fine.”⁸⁶

Section 377 served as a model for British territories beyond the Caribbean, including Africa, Asia, and the Pacific Islands.⁸⁷ Although the domestic iterations of Section 377 varied textually and substantively, many mandated capital punishment for consensual same sex relations.⁸⁸

Despite gaining independence from the British rule, many Commonwealth nations retain vestiges of Section 377 in their domestic jurisprudence. The next few paragraphs describe what remains of the colonial law in the Commonwealth Caribbean, first looking at the three featured nations, The Bahamas, Jamaica, and Trinidad and Tobago, then turning attention to the Independent Commonwealth Caribbean, and finally the British Overseas Territories.

7.6.1 Anti-Sodomy Laws in the Bahamas, Jamaica, and Trinidad and Tobago

In 1991, The Bahamas repealed its anti-sodomy laws substantially. Prior to 1991, all same sex activity was criminal *per se*. Since the repeal, only public same sex conduct and same sex conduct between an adult and a minor are criminalized under Section 16 of the Bahamian Sexual Offences and Domestic Violence Act.⁸⁹

⁸⁴In fact, worldwide, colonial influences are largely to blame for homophobic legislation that persists today. As of 2008, more than 80 nations criminalized consensual homosexual conduct and more than half of these countries inherited their anti-sodomy laws from former colonial powers Human Rights Watch, *This Alien Legacy: The Origins of “Sodomy” Laws in British Colonialism* 5 (December 2008).

⁸⁵Human Rights Watch, *This Alien Legacy: The Origins of “Sodomy” Laws in British Colonialism* 18 (December 2008).

⁸⁶Bart Rwezaura, *To Be or Not To Be: Recognition of Same-Sex Partnerships in Hong Kong*, 34 *Hong Kong L. J.* 557, 564 n. 38 (2004).

⁸⁷Bart Rwezaura, *To Be or Not To Be: Recognition of Same-Sex Partnerships in Hong Kong*, 34 *Hong Kong L. J.* 557, 564 n. 38 (2004).

⁸⁸*Ibid.*

⁸⁹Sexual Offences and Domestic Violence Act, 2006, Cap 99 (The Bahamas).

Section 13 of Trinidad and Tobago's Sexual Offences Act defines the offence of buggery as, "sexual intercourse per anum by a male person with a male person or by a male person with a female person." Buggery is punishable by life imprisonment if committed by an adult upon a minor; by 25 years if committed between two adults; and 5 years if committed by a minor.⁹⁰

Sections 76, 77, and 79 of the Jamaican Offences Against the Person Act criminalize buggery, defined as consensual sex between adult men.⁹¹ The offense is punishable by imprisonment with hard labor for up to 10 years. Attempts to commit buggery are also punishable by up to 7 years, with or without hard labor. These homophobic laws were further entrenched in 2011, when Jamaica passed the Charter of Fundamental Rights and Freedoms to replace the Jamaican Bill of Rights. Section 13(12) of the Charter shelters the anti-sodomy laws from constitutional challenges. The Section states:

(12) Nothing contained in or done under the authority of any law in force immediately before the commencement of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, relating to

- (a) *sexual offences*; (emphasis added)
- (b) obscene publications; or
- (c) offences regarding the life of the unborn,

shall be held to be inconsistent with or in contravention of the provisions of this Chapter.⁹²

Therefore, as was the case with same sex marriage in Jamaica, opposition to same sex sexual conduct between consenting adults is steadfast and vociferous.

7.6.2 *Anti-Sodomy Laws in the Broader Independent Commonwealth Caribbean*

Consensual sexual activity between same sex adults continues to be criminalized in many Commonwealth Caribbean countries. However, the language and exact nature of criminal offenses does vary from state to state. For example, Antigua and Barbuda, Dominica, Guyana, Jamaica, St. Kitts and Nevis, St. Lucia, and St. Vincent and the Grenadines criminalize consensual same sex sexual activity between men,

⁹⁰Sexual Offences Act, 1986, Cap 11:28 (Trinidad and Tobago) (available at http://rgd.legalaffairs.gov.tt/laws2/alphabetical_list/lawspdfs/11.28.pdf)

⁹¹Sexual Offences Act, 2009 (Jamaica) (available at http://www.japarliament.gov.jm/attachments/341_The%20Sexual%20Offences%20Act,%202009.pdf)

⁹²The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 (Jamaica).

with no mention of women. Belize, Grenada, and Trinidad and Tobago criminalize all same sex sexual activity, between men and women.⁹³

Another distinction exists insofar as the laws of some countries proscribe anal sex between men, while others proscribe anal sex between any two persons, of the same or opposite sex. For example, St. Lucia criminalizes anal sex between men. Section 133 of the St. Lucian Criminal Code defines buggery as, “sexual intercourse per anus by a male person with another male person.” The offence is punishable by imprisonment for life if committed with force and without consent and by 10 years in all other cases. Attempt to commit buggery is punishable by imprisonment for 5 years.⁹⁴

By comparison, Antigua and Dominica criminalize anal sex between both same sex and opposite sex couples. Under Section 12(1) of Antigua and Barbuda’s Sexual Offences Act, “A person who commits buggery is guilty of an offence and is liable on conviction to imprisonment.”⁹⁵ The offense is punishable by life imprisonment if committed by an adult with a minor; 15 years if committed between two adults; and 5 years if committed by a minor. The Act defines buggery as “sexual intercourse per anum by a male person with a male person or by a male person with a female person.”⁹⁶

Under Article 16 of Dominica’s Sexual Offences Act, buggery is defined as “sexual intercourse per anum” between two males or between a male and a female. Buggery is criminalized and punishable by 25 years if committed by an adult on a minor; 10 years if committed between two adults; and 5 years if committed by a minor. Dominican judges are also permitted to order psychiatric treatment for those convicted under this law. Attempts to commit buggery are also criminalized under the Dominican law.⁹⁷

Other anti-sodomy laws include Section 435 of Grenada’s Criminal Code, which defines an unnatural crime as “sexual intercourse per anum.”⁹⁸ The unnatural crime is punishable by imprisonment for 10 years. In St. Christopher and Nevis (St. Kitts and Nevis), under Section 56 of the Offences Against the Person Act, buggery is punishable by up to 10 years imprisonment, with or without hard labor. Attempts are also punishable by up to 4 years imprisonment, with or without hard labor.⁹⁹ Same

⁹³AIDS Free World, *Unnatural Connexion: Creating Societal Conflict Through Legal Tools*, 17 (2004).

⁹⁴Criminal Code, 2004, Cap 273 (St. Lucia) (available at <http://www.rslpf.com/site/criminal%20code%202004.pdf>)

⁹⁵Sexual Offences Act, 1995 (Antigua and Barbuda) (available at <http://laws.gov.ag/acts/1995/a1995-9.pdf>)

⁹⁶*Ibid.*

⁹⁷Sexual Offences Act, 1998 (Dominica) (available at <http://www.dominica.gov.dm/laws/1998/act1-1998.pdf>)

⁹⁸Criminal Code, 1958, Cap 76 (Grenada).

⁹⁹AIDS Free World, *Unnatural Connexion: Creating Societal Conflict Through Legal Tools*, 62 (2004).

sex conduct (buggery) is criminalized under Section 146 of the Criminal Code of St. Vincent and the Grenadines and punishable by up to 10 years imprisonment.¹⁰⁰

7.6.3 *Anti-Sodomy Laws in the British Overseas Territories (Anguilla, British Virgin Islands, Cayman Islands, Montserrat, and Turks and Caicos)*

In 2000, in an effort to comply with its own international human rights treaty obligations, Britain called on its Overseas Territories (Anguilla, British Virgin Islands, Cayman Islands, Montserrat, and Turks and Caicos) to repeal their anti-sodomy laws.¹⁰¹ British Governor, Roger Cousins, explained, “We simply can’t be seen to have territories with laws that violate these agreements,”¹⁰² referring to Britain’s human rights obligations under various international agreements. Of the five territories, the British Virgin Islands was the only to comply. Anguilla, the Cayman Islands, Montserrat, and Turks and Caicos snubbed the request and held firm to their colonially implanted anti-sodomy laws. In 2001, after an exhausting diplomatic effort, the United Kingdom Privy Council finally issued a unilateral order decriminalizing private homosexual activities between consenting adults in these territories.¹⁰³

7.7 Regional Jurisprudence Around LGBTI Rights

The regional legal systems of the Commonwealth Caribbean do have some persuasive value in the Caribbean and are therefore worth discussing. This section explores LGBTI rights in the Inter-American Human Rights system, the Caribbean Court of Justice and the United Kingdom Privy Council.

7.7.1 *Inter-American Court and Commission on Human Rights Jurisprudence*

The Inter-American Court of Human Rights (hereafter “Inter-American Court”) and the Inter-American Commission on Human Rights (hereafter “Inter-American Commission”) constitute the judicial arm of the Organization of American States

¹⁰⁰ *Ibid.*

¹⁰¹ *Scrap Caribbean Anti-Gay Laws*, CBS News, Feb. 11, 2009.

¹⁰² *Ibid.*

¹⁰³ *Sexuality and the law*, Jamaica Gleaner, Jul. 25, 2001.

(OAS). The Inter-American Commission may accept petitions and issue rulings for all the Commonwealth Caribbean nations because they are all member states of the OAS, with the exception of the British Overseas Territories (Anguilla, British Virgin Islands, Cayman Islands, Montserrat, and Turks and Caicos).¹⁰⁴ However, the Inter-American Court's jurisdiction is more limited. The Court can only be referred cases arising from states that have ratified the American Convention on Human Rights (hereafter "American Convention"). In the Commonwealth Caribbean, this includes Barbados and Trinidad and Tobago. Note, however, that Trinidad and Tobago withdrew from the American Convention and the Court is therefore only competent to examine petitions related to events that occurred between 1991 and 1999.¹⁰⁵ Although the Inter-American Commission and Inter-American Court lack binding enforcement mechanisms, the jurisprudence of both bodies are widely considered to be effective shaming mechanisms. The persuasion of these bodies is therefore worth discussing.

The Inter-American Commission is unambiguously opposed to the Caribbean's anti-sodomy laws and general homophobic disposition. In 2011, the Inter-American Commission established the Unit on the Rights of Lesbian, Gay, Bisexual, Trans, and Intersex (LGBTI) Persons.¹⁰⁶ The unit was established in recognition of threats and incidents of murder, rape, and other forms of violence and discrimination against LGBTI persons in the region.¹⁰⁷ Although the Court has not issued any rulings pertaining to LGBTI rights in the Caribbean, it has issued such rulings pertaining to Latin America and the Inter-American Commission has also issued press releases concerning the welfare of LGBTI communities in the Caribbean.

With regard to the Inter-American Court's rulings, the landmark 2012 Atala case is directly relevant. The case arose out of a Chilean court's denial of custody to Karen Atala of her three daughters based on Atala's sexual orientation. The Inter-American Court ruled for the first time that sexual orientation is a protected class and discrimination based on sexual orientation is barred under the American Convention on Human Rights.¹⁰⁸ In 1999, the Inter-American Commission issued an admissibility ruling in the case of Marta Lucia Alvarez Giraldo. Giraldo alleged that her personal integrity, honor, and equality were violated when Colombian prison authorities denied her intimate visits because of her sexual orientation. The Commission found the petition to be admissible.¹⁰⁹ Again, in the 2011 admissibility determination concerning Angel Alberto Duque, the Commission considered the

¹⁰⁴Petition and Case System: Informational Brochure, Organization of American States (2010).

¹⁰⁵Petition and Case System: Informational Brochure, Organization of American States (2010).

¹⁰⁶*IACHR Creates Unit on the Rights of Lesbian, Gay, Bisexual, Trans, and Intersex Persons*, Organization of American States, Nov. 3, 2011.

¹⁰⁷*IACHR Creates Unit on the Rights of Lesbian, Gay, Bisexual, Trans, and Intersex Persons*, Organization of American States, Nov. 3, 2011.

¹⁰⁸*Karen Atala and Daughters v. Chile*, (IACHR Sept. 17, 2010).

¹⁰⁹*Marta Lucía Álvarez Giraldo v. Colombia* (IACHR My 4, 1999) (Admissibility Report).

denial of social security benefits to the same sex partner of a deceased man. Some of the claims brought were deemed admissible, others were not.¹¹⁰

At the conclusion of the 140th sessions in 2010, the Inter-American Commission issued a press release expressing deep concern for the “systematic discrimination and violence against lesbian, gay, bisexual, trans, and intersex persons (LGBTI) in the region. Most particularly, the IACHR [was] concerned about the situation in those countries of the English-speaking Caribbean where the conduct of LGBTI persons is criminalized, through laws in effect that impose criminal sanctions ranging from 10 years in prison or forced labor to life imprisonment for consensual sexual conduct between adults of the same sex.”¹¹¹ The Commission further called for a repeal of these laws.¹¹²

To briefly summarize, the Inter-American Commission has not issued any reports directly addressing LGBTI rights in the Caribbean and the Inter-American Court lacks jurisdiction over the vast majority of the Commonwealth Caribbean. However, the Court and Commission’s pro-LGBTI persuasion may offer some hope.

7.7.2 The United Kingdom Privy Council and the Caribbean Court of Justice

The disposition of the United Kingdom Privy Council and the Caribbean Court of Justice (hereafter “Caribbean Court”) are relevant in light of their binding appellate functions in the Caribbean.

As an initial matter, the institutional history and functional similarities between the two bodies are important for understanding the role these courts assume in the Caribbean. The United Kingdom Privy Council sits in London, England, as part of the House of Lords. Prior to the establishment of the Caribbean Court, the Privy Council was the final court of appeal for Commonwealth countries.¹¹³ The Privy Council is governed by domestic legislation in the United Kingdom as well as the laws of the country or territory from which an appeal is brought.¹¹⁴

¹¹⁰*Ibid.*

¹¹¹*IACHR Concludes its 140th Period of Sessions*, Inter-American Commission on Human Rights, Nov. 5, 2010.

¹¹²*Ibid.*

¹¹³Website of the Judicial Committee of the Privy Council (available at <http://www.jcpc.gov.uk/>) (last visited Feb. 3, 2013).

¹¹⁴*Ibid.*

In 2001, the Caribbean Court was established through the Agreement Establishing the Caribbean Court of Justice.¹¹⁵ The agreement took effect upon the signing of twelve Caribbean states.¹¹⁶ The Caribbean Court grew out of a regional sentiment desiring greater autonomy from the former colonial powers.¹¹⁷ For many, the United Kingdom Privy Council symbolized a remnant of colonialism and so the Caribbean Court represented a sort of judicial liberation from the British Empire.¹¹⁸ However, in 2004, the Jamaican legislature passed two pieces of legislation, the Judicature Act and the Caribbean Court of Justice Act, both intended to strip the Privy Council of its appellate functions over the island and give domestic effect to the Caribbean Court. In a 2005 decision, the Privy Council itself deemed the acts to be unconstitutional and therefore void.¹¹⁹ Even as recently as 2011, Jamaican Prime Minister Portia Simpson Miller vowed to rid Jamaicans of “judicial surveillance from London” by replacing the Privy Council with the Caribbean Court.¹²⁰

Therefore, it is clear that a battle of attrition has ensued between the competing appellate powers of the Privy Council and the Caribbean Court. Although the Caribbean Court was established to supplant the Privy Council, the Privy Council retains some judicial authority over the Commonwealth Caribbean. Accordingly, the jurisprudence of both courts are discussed below.

7.7.2.1 Privy Council Jurisprudence

The Privy Council has taken a clear opposition to the Commonwealth’s anti-gay legislations. Take for example the aforementioned orders for the British Overseas Territories to repeal their anti-gay laws, which came from the Privy Council.¹²¹ Also, in a 2009 decision, appealed from Gibraltar, *Rodriguez v Minister of Housing of the Government & Anor*, the Privy Council noted the distinction between heterosexual and homosexual couples to be illegitimate and inconsistent with the

¹¹⁵Website of the Caribbean Court of Justice (available at <http://www.caribbeancourtjustice.org/court-instruments>)(last visited January 22, 2013).

¹¹⁶*Ibid.* (Signatories to the Agreement Establishing the Caribbean Court of Justice include Antigua & Barbuda; Barbados; Belize; Dominica; Grenada; Guyana; Jamaica; St. Kitts & Nevis; St. Lucia; St. Vincent & The Grenadines; Suriname; and Trinidad & Tobago).

¹¹⁷Jamaicans for Justice, Brochure on the Privy Council and the Proposed Caribbean Court of Justice, June 5, 2006 (available at <http://www.jamaicansforjustice.org>) (last visited Feb. 3, 2013).

¹¹⁸See for example Leonard Birdsong, *Formation of the Caribbean Court of Justice: the Sunset of British Colonial Rule in the English Speaking Caribbean*, 36 U. Miami Inter-Am. L. Rev. 197, 200 (Winter-Spring 2005).

¹¹⁹*Independent Jamaica Council for Human Rights (1998) Limited and Others v. Hon. Syringa Marshall- Burnett and Attorney General of Jamaica*, Privy Council Appeal No. 41 of 2004 (Feb. 3, 2005).

¹²⁰Owen Bowcott, *Jamaica’s colonial-era ties to UK legal system continue to fray*, The Guardian, Jan. 6, 2012.

¹²¹*Sexuality and the law*, Jamaica Gleaner, Jul. 25, 2001.

right of homosexual couples to enjoy respect for private life.¹²² In issuing its decision, the Council referred to the landmark European Court of Human Rights case, *Dudgeon v. United Kingdom*.¹²³

7.7.2.2 Caribbean Court Jurisprudence

As of this publication, there appears to be no litigation regarding sexual minorities in the Caribbean Court. However, Jamaican LGBTI activist, Maurice Tomlinson, has initiated challenges to Belize's and Trinidad's discriminatory immigration laws in the Caribbean Court. The immigration laws of both countries prohibit the entry of homosexuals.¹²⁴ This will likely be the first opportunity for the Caribbean Court to weigh in on the issue of LGBTI rights.

Moving forward, LGBTI rights advocates may find limited redress in the Privy Council, in light of its waning influence over the Commonwealth. The Inter-American Commission may offer persuasive, though non-binding influence, and the Inter-American Court is simply a non-starter for all Commonwealth states except Barbados. Therefore, the Caribbean Court of Justice may be the most promising avenue for binding judicial recourse. However, the Caribbean Court is relatively young and therefore somewhat unpredictable.

7.8 Limitations and Conclusion

This discussion of marriage, anti-sodomy, and other relevant laws demonstrates the broad and diverse range of progress for LGBTI rights within the Commonwealth Caribbean. Some states have progressed remarkably, most notably the French and Dutch Caribbean. In other states, the possibility of recognizing same sex marriage appears remote and must certainly be preceded by an overhaul of anti-sodomy laws, which outlaw homosexuality itself.

What is clear, however, is the importance of exhausting all available avenues for change, including legislative reform, litigation in domestic and regional courts, and community education. With rampant discrimination plaguing the region's LGBTI communities, advocates must exploit all windows of opportunity to effectuate progress.

¹²²*Nadine Rodriguez v. Minister of Housing of the Government and The Housing Allocation Committee*, Privy Council Appeal No 0028 of 2009 (Dec. 14, 2009).

¹²³*Dudgeon v United Kingdom* (1981) 4 EHRR 149.

¹²⁴*Gay Activist Vows To Fight Belize's Immigration Law*, Jamaica Gleaner, Dec. 27, 2012.

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