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# Jamaica's Buggery Law: The Time Is Ripe to Revisit the Law

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*“You’re more eager for progress that comes not by holding down any segment of society, but by holding up the rights of every human being, regardless of what we look like, or how we pray, or who we love. You care less about the world as it has been, and more about the world as it should be and can be.”*

**– President Barack Obama**

*Town Hall with Young Leaders of the Americas Kingston, Jamaica*

## **ABSTRACT**

*Difference is as natural as the air we breathe and there are infinite variety under the sun, thus respect and acknowledgement ought to be given to every human irrespective of their ideals and orientation. Denying individuals their right to express themselves based on their sexual orientation is an affront to the dignity of a human being and a violation of core human rights. Laws must be drafted with the understanding that individuals should not be penalized for their right to love whom they choose. This paper analyzes Jamaica's Buggery Law through the lens of the New Haven School of Thought, also known as Policy-Oriented Jurisprudence. Using the New Haven School of Jurisprudence, this paper aims to diagnose critical social problems and prescribe possible solutions to guarantee a safer society for individuals who identify as LGBTQIA.*

## **KEYWORDS**

*Prison, Inmates, Punishment, Human Rights, Undertrial Prisoners*

## 1. DELIMITATION OF THE PROBLEM

Queer relationships upend the gender order in hegemonic heterosexual societies like Jamaica, where opposite-sex relations and attraction are accepted as the standard and modality by which laws and policies governing sexual and reproductive health are created. We can do better. Jamaica has had a long-standing history of systemic homophobia and transphobia, which, inherently, has a ripple effect on the negative general attitudes of society towards LGBT people.

Relatedly, as a rule, Jamaican males vigorously reject performances that might make them appear feminine, weak or unmanly.<sup>1</sup> And since patriarchy, sexism and homophobia operate in tandem to frame males' performances of their heterosexual hegemonic masculinities, they will make every attempt to avoid labels such as "fag" or "sissy," since these perceived socially derogatory terms mark them as "failed males."<sup>2</sup>

The criminalization of homosexuality in Jamaica dates back to the 1864 Offences Against the Person Act.<sup>3</sup> Jamaica's laws do not criminalize the status of being homosexual but rather outlaw conduct. The Jamaican Offences Against the Person Act (also referred to as the "buggery" law) prohibits anal sex between men,

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<sup>1</sup> Jamaican terms such as battyman, batty boi, chi-chi man, fish, sissy, pu\*\*y and fag are used to describe men who are perceived to be homosexuals or feminine.

<sup>2</sup> Delores E. Smith, (2018). "Homophobic and transphobic violence against youth": The Jamaican context, *International Journal of Adolescence and Youth*, 23:2, 250-258, DOI: 10.1080/02673843.2017.1336106. Available at: <https://doi.org/10.1080/02673843.2017.1336106>.

<sup>3</sup> Jamaica's legal system is based on English common law, which was adopted through a process called "reception". This process refers to the transplantation or imposition of one country's legal system onto another country's way of life and legal system, due to the process of colonization, hence Jamaica received the British Buggery Act 1533. See <https://www.caribjournal.com/2013/05/24/a-history-of-jamaicas-constitution/>.

in public or in private, punishable by 10 years in prison with hard labor.<sup>4</sup> The law also makes “gross indecency” between two men, the acts of which are not defined, a misdemeanor punishable by 2 years in prison.<sup>5</sup> Moreover, there is no law which prevents discrimination against an individual on the basis of his or her sexual orientation, gender identity, or gender expression.<sup>6</sup> There is no legislation addressing hate crimes in Jamaica.

Jamaican laws provide police great discretion in detaining individuals; the Offenses Against the Person Act permits a police officer to arrest without a warrant any person found “loitering” between 7 p.m. and 6 a.m. whom the police constable has “good cause<sup>7</sup> to suspect of having committed or being about to commit any felony” proscribed by the Act.<sup>8</sup> Jamaican laws are also used as a pretext by police to detain men who do not conform to gender roles, and women who have sex with women are also targeted for arrest.<sup>9</sup> There are accounts that the laws are actively enforced against men engaged in homosexual behavior.<sup>10</sup> Thus, members of the LGBTI<sup>11</sup> community face arrest, detention, and prosecution for their sexuality under the law.<sup>12</sup>

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<sup>4</sup> Jamaica Offenses Against the Person Act (1864), Section 76.

<sup>5</sup> Jamaica Offenses Against the Person Act (1864), Section 79.

<sup>6</sup> Jamaica Gleaner, “*Laws of Eve - Do we really have gay rights in Jamaica?*”, May 26, 2008. Available at: <https://old.jamaica-gleaner.com/gleaner/20080526/flair/flair3.html>.

<sup>7</sup> Good cause is a very low threshold because it is in the discretion of the police officer to make such a finding. Police officers are general anti-gay and therefore this leads to police officers having too much power.

<sup>8</sup> Jamaica Offenses Against the Person Act (1864), Section 80; See also, Human Rights Watch, “*Hated to Death: Homophobia, Violence, and Jamaica’s HIV/AIDS Epidemic*,” November 2004 at 22. Available at: <http://www.hrw.org/en/node/11894/section/1>.

<sup>9</sup> Human Rights Watch, “*Hated to Death: Homophobia, Violence, and Jamaica’s HIV/AIDS Epidemic*,” November 2004 at 25. Available at: <http://www.hrw.org/en/node/11894/section/1>.

<sup>10</sup> Id.

<sup>11</sup> Lesbian, Gay, Bisexual, Transgender, and Intersex.

<sup>12</sup> Human Rights Watch, “*Hated to Death: Homophobia, Violence, and*

The folklore of Jamaican culture points to a direct relationship between slavery and the negative attitudes towards slavery held by Jamaicans. Rev John Hardy, a minister of the New Testament Church of God in Kingston, posited that “the black slaves and most of their descendants developed this hatred for homosexual activities because of the painful experiences that their forefathers endured during slavery.”<sup>13</sup> He further posits that, “it is alleged that if and when a white slave master suspected that black male slaves were showing any sign of resistance to their enslavement, the most cruel and brutal treatment would be meted out to them.”<sup>14</sup> He specifically refers to historical claims that slaves were punished by being forcibly sodomized by their British masters, other slaves or implements.<sup>15</sup> It is just about 170-odd years since the blacks in Jamaica have been freed from slavery, and the painful memory of the colonial masters’ sodomization still lingers.<sup>16</sup> It may take another 400 to 500 years before Jamaicans become more tolerant to homosexual activities.<sup>17</sup>

On the other hand, because the texture and the fabric of the Jamaican society perspective on homosexuality was built on planters demasculinizing men and subjecting them to being less of a man, real liberals would realize it is meaningless to vilify Jamaicans for attitudes that Britain created.<sup>18</sup> But the vilification of Jamaican homophobia implies more than a failure to accept

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*Jamaica’s HIV/AIDS Epidemic*,” November 2004 at 25. Available at: <http://www.hrw.org/en/node/11894/section/1>.

<sup>13</sup> PinkNews, “*Slave owners responsible for Jamaican homophobia*” Jun 19, 2007. Available at: <https://www.thepinknews.com/2007/06/19/slave-owners-responsible-for-jamaican-homophobia/>

<sup>14</sup> Id.

<sup>15</sup> Mamba online.com, “*Slavery at root of Jamaican Homophobia?*” June 20, 2007. Available at: <https://www.mambaonline.com/2007/06/20/slavery-at-root-of-jamaican-homophobia/>.

<sup>16</sup> Id.

<sup>17</sup> Id.

<sup>18</sup> The Guardian, “*Their homophobia is our fault*” January 5, 2005. Available at: <https://www.theguardian.com/world/2005/jan/05/gayrights.comment>

postcolonial politics.<sup>19</sup> It is a failure to recognize 400 years of Jamaican history, starting with the sodomy of male slaves by their white owners as a means of humiliation.<sup>20</sup> Slavery laid the foundations of homophobia, and its legacy is still unmistakable in the precarious, overexaggerated masculinity of many men in Jamaica.<sup>21</sup>

These strong resentment is still present and perhaps changes eliminating the buggery law will not be achieved in the near future.<sup>22</sup> According to 2012 data 88 % of respondents believe that male homosexuality is immoral and nearly 84 % believe that female homosexuality is immoral.<sup>23</sup> More than 75 % of respondents are against repealing the “buggery” law and 65 % oppose amending the Charter of Fundamental Rights and Freedoms to protect the rights of members of the LGBT community.<sup>24</sup> In 2014, a lead story in the Jamaica Gleaner noted that majority of Jamaicans resolute on keeping buggery law intact. The findings of the latest Gleaner-commissioned Bill Johnson poll revealed that 91 % of Jamaicans believe lawmakers should make no attempt to repeal the controversial buggery law, which makes it a criminal offence for persons to engage in anal sex.<sup>25</sup> The survey was conducted on September 6-7 and 13-14, with 1,208 residents of Jamaica and has a margin of error of plus

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<sup>19</sup> Id.

<sup>20</sup> Id.

<sup>21</sup> Id.

<sup>22</sup> The statistics cited lead to the conclusion that if and when a referendum is carried out to change the law, it seems very unrealistic that a referendum would be successful to change the law since majority of Jamaicans are in support of changing the law. Therefore, government intervention is necessary and perhaps it should not be left up to the people to decide.

<sup>23</sup> Human Rights First, *LGBT Issues in Jamaica*. Available at: <https://humanrightsfirst.org/wp-content/uploads/2022/11/Jamaica-LGBT-Fact-Sheet.pdf>.

<sup>24</sup> Id.

<sup>25</sup> Jamaica Gleaner, “*Jamaica And The ‘Buggery Law’*”, October 6, 2014. Available at: <http://digjamaica.com/m/blog/jamaica-and-the-buggery-law/>.

or minus three per cent.<sup>26</sup>

Similarly, the Latin American Public Opinion Poll noted that overall Jamaica is becoming less tolerant of gays and their rights as human beings.<sup>27</sup> How else could one explain a fall-off in support for the right of homosexuals to run for office in Jamaica, from 19.8% in 2006 to 16.0% in 2014?<sup>28</sup> This despite global trends in support for the gay community. On a scale of 1 to 10, with ‘strongly approve’ and ‘strongly disapprove’ as extreme opposites, a stunning 69.1 % of Jamaicans ‘strongly disapprove’ of homosexuals’ right to run for office, while a mere 5.3% ‘strongly approve’.<sup>29</sup> These views were buttressed by surveys showing strong support for the buggery law emerged from two surveys conducted March 12-15, 2020 and July 9-12, 2020 by the veteran pollster among 1,200 voting-age Jamaicans across the country.<sup>30</sup> The polls have a sampling error of plus or minus 2.5 per cent. When the pollsters asked Jamaicans to state whether law should be changed or not, 93 per cent of respondents in both polls said no.<sup>31</sup>

The view towards homosexuality in the political area is centered on part lines.<sup>32</sup> In an interview with the British

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<sup>26</sup> Id.

<sup>27</sup> Marcia Forbes Media Matters, “*Homosexuals & Human Rights in Jamaica*” March 14, 2016. Available at: <https://www.marciaforbes.com/content/homosexuals-human-rights-jamaica>.

<sup>28</sup> The article posed this question in response to former Prime Minister Bruce Golding’s statement of not allowing any ‘Gay Jamaican in his cabinet.’ See below at footnotes 28-31.

<sup>29</sup> Marcia Forbes Media Matters, “*Homosexuals & Human Rights in Jamaica*” March 14, 2016. Available at: <https://www.marciaforbes.com/content/homosexuals-human-rights-jamaica>.

<sup>30</sup> Id.

<sup>31</sup> Equal Eyes, “*Jamaica: Massive agreement with buggery law*” August 14, 2020. Available at: <https://equal-eyes.org/database/2020/8/14/jamaica-massive-agreement-with-buggery-law>.

<sup>32</sup> In Jamaica the 2 major political parties are the PNP (Peoples National

Broadcasting Corporation (BBC) on May 20, 2008, then Prime Minister Bruce Golding stated he would never appoint a cabinet minister whom he knew to be gay.<sup>33</sup> When asked if he would want to live in a Jamaica wherein it would be entirely natural for a gay person to hold a cabinet position, he responded, "I do not know that that is necessarily the direction in which I want my country to go."<sup>34</sup> In 2009 Ernest Smith, a governing-party member of Parliament, stated during a parliamentary debate that "homosexual activities seem to have taken over" Jamaica.<sup>35</sup> He described homosexuals as "*abusive*" and "*violent*," and called for a stricter law outlawing homosexual conduct between men that would impose sentences of up to life in prison.<sup>36</sup> This statement goes to the center of the issue of homosexuality in Jamaica. It should never be this free for individuals, especially those in high-ranking government positions, to be open to making such discriminatory and hateful statement.

While on the campaign trail leading up to the December 2011 general election, then opposition leader Portia Simpson Miller indicated that it was time for a review of the buggery law.<sup>37</sup> Only time will tell whether she will make good on this commitment

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Party) and the JLP (Jamaica Labor Party). The PNP is more democratic and in favor of changing the law, while the JLP is more conservative and leans toward the idea of having the law remain as is.

<sup>33</sup> GlobalVoices, "*Jamaica, Caribbean: No gays in Golding's government*", May 23, 2008 Attached at: <https://globalvoices.org/2008/05/23/jamaica-caribbean-no-gays-in-goldings-government/>. See also: The Gleaner, "*Gays out of the closet into the Cabinet*" February 22, 2020. Available at: <https://jamaica-gleaner.com/article/commentary/20200223/carolyn-cooper-gays-out-closet-cabinet>.

<sup>34</sup> Id.

<sup>35</sup> Humans Rights Watch, "*Jamaica: Condemn Homophobic Remark*", February 19, 2009. Available at: <https://www.hrw.org/news/2009/02/19/jamaica-condemn-homophobic-remarks>.

<sup>36</sup> Id.

<sup>37</sup> Portia Simpson Miller became Prime Minister in again in 2014, but no progress was made because per the constitution of Jamaica, a 2/3 majority is required to change laws and elections are rarely results in a government having a clear majority in either chamber.

to have Parliament engage in a conscience vote on whether or not to repeal the buggery act.<sup>38</sup> In an apparent push-back against pressures from some gay lobby groups and pro-gay countries that are frustrated by the slow pace at which Jamaica is moving to secure the rights of LGBT<sup>39</sup> people, Prime Minister Andrew Holness, in 2018, has appealed for respect for the Jamaican people as the issues are ventilated in the society.<sup>40</sup> Holness said that the current generation is changing and now has “a stronger view against discriminating against people.”<sup>41</sup> Holness also stated that what he would like to see is the process being further opened to bring more people further into the discussion so that everyone is protected and that the constitutional rights are guaranteed.”<sup>42</sup> But one can argue that the Holness administration is simply paying lip service to the progress of change because his administration has had 7 consecutive years of power (2016-2023), and nothing has done to stimulate change in guaranteeing protection against discrimination for LGBT individuals.

Fueling the discrimination against LGBTI individuals is attributed to the fact that there is severe underreporting and late reporting of violation and discrimination against LGBT individuals. Many incidents are not always reported to J-FLAG (Jamaican Forum for Lesbians, All-Sexual, and Gays) immediately.<sup>43</sup> The analysis of reports from J-FLAG shows that a

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<sup>38</sup> Jamaica Gleaner, “*Jamaica And The ‘Buggery Law’*”, October 6, 2014. Available at: <http://digjamaica.com/m/blog/jamaica-and-the-buggery-law/>.

<sup>39</sup> Lesbian, Gay, Bisexual, and Transgender.

<sup>40</sup> The Gleaner, “*Respect our democratic process - Holness tells gay advocates overseas*”, April 5, 2018. Available at: <https://jamaica-gleaner.com/article/lead-stories/20180419/respect-our-democratic-process-holness-tells-gay-advocates-overseas>.

<sup>41</sup> Id.

<sup>42</sup> Id.

<sup>43</sup> J-FLAG is a local human rights and social justice organization which advocates for the rights, livelihood and well-being of lesbian, gay, bisexual and transgender (LGBT) people in Jamaica.

significant number of incidents are reported several months after they were perpetrated. Between January 2012 and August 2013, for example, a total of 87 incidents were reported to J-FLAG, however, only 64.37% of them were perpetrated in that period.<sup>44</sup> There were also instances of incidents which were perpetrated in previous years and reported in the period.<sup>45</sup>

Between 2009 and 2012, there were 231 documented reports of discrimination and violence based on gender identity and sexual orientation by J-FLAG.<sup>46</sup> Discrimination in access to housing, employment, and healthcare is part of daily life for many LGBT Jamaicans. In 2013, teenager Dwayne Jones was brutally killed by a mob after attending a party dressed in feminine attire.<sup>47</sup> He was beaten, stabbed, shot, and run over by a car.<sup>48</sup> After the killing, his family would not claim his body.<sup>49</sup> Jones had dropped out of school at age 14 after he was relentlessly teased for being feminine.<sup>50</sup> The widespread violence and discrimination has forced segments of the LGBT community literally underground. Shunned by their families, some LGBT teenagers have taken to sewers to avoid attacks.<sup>51</sup>

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<sup>44</sup> The Gleaner, “*Respect our democratic process - Holness tells gay advocates overseas*”, April 5, 2018. Available at: <https://jamaica-gleaner.com/article/lead-stories/20180419/respect-our-democratic-process-holness-tells-gay-advocates-overseas>

<sup>45</sup> Equality Jamaica, “*Homophobia and Violence in Jamaica*” December 2013. Available at: <https://www.equalityjamaica.org/wp-content/uploads/2021/08/Homophobia-Violence-in-Jamaica-JFLAG-2013.pdf>.

<sup>46</sup> Id.

<sup>47</sup> Daily Mail, “*Jamaican transgender teen, 16, harassed at school, kicked out of house and beaten to death in the streets for wanting to be a woman*” August 11, 2013. Available at: <https://www.dailymail.co.uk/news/article-2389284/Dwayne-Jones-16-year-old-transgender-teen-latest-die-Jamaican-mob-violence-LGBT-community.html>.

<sup>48</sup> Id.

<sup>49</sup> Id.

<sup>50</sup> Id.

<sup>51</sup> Human Rights First, “*LGBT Issues in Jamaica*.” Available at: <https://humanrightsfirst.org/wp-content/uploads/2022/11/Jamaica-LGBT->

Bullying can have significant impacts on children in many ways: psychosomatically (headaches, stomach aches, etc.), in addition to psychological difficulties (anxiety, depression, suicidality).<sup>52</sup> Jamaican youth experience bullying in school at a disproportionate rate compared with other cultures (with one study indicating an incredibly high percentage of 93.4 % of students witnessing bullying of peers in school).<sup>53</sup> As is the case in many societies, reliable data on homophobic and transphobic violence in Jamaica are lacking (UNESCO, 2016). However, considering that school is a microcosm of society and that there is pervasive homophobia in the Jamaican society, there is good reason to assume that bullying against LGBTI students would be high. Findings from the only local national study (UNICEF, 2015) of bullying in schools that could be located, hinted at such dynamics.<sup>54</sup> In that study, 70% of students in grades 1–12 reported being bullied within the past year and when students were asked to provide a profile of peers most likely to be bullied, they noted, among other characteristics, those perceived as lesbian, gay, bisexual and trans-gendered.<sup>55</sup> That same study referenced a school that refused intervention for LGBTI bullying because of the fear of being ‘labelled’.<sup>56</sup> More pointedly, the school climate for LGBTI students was inferred when an official representative of the Jamaica Association for Guidance

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Fact-Sheet.pdf

<sup>52</sup> The Chronicle of Evidence based Mentoring, “*Bullying and its effect on mental and physical health for Jamaican teens, and how parents might be able to help*”, January 17, 2020. Available at:

<https://www.evidencebasedmentoring.org/bullying-and-its-effect-on-mental-and-physical-health-for-jamaican-teens-and-how-parents-might-be-able-to-help/>.

<sup>53</sup> Id.

<sup>54</sup> UNICEF. (2015). “*Investigating the prevalence and impact of peer abuse (bullying) on the development of Jamaica’s children*”. Available at:

[http://www.cda.gov.jm/wp-content/uploads/bullying\\_full-report\\_FINAL.pdf](http://www.cda.gov.jm/wp-content/uploads/bullying_full-report_FINAL.pdf).

<sup>55</sup> Id.

<sup>56</sup> Id.

Counsellors in Education noted the many guidance counsellors, particularly those of the Christian faith, are refusing to offer counselling to LGBTI students.<sup>57</sup>

It is instructive that LGBTI youth are up to four times more likely than heterosexual youth to seek counselling and are more likely to disclose their LGBTI status to school counsellors than to other school staff members (Jamaica, 2016). Research has also shown that 50% of LGBTI youth do not receive successful counselling intervention because of counsellors' homophobic attitudes (Jamaica, 2016).<sup>58</sup> Bullying and threats of violence is also evident in the grand scheme of things because in 2013, an LGBT Jamaican filed a case against the law, but he later withdrew the case due to threats against his safety and that of his family.<sup>59</sup> In November 2015, gay Jamaican activist and lawyer Maurice Tomlinson filed a new constitutional challenge against the law.<sup>60</sup>

The music of Jamaica has a deep-rotted influence in the perpetuation of homophobia in Jamaica. Dancehall is not just a genre of music; it is a major cultural event. A whole economy revolves around the dancehall: dancers prepare fresh looks with the help of stylists, hairdressers and tailors, while a small army of technicians, DJs and mic men are enlisted for the party itself.<sup>61</sup>

In the 1990s, Caribbean millennials saw a number of reggae

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<sup>57</sup> Delores E. Smith (2018). *Homophobic and transphobic violence against youth: The Jamaican context*, *International Journal of Adolescence and Youth*, 23:2, 250-258, DOI: 10.1080/02673843.2017.1336106. Available at: <https://doi.org/10.1080/02673843.2017.1336106>.

<sup>58</sup> Id.

<sup>59</sup> Human Rights First, *LGBT Issues in Jamaica*. Available at: <https://humanrightsfirst.org/wp-content/uploads/2022/11/Jamaica-LGBT-Fact-Sheet.pdf>.

<sup>60</sup> See also, <http://www.humanrightsfirst.org/sites/default/files/HRF-Jamaica-Report-final.pdf>.

<sup>61</sup> Financial Times, "Bye bye bigotry — does dancehall still have a homophobia problem?" January 18, 2019. Available at: <https://www.ft.com/content/cc74f254-fd44-11e8-b03f-bc62050f3c4e>.

and dancehall songs cross over from our parents' sound systems to mainstream airwaves. One of the most popular was Buju Banton's 1992 single "Boom Bye Bye,"<sup>62</sup> a track that followed in a tradition of Jamaican songs that espouse violence against queer people — and one that became lodged in the memories of queer Caribbeans, making clear that homophobia was alive and well in our homes and communities.<sup>63</sup>

Originally written when he was just 15 years old, "Boom Bye Bye" finds Banton calling for the murder and torture of "batty boys," a Jamaican patois slur for gay men (whom the star conflates with pedophiles).<sup>64</sup> The song was re-released in 1992, when Banton was 19, and became a smash hit that would follow him throughout his stratospheric rise as a dancehall artist.<sup>65</sup> Though Banton would go on to break Bob Marley's record for the most number one songs in Jamaica, the artist attracted protests from LGBTQ+ advocates throughout his career, leading him to sign a 2007 pledge called the Reggae Compassionate Act wherein he and other prominent reggae artists agreed to stop performing songs with homophobic lyrics.<sup>66</sup> Buju broke that promise, however, and continued to perform the song, attracting further protests and outcry. It took until just last year for the artist to officially remove "Boom Bye Bye" from his catalog.<sup>67</sup>

People often sing this song because of the catchy rhythm and beat, not realizing the horrendous lyrics. A perfect example of this can be seen below where Jewel, a Haiti national, recounts

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<sup>62</sup> A Jamaican term which translates to "gun shot, hence the lyrics "Boom bye bye inna batty boi head" means " a gunshot to a homosexual man's head".

<sup>63</sup> Them "Queer Caribbeans Speak Out About One of Dancehall's Most Homophobic Songs" February 26, 2020. Available at: <https://www.them.us/story/queer-caribbeans-speak-out-about-buju-banton>.

<sup>64</sup> Id.

<sup>65</sup> Id.

<sup>66</sup> Id.

<sup>67</sup> Id.

here experience.<sup>68</sup>

### **Jewel (Haiti)**

“Boom Bye Bye” was my jam when I was a kid.<sup>69</sup> It was played at my house, family get togethers — it was a staple of reggae music. Looking back, I remember that no one talked about queerness outside of the context of someone dying.<sup>70</sup> My mother tells this story about a time when her father and my aunts and uncles were driving to the village; he was pointing out gay people, trans people, drag queens, and told them, “If any of y’all end up like this, I’m going to shoot you.”<sup>71</sup> Hearing that story at age seven made me feel like I could never come out to my family. As I got older, I started to think about his choice of words and why he said “shoot,” and I instantly thought of the song, when Buju Banton sings “Boom Bye Bye to a batty boy head.”<sup>72</sup> It made me realize that if you live this life, this is what will happen to you.<sup>73</sup>

In spite of all numerous reports and calls by international organizations to repeal the Buggery Act, taking away the license that Jamaicans have to freely discriminate against LGBTI individuals, Jamaica maintains that there had been no evidence of any mob-related killing of LGBTI persons and refused to acknowledge the recommendations of the United Nations.<sup>74</sup> Furthermore, Jamaica claims that there are no violations, and the

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<sup>68</sup> Id.

<sup>69</sup> Them “Queer Caribbeans Speak Out About One of Dancehall’s Most Homophobic Songs” February 26, 2020. Available at: <https://www.them.us/story/queer-caribbeans-speak-out-about-buju-banton>.

<sup>69</sup> Id.

<sup>70</sup> Id.

<sup>71</sup> Id.

<sup>72</sup> Id.

<sup>73</sup> Id.

<sup>74</sup> See United Nations Human Rights Council, Draft Report of the Working Group on the Universal Periodic Review, Jamaica, Ninth Session, November 1-12 2010, A/HRC/WG.6/9/L.12, ¶ 31.

government keeps reiterating that they are committed to working to ensure the rights of all Jamaican's are protected? But how can this be when there are no laws to protect LGBTZ individuals in the first place?

## **2. CONFLICTING CLAIMS**

### **A. Stigma of HIV in the Medical Community**

The attitudes of many Jamaican working in the health care sector has a disdain towards providing care to MSM<sup>75</sup>. The general consensus is formed from questioning why should scares resources be wasted on homosexuals when many other vulnerable groups in society needs help. Hence, discriminatory treatment is given to men suffering from HIV or AIDS because the vast majority of people believe that the deserve to die and not be treated.

The Inter American Court on Human Rights submit that the State violated the right to health because the alleged victims are unable to seek accessible and effective HIV prevention, testing and treatment services because of the pervasive discrimination against homosexuals and LGBTI persons including in the public health sector.<sup>76</sup> The Court argues that an estimated 32,000 people are infected with HIV in Jamaica. They express that according to Jamaica's national AIDS report half of the infected population neither knows their status nor has access to health services.<sup>77</sup> This report draws a connection between the low reporting of HIV and AIDS and the stigma and discrimination that accompanies being gay and concludes that anti-sodomy laws impeded

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<sup>75</sup> Men who have sex with men.

<sup>76</sup> IACHR, Report No. 401/20. Case 13.095. Merits (Publication). T.B AND S.H. Jamaica. December 31, 2020.

<sup>77</sup> Id.

homosexuals from seeking prevention and treatment.<sup>78</sup>

The buggery law impedes access to health care, particularly related to HIV and AIDS. Because buggery is a crime, people are afraid, whether they are homosexual or heterosexual, to seek HIV testing, and prevention services, as well as treatment for other ailments that may be related to their sexual orientation.<sup>79</sup> The buggery law has a deleterious effect on the health-seeking behavior of the homosexuals and MSM because the buggery law legitimizes discrimination against homosexuals or those believed to be homosexual, affected populations are reluctant to access both general health services and specific services related to HIV and AIDS.<sup>80</sup>

Confidentiality concerns included clinical settings that segregated HIV services from other health services, fear that healthcare providers would publicly disclose their status, and concerns at LGBT-friendly clinics that peers would discover they intention to get tested or their HIV status.<sup>81</sup> HIV-related stigma contributed to fear of testing HIV-positive; this intersected with the stigma of HIV as a “gay” disease.<sup>82</sup> Reports about the difficulties of starting HIV prevention program among MSM in some countries, in correlation with a strong sexual discrimination, lead to legal invisibility of MSM serologic status.<sup>83</sup>

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<sup>78</sup> Id.

<sup>79</sup> Id.

<sup>80</sup> IACHR, Report No. 401/20. Case 13.095. Merits (Publication). T.B AND S.H. Jamaica. December 31, 2020.

<sup>81</sup> Logie C, Lacombe-Duncan A, Brien N, Jones N, Lee-Foon N, Levermore K, et al. “Barriers and facilitators to HIV testing among young men who have sex with men and transgender women in Kingston, Jamaica: a qualitative study”. *J Int AIDS Soc.* 2017;20(1):21385.

<sup>82</sup> Rutledge S, Abell N, Padmore J, McCann T. “AIDS stigma in health services in the Eastern Caribbean”. *Social Health Illn.* 2009;31(1):17–34

<sup>83</sup> Willy Dunbar et al (2021), “HIV among men who have sex with men in the Caribbean: reaching the left behind” *Pan American Journal for Public Health*, DOI: 10.26633/RPSP.2021.12. Available at:

Experiences of LGBT access to healthcare is depicted utmost disrespect and ridicule. According to an unidentified person, “I went to make an appointment for an HIV test. The reception asked, ‘Why are you here? Are you having sex with a man?’ [I responded] ‘Do I have to answer the question?’ The receptionist said ‘Bwoy, do you f—k men? Either you f—k men or not?’” I felt so uncomfortable that I left.<sup>84</sup> Other people could hear this. People who were in the front row laughed.<sup>85</sup>

On September 29, 2011 the Director of UN AIDS Caribbean Regional Support Team who works on the HIV response in the region, issued a Statement in which he highlighted the impact that the Offences against the Person Act has in the HIV response.<sup>86</sup> In his words he noted that “the political, social and cultural contexts of Jamaica have severely challenged the implementation of an HIV response”.<sup>87</sup> First, as the epidemic spread among men who have sex with men it has been difficult for the State to publicly disclose that it is providing services to men who have sex with men or supporting civil society groups that work with these populations, especially around issues of condom use. For example, when it was revealed that condoms were being provided in prisons, riots occurred in which those suspected of being homosexual were killed and the program had to be adjusted. The provisions of the Offences against the Person Act are antagonistic to the public’s health and put the lives of men

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<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7939031/>.

<sup>84</sup> Id.

<sup>85</sup> Antilean Media Group, “*Gay in Jamaica: J-FLAG Talks Impact on LGBT Health and Rights*”, November 9, 2014. Available at: <https://www.antillean.org/j-flag-talks-health-jamaicas-lgbt-community-response-human-rights-report/>

<sup>86</sup> Id.

<sup>87</sup> IACHR, Report No. 401/20. Case 13.095. Merits (Publication). T.B AND S.H. Jamaica. December 31, 2020.

who have sex with men at greater risk.<sup>88</sup>

Second, over the last two decades, the stigma of homosexuality has also meant that the volume of resources that should have been directed at men who have sex with men, a population at higher risk than the general population, have not been targeted at that population.<sup>89</sup> The preventative and treatment measures that were required to ensure the health of men who have sex with men have not been implemented to the scale required.<sup>90</sup>

Third, the fear of discrimination, disclosure of one's status and sexuality and vulnerability in the face of the law and police, in a society of tight social networks has led men who have sex with men to avoid seeking services to address HIV.<sup>91</sup> It has been a serious challenge to work with populations whose existence and sexual behaviors are deemed illegal and immoral in a country with a fear of homophobic violence.<sup>92</sup> In short, legal, cultural and religious codes have made it difficult to address HIV among men who have sex with men in Jamaica.<sup>93</sup>

## **B. Victims and LGBTI Individuals**

There are reports from IACHR showing that there is a need for striking down the law because of the license that it gives the Jamaican society to discriminate against LGBTI individuals. The following accounts are from cases filed to the IACHR detailing the victims firsthand experiences of discrimination and LGBT violence that has become normalized in Jamaica because of the ease of

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<sup>88</sup> Id.

<sup>89</sup> Id.

<sup>90</sup> Id.

<sup>91</sup> Id.

<sup>92</sup> Id.

<sup>93</sup> IACHR, Report No. 401/20. Case 13.095. Merits (Publication). T.B AND S.H. Jamaica. December 31, 2020.

discrimination by anti-LGBTI individuals. Below are the experiences of several individuals who have been treated severely because of the licenses that individuals in Jamaica have to freely discriminate against LGBTZ people:

### **Victim #1**

On September 4, 2011 S.H filed a statement before the IACHR concerning the impact that homophobia in Jamaica has had in his life. In his own words: “Life in Jamaica is hell for me. If you are gay, and it shows, you have to be hiding. I refuse to be tested for HIV or other sexually transmitted infections at public health centers, because I have heard from friends who are gay men or men who have sex with men that they often experience discriminatory treatment. They are asked about their sexual conduct and if they admit that they have had sex with a man, they are treated differently. I am concerned that I will experience similar discrimination if I seek sexual health services from providers who are not known within the LGBT community for their tolerance. Therefore, my access to sexual health services, including HIV testing, prevention, and treatment should I require them, is constrained by my fear of the common discrimination that gay men face.”<sup>94</sup>

S.H. further posits that, “My first experience of physical violence because of my sexual orientation was in April 2011. I was walking along Dome St. off of Humber Avenue in Montego Bay. Two men got in front of me while I was walking. One of them said “batty man”, and they went on to say they didn’t want any “batty man” around there ... they both started pushing me. The pushing

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<sup>94</sup> IACHR, Report No. 401/20. Case 13.095. Merits (Publication). T.B AND S.H. Jamaica. December 31, 2020.

escalated until they were shoving me back and forth between them. There is a hardware store on Dome Street Near Princess Street ... at the time of this incident, the owner of the hardware store saw what was happening and he intervened. He told the guys to leave me alone and he told me to go home. While I was walking away, the y said, "Batty man, you're dead"... A few days after the incident where the two men pushed me around, the owner of the hardware store told me that he overheard this group of men talking. The hardware store owner told me he heard them planning to kill me ... the next incident happened a week later ... I was walking down the street, and a man was washing his car ... As I passed, he threw water on me and then shouted, "No batty man walk round me:". I didn't say anything in return and went home."<sup>95</sup>

## **Victim #2**

On November 6, T.B filed a declaration expressing that the buggery law promotes discrimination against LGBTI people like her.<sup>96</sup> Specifically, she stated: "In Jamaica it is very difficult to access stigma-free public health care as a gay man, especially one who looks like me and is very effeminate ... In 2009 when I was 17, I went for my first and only HIV test at a public health clinic in Jamaica ... however, the treatment that I received caused me to leave the clinic before I took the tested and I refused to return to another public health care facility in Jamaica for any other medical care. ... the nurse handed me a questionnaire to complete. Among other things it had questions about my previous sexual partners. I was afraid to fill it out truthfully because I had only ever had sex with men, which is a crime in Jamaica.

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<sup>95</sup> Id.

<sup>96</sup> The Declaration was filed to the IACHR.

Completing the questionnaire would be admitting that I broke the law and could spend up to 10 years in prison. I also did not want to expose myself to further ridicule by admitting that I was gay. So, when the nurse was not looking, I quickly gathered my belongings and left.”<sup>97</sup>

“In 2011 a friend in Trinidad heard about my situation and paid for me to visit him. He promised to let me stay with him and take care of me. However, when I arrived, and he saw how effeminate I was he refused to take me to his home. He said that he was concerned about what the neighbors would say. I ended up sleeping on the streets in Trinidad for eight months. During that time, I met some Trans women who were also homeless, and they helped me to get hormones to start transitioning. .... When I left Jamaica for Holland in 2012, I sent a message via email to my mother and told her where I was, but she only responded to ask for money and nothing else. She did not ask how I was doing or how I was surviving ... I miss my family, my home and my country but I know that I cannot return safely until Jamaica gets rid of the anti-buggery law and becomes more accepting of LGBT people like me.”<sup>98</sup>

### **Victim #3**

The petitioners<sup>99</sup> affirm that, as an advocate for LGBTI rights and HIV/AIDS prevention, Mr. Henry and his colleagues were not allowed to provide information and express their views on those issues and were verbally and physically attacked multiple times in public spaces by police officers and third parties

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<sup>97</sup> IACHR, Report No. 401/20. Case 13.095. Merits (Publication). T.B AND S.H. Jamaica. December 31, 2020.

<sup>98</sup> Id.

<sup>99</sup> The Human Dignity Trust initiating the case on behalf of Gareth Henry.

when they were doing advocacy work in the community.<sup>100</sup> Petitioners allege that Mr. Henry reported many of these attacks, but police never investigated them.<sup>101</sup> Petitioners allege that subsequent homophobic aggression led Mr. Henry to flee his country, and that he was granted asylum in Canada in June 2008 and obtained the citizenship in 2015.<sup>102</sup>

#### **Victim #4**

The petitioners allege that Simone Carline Edwards is a lesbian woman who suffered a homophobic attack on August 29, 2008, that almost killed her.<sup>103</sup> Petitioners claim that Ms. Edwards and her brothers, one of whom is also gay, were shot multiple times in her home in Spanish Town by two men who belong to a homophobic gang.<sup>104</sup> They claim that Ms. Edwards lost one of her kidneys and part of her liver as a result. Petitioners allege that Ms. Edwards recognized one of the assailants, and that her brother identified one of the gunmen in an identification parade.<sup>105</sup> They add that Ms. Edwards's brother asked for witness protection, but it was refused.<sup>106</sup> They argue that Ms. Edwards was never informed of any progress on the police investigation and that she and her brother were never asked to go to court.<sup>107</sup> They report that, despite the identifications made by the Edwards, the only assailant who had been captured was later released, and that the second gunman was never arrested.<sup>108</sup> They claim that Ms.

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<sup>100</sup> IACHR, Report No. 400/20. Case 13.637. Merits (Publication). Gareth Henry and Simone Carline Edwards. Jamaica. December 31, 2020.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> The Human Dignity Trust initiating the case on behalf of Simone Caroline Edwards.

<sup>104</sup> IACHR, Report No. 400/20. Case 13.637. Merits (Publication). Gareth Henry and Simone Carline Edwards. Jamaica. December 31, 2020.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

Edwards and her family were not able to return to their home after the shooting because they were afraid of reprisals, and that she and her daughter were compelled to continuously move from place to place. They indicate that she fled Jamaica in September 2009 after receiving two more homophobic threats, and that she was granted asylum in the Netherlands.<sup>109</sup>

The victims testimonies clearly indicates that they are in favor of repealing the buggery law. The experiences of the victim outlines that the society has failed them to the point where they have to flee to seek refuge in other countries. This should not be the case, because Jamaica as a nation who prides itself as a nation ‘out of many one people’ has failed to provide sanctity for its own people because their conducts are different from the widely held social values. The victims desperately yearn for the removal of the buggery law from the laws of Jamaica, that would in effect combat the unrestraint proclivity by which LGBTQ rights are being infringed.

### **C. Tourism**

#### **“JAMAICA IS THE WORST ANY OF US HAS EVER SEEN”.**

- Rebecca Schleifer from Human Rights Watch, in a report on the country’s homophobia.

In 2019, contribution of travel and tourism to GDP (% of GDP) for Jamaica was 34.7 %.<sup>110</sup> Though Jamaica contribution of travel and tourism to GDP (% of GDP) fluctuated substantially in recent years, it tended to increase through 2000

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<sup>109</sup> Id.

<sup>110</sup> Knoema, “*Jamaica - Contribution of travel and tourism to GDP as a share of GDP*”. Available at: <https://knoema.com/atlas/Jamaica/topics/Tourism/Travel-and-Tourism-Total-Contribution-to-GDP/Contribution-of-travel-and-tourism-to-GDP-percent-of-GDP>.

- 2019 period ending at 34.7 % in 2019.<sup>111</sup> Jamaica has been dubbed one of the “big three” Caribbean tourism economies, ranking the 13th most tourism-dependent economy in the world, as the Inter-American Development Bank (IDB) highlighted the importance of boosting innovation and supporting transformations that align tourism offerings with post-pandemic global demands.<sup>112</sup>

In some countries with anti-gay laws, foreigners are afforded a kind of protection from harassment by the public and by the authorities. In November 2017, the Jamaican tourism minister Edmund Bartlett declared that “LGBT travelers should feel relaxed traveling to Jamaica.<sup>113</sup> It’s ‘tourism for all’ in our country, regardless of gender, religion, handicap, or sexual orientation.” However, reports by LGBT tourists reveal this is not the case.<sup>114</sup>

One challenge of traveling to Jamaica as a gay person – especially for men – is that the only really safe places are the resorts around Negril and Montego Bay, many of which have a policy of being “open to all couples”.<sup>115</sup> However, anyone hoping to leave the confines of the resort will need to act extremely discreetly to avoid attracting attention to their sexual orientation (or transgender identity). In addition, some of those which are branded as “family resorts” may be less welcoming towards LGBT visitors. Of course, if you travel solo, particularly as part of a small

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<sup>111</sup> Id.

<sup>112</sup> Jamaica Observer, “Jamaica ranked 13th most tourism-dependent economy in the world”. May 18, 2021. Available at: <https://www.jamaicaobserver.com/latest-news/jamaica-ranked-13th-most-tourism-dependent-economy-in-the-world/>.

<sup>113</sup> Responsible Travel, “*LGBT Jamaica Vacation Advice*”. Available at: <https://www.responsiblevacation.com/vacations/jamaica/travel-guide/lgbt-holidays-in-jamaica>

<sup>114</sup> Id.

<sup>115</sup> Id.

group tour, you are likely to be under the radar and should not attract negative attention. But LGBT couples wishing to take a vacation to spend time together and celebrate their relationship would be advised to choose another country, for their own safety and peace of mind.<sup>116</sup> This by no means promote human flourishing because it stifles the ability for LGBTQ people to give and receive intimacy, to develop bonds of friendship and loyalty, including the institutions of family and intimate friends because their presence is considered to be unwelcome.

#### **D. Local and International Human Rights Organization calling for the Elimination of the Buggery Law.**

These include international groups such as: Amnesty International, Inter-American Court on Human Rights and United Nations and local groups such as: Jamaicans for Justice, Jamaican Forum for Lesbians, All-Sexual and Gays (J-FLAG) and Quality of Citizenship Jamaica.

Importantly, the IACHR presented a menu of options for the Government of Jamaica to address the situation faced by the LGBTI individuals who have faced stigma, discrimination, violence and exclusion. The commission posits that like everything that happens at the international level, the case and the recommendations therein present an opportunity for increased dialogue between us and the Government of Jamaica on how to best secure the rights of LGBT Jamaicans and ensure that the tragic incidents experienced by the petitioners do not recur.<sup>117</sup> The commission further articulates that, “J-FLAG

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<sup>116</sup> Id.

<sup>117</sup> The Observer, “*J-FLAG backs IACHR ruling calling for Jamaica to abolish buggery laws*” February 19, 20221. Available at: <https://www.jamaicaobserver.com/news/j-flag-backs-iachr-ruling-calling-for-jamaica-to-abolish-buggery-laws/>

remains open to having that dialogue and providing the space for our leaders to engage members of the LGBT community around their experiences and challenges and begin the process of addressing the prevalence of stigma and discrimination identified within the petition.”<sup>118</sup>

Similarly, the commission has considered that provisions that punish a given group of persons for engaging in a consensual sexual act or practice with another person of the same sex are not admissible, for this is directly at odds with the prohibition on discrimination based on sexual orientation.<sup>119</sup> Specifically in its Report on Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas, the Commission indicated that, “laws that criminalize same-sex intimacy between consenting persons of the same sex in private are incompatible with the principles of equality and non-discrimination according to international human rights law.”<sup>120</sup> Thus, and taking into account their impact on violence against LGBT persons, the IACHR urges the States of the region that have laws criminalizing consensual sex between adults of the same sex, “serious indecency” and “gross indecency” laws, and legislation criminalizing cross-dressing, to repeal those laws, and, in the meantime, to impose an explicit and formal moratorium on enforcement of those laws. This would send a clear message to society in general, and law enforcement agents in particular, that such laws cannot be used to threaten or extort LGBT persons or those perceived as such.<sup>121</sup>

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<sup>118</sup> Id.

<sup>119</sup> Id.

<sup>120</sup> Id.

<sup>121</sup> IACHR, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*, Oas/Ser.L/V/II.rev.1, Doc. 36, 12 November 2015, para 85; See also IACHR *Hails Unconstitutionality Decision on Criminalization of Consensual Sexual Relations between Same Sex Adults in Belize*, August 22, 2016; IACHR, *Report on the Situation of Human Rights in Jamaica*, OEA/Ser.L/V/II.144 Doc.12, 10 August 2012, para 271; IACHR,

## E. Local Conservative Groups

The local conservative groups has a strong stance against homosexuality and any attempt to change the current law. These include local groups such as: Rastafarian Community, Revolutionary Conservative Movement and National Democratic Movement.

This view is buttressed by Jamaica Rastafarian elder, Ras Iyah V, who serves the Rastafarian movement as a member of the Rastafari Millennium Council is staunchly opposing a proposed to change in Jamaica's buggery law.<sup>122</sup> Elder Iyah stated that: "I would have to stand with those who oppose homosexuality because that is not our way. From a moral and traditional African point of view<sup>123</sup>, homosexuality is not acceptable.<sup>124</sup> Regardless of which church or group is leading the opposition to the changing of the buggery law, we are ready to stand up with them and say a resounding 'No way'".<sup>125</sup> "Homosexuality is unnatural and must

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*Criminalization of Human Rights Defenders*, OEA/Ser.L/V/II.Doc.49/15, 31 December 2015, par.163.

<sup>122</sup> Back2Stonewall, "Senior Rastafarian Leader Says No To Repealing Jamaica's Buggery Law", June 8, 2013. Available at: <http://www.back2stonewall.com/2013/06/senior-rastafarian-leader-repealing-jamacias-buggery-law.html>.

<sup>123</sup> Is it really against African value today when 5 African countries have decriminalized same-sex relationships in the past 10 years? Africa seems to be more tolerant. According to a 2020 review by ILGA (International Lesbian, Gay, Bisexual, Trans, and Intersex Association), many countries in Africa have banned same-sex relationships. In fact, out of the 54 countries, only 22 did not criminalize homosexuality. These countries were Angola, Benin, Botswana, Burkina Faso, Cape Verde, Central African Republic, Congo, Côte d'Ivoire, DR Congo, Djibouti, Equatorial Guinea, Gabon, Guinea Bissau, Lesotho, Madagascar, Mali, Mozambique, Niger, Rwanda, Sao Tome and Principe, Seychelles, and South Africa. Although homosexuality is not banned in these countries, LGBTQ+ communities still face social discrimination, stigma, and even violence because of their sexual orientation and gender identities. See Samuel Njoroge, "5 African Countries that Have Decriminalized Same-Sex Relationships in the Past 10 Years" May 21, 2022. Available at: <https://www.globalcitizen.org/en/content/countries-legalized-same-sex-relationships-africa/>.

<sup>124</sup> Id.

<sup>125</sup> Id.

not be encouraged,” he stressed.<sup>126</sup>

The Rastafarian movement, which was listed in the last census as being 29,026 members strong, is among the religious groups expected to join the effort to have the buggery law remain in place.<sup>127</sup> The Rastafarian community has declared a willingness to stand up with those church leaders who have been declaring their opposition to the gay lobby and are staunchly opposing a proposal to change the buggery law.<sup>128</sup> While the traditional Church and the Rastafarian community do not see eye to eye on a range of issues to include the divinity of Haile Selassie, Ras Iyah V said he would not have a difficulty standing up with church leaders for what he considers a just cause.<sup>129</sup>

## **F. Religion**

Jamaica, as we all know, has the most churches per square mile, and several of the nation's fundamental principles are anchored in the teachings of the Holy Christian *Bible*. The Church often finds itself in a compromising and hypocritical position. It has long been viewed that homosexuality is the greatest sin a man or woman could commit. A lot of Christians pick and choose what they believe is good for them personally.<sup>130</sup> It is like using the moral laws (The Ten Commandments) as the foundation but argue that the fourth one — observance of the seventh-day Sabbath — was nailed to the cross.<sup>131</sup> Or they preach “love your neighbor as

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<sup>126</sup> Id.

<sup>127</sup> Id.

<sup>128</sup> The Gleaner, “Senior Rastafarian says no to repealing buggery law”, June 8, 2013. Available at: <https://jamaica-gleaner.com/gleaner/20130608/lead/lead1.html>

<sup>129</sup> Id.

<sup>130</sup> Jamaica Observer, “The Church, homosexuality and civil union laws”, October 23, 2020. Available at: <https://www.jamaicaobserver.com/columns/the-church-homosexuality-and-civil-union-laws/>.

<sup>131</sup> Id.

thyselves”, but they are some of the most devious and envious people in the world.<sup>132</sup> Who to tell that several of these church leaders are not themselves engaged in fornication, adultery, and even homosexuality? After all, Romans 3:23, King James Version (KJV), tells us that: “All have sinned and fall short of the glory of God.”<sup>133</sup>

At the same time, however, the Church, being the moral authority above other institutions, cannot allow for its standards and the word of God to be denigrated.<sup>134</sup> Agreeably, society is not what it used to be. Morals have changed; people’s thoughts and beliefs have changed; basic common structures within our cultures have changed. Jesus teaches that: “Heaven and Earth shall pass away, but my words shall not pass away” (Matthew 24:35 KJV). We also see in Psalm 138:2 KJV that Jesus “has magnified thy word above all thy name” because “the grass withers and the flowers fail, but the word of our God endures forever” (Isaiah 40:8 KJV).<sup>135</sup>

In 2013, several church pastors in Jamaica led a revival meeting Sunday to oppose efforts to overturn the Caribbean country’s anti-sodomy law and turn back what they see as increasing acceptance of homosexuality.<sup>136</sup> Roughly 1,500 people in their Sunday best gathered in a central Kingston park for a spirited religious service two days before a rare court challenge to Jamaica’s anti-sodomy law.<sup>137</sup> Similarly members of the Christian community gathered in Kingston and carried placards saying marriage should only be between a man and a woman and others

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<sup>132</sup> Id.

<sup>133</sup> Id.

<sup>134</sup> Id.

<sup>135</sup> Id.

<sup>136</sup> First Post, “Jamaica church leaders rally for anti-homosexuality law”, June 24, 2013. Available at: <https://www.firstpost.com/world/jamaica-church-leaders-rally-for-anti-homosexuality-law-899367.html>

<sup>137</sup> Id.

pumped signs into the air saying “Keep the buggery law!” A similar prayer meeting was held in the northern city of Montego Bay.<sup>138</sup>

A religious group called Prayer 2000, led by the Rev. Naila Ricketts, spearheaded the meetings. Pastors spoke about the power of prayer and the need to transform Jamaica as petitions were circulated urging the government not to abolish the anti-sodomy law.<sup>139</sup> A gospel music band performed while the participants enthusiastically clapped, swayed and sang under the hot afternoon sun.<sup>140</sup> For those staunchly opposed to the idea of homosexuality, they have found strong support in the following Bible verses:

1. Genesis 19:5: “And they called unto Lot, and said unto him, Where *are* the men which came into thee this night? bring them out unto us, that we may know them.”<sup>141</sup>
2. Leviticus 18:22: “Thou shalt not lie with mankind, as with womankind: it is abomination.”<sup>142</sup> This verse is very

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<sup>138</sup> Id.

<sup>139</sup> Id.

<sup>140</sup> First Post, “Jamaica church leaders rally for anti-homosexuality law”, June 24, 2013. Available at: <https://www.firstpost.com/world/jamaica-church-leaders-rally-for-anti-homosexuality-law-899367.html>

<sup>141</sup> *Genesis* 19:5 (King James Version). See the alternative argument that Sodom and Gomorrah were destroyed because of arrogance and apathy toward the poor, not for “being gay.” Like all of the other arguments put forward, this is not a Bible quote that supports same-sex relationships. It is simply the twisting of a biblical account. In *Genesis* 18 and 19 we are told that Sodom was an extremely wicked and evil place. The only specific act of wickedness we see is that the men of the city tried to rape other men. So, there is nothing in that text which supports the argument that the sin of Sodom was apathy toward the poor.

<sup>142</sup> *Leviticus* 18:22 (King James Version). See the alternative argument that Leviticus, which specifically condemns homosexuality, is never applied to Christians as moral law. Again, there is some truth to this argument. Although *Leviticus* 18:22 shows God considered homosexuality an abomination under the Old Law, Christians are not under the Old Law today. This is why I have no problem using Leviticus 18 to show that homosexuality was one of the abominations of Sodom, but it is not a passage I lean heavily upon to convince people homosexuality is a sin today. That being said, if the New Testament said nothing about sexual immorality, we might assume God's instructions concerning sexual immorality were no longer applicable

popular among the Jamaican population because homosexual individuals are often called ‘abominations’.

3. Leviticus 20:13: “If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood *shall be* upon them.”<sup>143</sup> This verse is on point with the widely believed perspective that homosexuals should be put to death. Perhaps when Buju says ‘Bum Bye Bye inna batty boi head’ it is a call back that death should be the solution to eradicate homosexuals.
4. 1 Corinthians 6:9: “Know ye not that the unrighteous shall not inherit the kingdom of God? Be not deceived: neither fornicators, nor idolaters, nor adulterers, nor effeminate, nor abusers of themselves with mankind.”<sup>144</sup>

The level of physical violence against LGBT is definitely more pronounced in Jamaica and also more pronounced is the influence of the evangelical churches<sup>145</sup>. The other islands that have much more multicultural and multireligious makeup or a more moderate form of religion, has less virulence against LGBT people.<sup>146</sup> For example, in Trinidad and Tobago, they have a more stringent anti-sodomy law. As a matter of fact, their country actually bans the entry of homosexuals and similar with Belize.

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today. However, the New Testament says a lot about sexual immorality. In order to understand what is meant by general terms like “sexual immorality,” the Old Testament is a great place to go for definitions. Everything Leviticus 18 says about sexual immorality is applicable today in the sense that it is still sexually immoral and sexual immorality is condemned over and over again in the New Testament.

<sup>143</sup> *Leviticus* 20:13 (King James Version).

<sup>144</sup> *1 Corinthians* 6:9 (King James Version).

<sup>145</sup> Evangelical churches include: the Brethren Church, the Open Bible Church and the Pentecostal Church.

<sup>146</sup> First Post, “Jamaica church leaders rally for anti-homosexuality law”, June 24, 2013. Available at: <https://www.firstpost.com/world/jamaica-church-leaders-rally-for-anti-homosexuality-law-899367.html>

But the level of hostility towards gays is not as prevalent as in Jamaica, because those two countries—in Trinidad, they have the Hindu, Muslim, Indian, Black, Chinese—there is a much more multicultural mix, resulting in an appreciation for diversity.<sup>147</sup>

On the other hand, those in support of homosexuality has cited numerous Bible verses to make the argument that homosexuals should be accepted. One such proponent posits that, “The Bible speaks of ‘agape’, a word specifically used to identify the type of love God embodies. Agape love is the highest level of love referenced in the Bible.<sup>148</sup> This form of love is everlasting and sacrificial, whether or not the giver receives the same level of love in return.<sup>149</sup> The word ‘agape’ is eloquently described by Paul in his famous passage on love: “Love is patient, love is kind. It does not envy, it does not boast, it is not proud.<sup>150</sup> It does not dishonor others, it is not self-seeking, it is not easily angered, it keeps no record of wrongs.<sup>151</sup> Love does not delight in evil but rejoices with the truth. It always protects, always trust, always hopes, always perseveres. Love never fails” (1 Corinthians 13:4-8).

Though Christ is perfect, and we are not, we must strive to love each other in this perfect way. “Whoever does not love does not know God, because God is love” (1 John 4:8). Others noted that homophobia and exclusion is not God’s response to the

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<sup>147</sup> Eliot Glenn, “No to Homo Agenda”: *How evangelicals spread anti-gay hate to Jamaica*” July 10, 2014. Available at: [https://www.salon.com/2014/07/10/no\\_to\\_homo\\_agenda\\_how\\_evangelicals\\_spread\\_antigay\\_hate\\_to\\_jamaica](https://www.salon.com/2014/07/10/no_to_homo_agenda_how_evangelicals_spread_antigay_hate_to_jamaica).

<sup>148</sup> The Gleaner, “*God loves LGBTQ but doesn’t affirm their lifestyle*”, November 8, 2021. Available at: <https://jamaica-gleaner.com/article/letters/20211108/god-loves-lgbtq-doesnt-affirm-their-lifestyle>

<sup>149</sup> Id.

<sup>150</sup> Id.

<sup>151</sup> Id.

LGBTQ; love is. In Matthew 22:34-40, God reminds us of the greatest commandments in the law; “Love the Lord your God with all your heart and with all your soul and with all your mind.” This is the first and greatest commandment, and the second says: “Love your neighbor as yourself.” All the law and the prophets hang on these two commandments.<sup>152</sup> Similarly, Jesus’ instructions in John 13:34-35 are still relevant for us today. “A new command I give you: Love one another. As I have loved you, so you must love one another. By this everyone will know that you are my disciples if you love one another.”<sup>153</sup>

Where the LGBT community is concerned, the churches play a huge role. There have been a number of church leaders have participated in different types of protests, some of them mass rallies, some of them just petitions to the prime minister, some of them meetings and, of course, sermons are often littered with anti-LGBT sentiments, which makes it difficult for a number of different people who might be LGBT in different churches.<sup>154</sup>

However, while that is the general consensus, there are some church leaders who have stood and say LGBT people should be protected, they should be respected, and they have rights like anyone else. For example, people from the Baptist Union have been very supportive. About two years ago (2020) ,there was a meeting with the president of the Jamaica Baptist Union, and he then invited members of the community to come to church and to worship with them.<sup>155</sup> Perhaps this is a move in the direction of having the church break the strongly held beliefs and assist the

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<sup>152</sup> Id.

<sup>153</sup> Id.

<sup>154</sup> Equal Eyes, “*Jamaica: Churches Opening Up To LGBTs*”, June 23, 2020. Available at: <https://equal-eyes.org/database/2020/6/23/jamaica-churches-opening-up-to-lgbts>.

<sup>155</sup>Id.

LGBTQ community in pressuring the government in changing the law.

### **3. PAST TRENDS IN DECISIONS AND CONDITIONING FACTORS**

#### **A. Jamaican Law**

Jamaica was a colony of England, and the laws of England was received in Jamaica. Therefore, in 1664, the Assembly in Jamaica, as one of its first enactments, immediately gave notice that the laws of England and those laws were in force in Jamaica. Thus, the Buggery Act of 1533 became the law in Jamaica. The law in focus can be found in the Offences Against the Person Act, under the 'Unnatural Offences' and 'Outrages on Decency.' See below:<sup>156</sup>

*76. 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 labor for a term not exceeding ten years.*<sup>157</sup>

*77. Whosoever shall attempt to commit the said abominable crime or shall be guilty of my 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 labor.*<sup>158</sup>

*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*

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<sup>156</sup> Jamaica Gleaner, "Jamaica And The 'Buggery Law'", October 6, 2014. Available at: <http://digjamaica.com/m/blog/jamaica-and-the-buggery-law/>.

<sup>157</sup> Jamaica Offences Against the Person Act (1864), Section 76.

<sup>158</sup> Jamaica Offences Against the Person Act (1864), Section 77.

*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 two years, with or without hard labor.*<sup>159</sup>

In 2011, Jamaica's Parliament approved the Charter of Fundamental Rights and Freedoms.<sup>160</sup> While the charter outlines protections from discrimination, sexual orientation and gender identity are not included in the list of protected classes. Activists in Jamaica urged parliament to include broad nondiscrimination language to ensure protection against discrimination based on sexual orientation, disability, and health status. However, efforts were unsuccessful and language against discrimination based on sexual orientation was deliberately excluded from the charter.<sup>161</sup> This law has led to the free and unrestricted discrimination

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<sup>159</sup> Jamaica Offenses Against the Person Act (1864), Section 79.

<sup>160</sup> The act opens with a clear statement of declaratory obligation on the part of the State to "promote universal respect for, and observance of, human rights and freedoms", but in my view, the seminal provision is to be found in Section 13 (2)(b), which prohibits both Parliament and an organ of the State from taking any action which abrogates, abridges or infringes the rights and freedoms which are to be found in Section 13 subsections (3), (6), along with those contained in sections 14, 15, 16 and 17. The charter retains those rights and freedoms which were contained in the old Chapter III such as:

Right to life, liberty and the security of the person.  
Freedom of thought, conscience, belief and observance of religious and political doctrines.

Freedom of expression.

Freedom of peaceful assembly and association.

Freedom of movement.

Due process of law.

Protection from search of the person, respect for private and family life, privacy of home and of communication.

Freedom from discrimination on the grounds of race, color, gender, place of origin and political interference.

Protection of property rights.

<sup>161</sup> Human Rights First, *LGBT Issues in Jamaica*. Available at: <https://humanrightsfirst.org/wp-content/uploads/2022/11/Jamaica-LGBT-Fact-Sheet.pdf>

against LGBTI individuals especially by the hands of the police whose responsibility is to serve and protect those in need.

In February of 2013 an individual named Javed Saunja Jaghai filed a claim to challenge the constitutionality of sections 76, 77 and 79 of the Offences against the Person Act before the Civil Division of the Supreme Court of Judicature of Jamaica.<sup>162</sup> On August 28, 2014, he withdrew his complaint giving the following reasons: “Jamaica is a very small society with many intolerant individuals, who regularly harm unsuspecting others for choosing to live in a way that displeases them.<sup>163</sup> The incidents referred to above merely confirm what is known to be norm in Jamaica. This sort of intolerance expressed towards gay people plus the several media reported attacks on gay men between 2013 and now, have made me extremely fearful. While I have never been harmed physically, I have been threatened enough times to know that I am vulnerable. I know as well that my loved ones are under threat, and they are fearful for my safety. Though the cause and the case are noble, I am no longer willing to gamble with my life or the lives of my parents and siblings.”<sup>164</sup>

This fear that Mr. Jaghai has is fueled by the police ineffective and uncooperative attitudes to take discrimination against LGBTZ people seriously. Furthermore, police brutality is very prevalent because there is a lack of oversight and review by the Independent Commission of Jamaica (INDECOM).<sup>165</sup> Below

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<sup>162</sup> Javed Saunja Jaghai and J-Flag v. The Attorney General (2013).

<sup>163</sup> IACHR, Report No. 401/20. Case 13.095. Merits (Publication). T.B AND S.H. Jamaica. December 31, 2020.

<sup>164</sup> Id.

<sup>165</sup> There is lack of oversight from the INDECOM (the commission charged with keeping the police force in check and ensuring that police conduct are consistent and are not ultra vires).

are detailed account of victims who have suffered grave injustice by the hands of Jamaican police officers:

1. Mr. Henry, a gay man, was often harassed and beaten from the time he was a child due to his sexual orientation. From December 2003 to March 2007, Mr. Henry was often harassed by police officers. In particular, Mr. Henry was brutally assaulted two times by police officers because of his sexual orientation. The first attack occurred on Christmas Day of 2003, when Mr. Henry was beaten by an officer in front of a crowd of 70 people who encouraged the attack. Mr. Henry attempted to report the incident two times without success because police either refused to file the report or required him to submit information about the assailant that was inaccessible to him.<sup>166</sup>
2. Mr. S.H, a gay man, has often been attacked due to his sexual orientation. In April 2011, as he was returning home from a shop, two men stepped in front of him in the street and called him “batty man and started pushing him and shoving him back and forth between them. The owner of a hardware store saw what was happening and intervened and told the men to leave Mr. S.H alone and instructed him to go home. As he was departing, the attackers said, “batty man, you’re dead.” A few days after, the owner of the store told Mr. S.H that he overheard this group of men planning to kill him. Mr. S.H reported these two incidents to the Barnett Street Police Station in a crowded room and before two officers,

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<sup>166</sup> IACHR, Report No. 400/20. Case 13.637. Merits (Publication). Gareth Henry and Simone Carline Edwards. Jamaica. December 31, 2020.

and after his statement, the supervising officer instructed the other to delete the word “threat” from the report, stating that the first incident merely constituted an assault. The next day he returned to the Barnett Street Police station to file another report. The officers informed him that stone-throwing was not an assault. When he asked what it was, the police reply was, “it’s just stone-throwing.”<sup>167</sup>

3. The petitioners allege that Ms. T.B a Trans woman, who had been assigned male at birth that previously identified herself as a gay man, who after being attacked by people coming from every direction to attack them with bottles, stones and sticks. They rushed into a nearby shop to escape, and then the police came and managed to walk T.B and her friend to the police station. Once inside the Station, the police officers informed them that they were going to charge them with a crime and that if they did not cooperate, they could find a dozen charges to file. They claim that from the time they arrived at the station after 7 p.m. until about 3 a.m., seven or eight officers harassed and abused the two of them constantly. They argue that they overheard some of the police say, “let us kill them here as if we kill them, nothing will come of it.” They claim that at some point the police allowed them to leave the Station, and as they were departing, one of the police officers said, “Let this be the last time I see you in Mandeville as I am a plain clothes police and if I see you in Mandeville again, I’m

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<sup>167</sup> IACHR, Report No. 401/20. Case 13.095. Merits (Publication). T.B AND S.H. Jamaica. December 31, 2020.

going to make the crowd beat you worse than how they were planning to.”<sup>168</sup>

Based on these horrific incidents that occurred to the individuals in question, the IACHR ruled that the buggery law, which weaponizes police brutality is a violation of basic human rights. Specifically, it violated Article 11<sup>169</sup>, Article 5<sup>170</sup>, and Article 22<sup>171</sup> of the American Convention. In its response to the ruling from IACHR, the Jamaican State holds that it “is committed to the equal and fair treatment of its citizens and affirms that any individual whose rights are alleged to have been infringed has a right to seek redress.”<sup>172</sup> The State further submits that “there is no legal discrimination against persons on the grounds of their sexual orientation” and that it “is opposed to discrimination or violence against persons whatever their sexual orientation.”<sup>173</sup>

## **B. IACHR**

The IACHR and other international agencies, nongovernmental organizations, and national bodies have voiced their concern over the situation of LGBTI persons in Jamaica and highlighted that the existence of laws that criminalize consensual sexual relations between adults of the same sex in private generates a culture of hostility, discrimination and serious

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<sup>168</sup> Id.

<sup>169</sup> Article 11 (2) reads as follows: 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 11 (3) reads “Everyone has the right to the protection of the law against such interference or attacks.”

<sup>170</sup> Article 5 (1) reads as follows: “Every person has the right to have his physical, mental, and moral integrity respected.”

<sup>171</sup> Article 22 (1) reads “Every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provision of the law.”

<sup>172</sup> IACHR, Report No. 401/20. Case 13.095. Merits (Publication). T.B AND S.H. Jamaica. December 31, 2020.

<sup>173</sup> See IACHR, Report No. 400/20. Case 13.637. Merits (Publication). Gareth Henry and Simone Carline Edwards. Jamaica. December 31, 2020.

violations against LGBTI persons.<sup>174</sup> On September 21, 2011, the IACHR granted precautionary measures to protect T.B and S.H. and asked the State of Jamaica to adopt the measures necessary to ensure their lives and personal integrity. The request stated that both have suffered aggressions, attacks, threats and harassment on account of their sexual orientation.<sup>175</sup>

In its 2012 Report on the situation of human rights in Jamaica, the Commission expressed that: Discrimination based on sexual orientation, gender identity and gender expression is widespread throughout Jamaica, and that discrimination against those in the lesbian, gay, bisexual, trans and intersex (LGBTI) communities is entrenched in Jamaican State Institutions.<sup>176</sup> Those who are not heterosexual or cisgender face political and legal stigmatization, police violence, and inability to access the justice system, as well as intimidation, violence and pressure in their homes and communities.<sup>177</sup> Laws against sex between consenting adult males or homosexual conduct may contribute to an environment that, at best, does not condemn, and at worst condones discrimination, stigmatization, and violence against the LGBTI community.<sup>178</sup> The law provides a social sanction for abuse, as LGBTI persons are already thought of as engaged in illegal activity. Because LGBTI individuals are believed to be engaged in criminal activity, it is logical to infer that police are less likely to investigate crimes against them.<sup>179</sup>

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<sup>174</sup> IACHR, Recognition of the Rights of LGBTI Persons, OEA/Ser.L/V/II.170, Doc. 184, 7 December 2018, para.241.

<sup>175</sup> IACHR, Report No. 401/20. Case 13.095. Merits (Publication). T.B AND S.H. Jamaica. December 31, 2020.

<sup>176</sup> IACHR, Report on the 153rd Session of the IACHR, Monitoring of the IACHR Report on the Situation of Human Rights in Jamaica, December 29, 2014.

<sup>177</sup> Id.

<sup>178</sup> Id.

<sup>179</sup> IACHR, Report on the Situation of Human Rights in Jamaica,

Furthermore, in 2014 the Commission expressed its concern over the continued violence, discrimination and hostility against LGBTI persons in Jamaica, and a lack of anti-discrimination legislation to address this issue. It expressed particular concern on the situation of homelessness and displacement of young men who have sex with men, and obstacles faced by LGBTI persons in accessing justice and health services, due to a fear that disclosing their sexual orientation and gender identity will lead to stigma and further violation, in a country that criminalizes same-sex consensual intimacy between adults.<sup>180</sup>

Likewise, in its 2015 Report on Violence against LGBTI Persons, the IACHR expressed its concern on the impact of legislation that criminalizes same-sex consensual intimacy in Jamaica, even when not enforced, particularly with respect to the rights to life, personal integrity, personal liberty, privacy, and access to health and other services.<sup>181</sup> The Commission noted that: these laws reinforce already existing societal prejudices and severely increase the negative effects of such prejudices on the lives of LGBTI persons.<sup>182</sup> The criminalization of sexual intercourse between men also has a symbolic effect since in the eyes of the legal system where such criminalization is in force, all gay men are criminals.<sup>183</sup> The existence of “buggery” laws is used as a mechanism for social control and domination that enables states to legitimize and contribute to the stigma of LGBTI persons as immoral individuals. Moreover, such laws have been used to justify the arbitrary arrests, detention and even torture of LGBTI

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OEA/Ser.L/v/II.144, Doc. 12, 10 August 2012, para 264 and 271.

<sup>180</sup> Id.

<sup>181</sup> Id.

<sup>182</sup> Id.

<sup>183</sup> Id.

people.<sup>184</sup>

### C. ICCPR

Jamaica became party to the International Covenant on Civil and Political Rights (“ICCPR”) on October 3, 1975. Jamaica submitted its second report for Universal Periodic Review (“UPR”) under Article 40 of the ICCPR was in January 1997.<sup>185</sup> However, in October 1997, a little-noticed event took place at the United Nations that may roll back the international legal protection of human rights. Jamaica became the first country to denounce the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), and thus withdrew the right of individual petition to the UN Human Rights Committee (“HRC”).<sup>186</sup> Although it is provided for under the Protocol’s Article 12, no other state has previously made such a denunciation.<sup>187</sup>

In its concluding observations in response to that report, the HRC expressed its hope at that time that the new Jamaican Charter of Fundamental Rights and Freedoms (“Charter”) would explicitly prohibit of discrimination on the grounds of sex, and that any conflict between provisions of Section 24 of the Jamaican Constitution and the ICCPR be eliminated<sup>188</sup>. Since that time,

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<sup>184</sup> IACHR, Violence against LGBTI Persons, OEA/Ser.L/V/II.rev.1, Doc.36, 12 November 2015, paras.56, 74,75; See also Leave no LGBT person behind, Statement by human rights experts on the International Day Against Homophobia, Transphobia and Biphobia, May 16, 2018.

<sup>185</sup> U.N. Human Rights Comm. [ICCPR], Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Second Periodic Report of States Parties due 1986, Addendum, Jamaica, U.N. Doc. CCPR/C/42/Add.15 (Mar. 7, 1997).

<sup>186</sup> This makes it more difficult for Jamaica to be scrutinized and it leads to the removal of the individual complaint mechanism that would put more pressure on Jamaica to enact legislations to protect the rights of LGBTQ individuals and possible removing the buggery law.

<sup>187</sup> American Journal of International Law , Volume 92 , Issue 3 , July 1998 , pp. 563 – 568 DOI: <https://doi.org/10.2307/2997931>. “Jamaica Withdraws the Right of Individual Petition under the International Covenant on Civil and Political Rights”

<sup>188</sup> U.N. Human Rights Comm. [ICCPR], Consideration of Reports Submitted

however, Jamaica, has not complied with the HRC's recommendations. Rather than prohibiting discrimination on the grounds of "sex," the new Charter prohibits discrimination on the ground of being "male or female."<sup>189</sup> This language serves to circumvent protections guaranteed under the ICCPR by excluding from the Charter the prohibition of discrimination on the basis of sexual orientation and gender identity, which the HRC has found to be protected grounds under the category of "sex."<sup>190</sup> Jamaica failed to submit its third UPR report in 2001 but submitted its combined third and fourth reports on July 20, 2009.<sup>191</sup>

#### **D. United Nations**

Jamaica claims that there are active public education program addressing deeply entrenched stereotypical views regarding issues of masculinity relating to gender-based violence.<sup>192</sup> Jamaica claims that in addition to domestic legislation, the Broadcasting Commission ensured that the operations and programming of media licensees met legal standards.<sup>193</sup> For example, in 2009, in response to public outcry about the insidious effects of lewd sexual lyrics and songs promoting violence, in particular against gays and lesbians, in certain dancehall songs aired on national radio, the Broadcasting

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by States Parties under Article 40 of the Covenant, Second Periodic Report of States Parties due 1986, Addendum, Jamaica, U.N. Doc. CCPR/C/42/Add.15 (Mar. 7, 1997), U.N. Human Rights Comm. [ICCPR], Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Jamaica, ¶4, U.N. Doc. CCPR/C/79/Add.83 (Nov. 19, 1997).

<sup>189</sup> See Jamaica Charter of Fundamental Rights and Freedom.

<sup>190</sup> *Toonen v. Australia*, U.N. Human Rights Comm., Comm'n. No. 488/1992, ¶ 8.7, U.N. Doc. CCPR/C/50/D/488/1992 (1994).

<sup>191</sup> U.N. Human Rights Comm. [ICCPR], Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Third Periodic Report of States Parties, Jamaica, ¶ 1, U.N. Doc. CCPR/C/JAM/3 (July 20, 2009)

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

Commission banned the airing of those songs.<sup>194</sup>

However, the United Nations has articulated that in spite of these changes by the Jamaica there were discriminatory laws against homosexuals. The HRC noted that there were reports of harassment and abuse of gay men and sex workers and reports of mob killings of lesbian, gay, bisexual and transgender persons because of the prohibition of consensual sex between male adults which provides encouragement to police and private persons to treat homosexuals as criminals.<sup>195</sup> However Jamaica denies that there had been no credible cases of harassment by the police nor was there any policy on their treatment. Members of those communities increasingly had political representation.<sup>196</sup>

In the Fourth Periodic report to the UNHRC, Mr. Iwasawa, a delegate of Jamaica, said that during discussions held during the first review of the human rights situation in Jamaica under the universal periodic review mechanism, the United States delegation had issued a recommendation to ensure the protection of defenders of the rights of LGBTI persons and to take measures to ensure that LGBTI could fully and freely exercise their rights without fear of attack or reprisal. However, the Government of Jamaica had not supported the recommendation, considering it to be based on false or erroneous premises. A report from the International Service for Human Rights cited in the stakeholders' document submitted as part of the second cycle of the universal periodic review had indicated that LGBTI persons had been murdered, beaten and threatened and that impunity for such

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<sup>194</sup> See Third and Fourth Periodic report.

<sup>195</sup> *Id.*

<sup>196</sup> U.N. Human Rights Comm. [ICCPR], Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Fourth Periodic Report of States Parties, Jamaica, ¶ 1, U.N. Doc. CCPR/C/SR.3312 (Oct 25, 2016)

crimes remained common.<sup>197</sup>

Additionally, Mr. Iwasawa, in the fourth periodic review, posits that the Jamaica Constabulary Force had made huge strides in transforming the behavior and attitudes of its members since adopting the policy.<sup>198</sup> However, he was unable to provide figures attesting to the impact of the policy on dealings with members of the LGBTI community because the police did not solicit information on sexual identity or orientation and disclosure was not obligatory.<sup>199</sup> Cases of domestic violence and allegations of abuse were handled in accordance with the domestic violence intervention training program run by the constabulary force, but whenever it became evident that a member of the LGBTI community was involved, the investigating police officers were also required to consult the diversity policy<sup>200</sup>. The policy set out standard operating procedures for interaction with individual members of diverse groups that were designed to eliminate all forms of unfair bias and to improve public confidence by demonstrating integrity, tolerance and understanding.<sup>201</sup> Various mechanisms, including redress through the courts, were available to citizens who considered themselves to be victims of discrimination.<sup>202</sup>

Important to note that per the recommendations of the HRC Jamaica should have mentioned information surrounding the

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<sup>197</sup> Id.

<sup>198</sup> Id.

<sup>199</sup> Id.

<sup>200</sup> Id.

<sup>201</sup> An argument can be made that perhaps Jamaica is doing something to help, but this is a minute step I comparison to total work that ought to be done. Nonetheless, it is a positive step in the direction that makes LGBT Jamaicans feel more welcoming.

<sup>202</sup> U.N. Human Rights Comm. [ICCPR], Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Fourth Periodic Report of States Parties, Jamaica, ¶ 1, U.N. Doc. CCPR/C/SR.3312 (October 25, 2016).

steps and procedures that Jamaica took to address the threats against violence to LGBTQ individuals. However, the periodic report contained no information regarding a concern raised in the Committee's preceding concluding observations about a lack of clarity in the respective mandates of INDECOM and the Office of the Director of Public Prosecutions with regard to powers to prosecute law enforcement personnel.<sup>203</sup>

Mr. Iwasawa stated that he was unaware of any reports of police involvement in mob violence or in acts against LGBTI persons. In any case, the Jamaica Constabulary Force had little reporting and monitoring systems in place to ensure oversight and to hold officers to account for their actions. There were few direct lines of communication between the police and LGBTI groups. Moreover, the Office of the Director of Public Prosecutions had invited LGBTI persons to make presentations to its staff to help them improve their approach to future prosecutions involving LGBTI issues. But this is insufficient to combat the problem. No steps had been taken to amend the provisions of the Offences against the Person Act concerning same-sex intimacy, although the Act was under constant review.<sup>204</sup>

With the findings coming from the report surrounding the need to repeal the buggery law and implement anti-discrimination law current Prime Minister and Minister of Foreign Affairs statements signally that Jamaica needs time to change this law and perhaps there is hope. However, signal must be drawn to a Ministers' statement that Gay Marriage will never be accepted. Thus, the argument can be made that after 10 years from the report of IACHR reports and decisions from the court and UN

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<sup>203</sup> Id.

<sup>204</sup> Id.

Nations, Jamaica has made no progress.

Further, press reports indicate that in 2010 the president of the Islamic Council of Jamaica announced that homosexuality was illegal and should be punishable by death. In that same 2010 hearing it was reported that when 2,000 people in a mall attacked 3 people believed to be gay, the violence was justified as “moral cleansing.” One of the participants in the hearing said that violence against LGBTI persons was characterized by some as “a service to society.”<sup>205</sup>

Clearly, the UN is in support of repealing the buggery law and urges Jamaica to do so. However, as a recurring theme, Jamaica either denies that no statistics exist that substantiates the allegations purported by these groups and Jamaica has signaled that any changes to the buggery law will be done when and if the country pleases; not from the pressure of the international community pushing for LGBTQ rights.

### **G. US- JAMAICA Relation**

President Obama traveled to Jamaica in April 2015 and recognized the important work of LGBT activist Angeline Jackson in a speech in front of 350 Caribbean youth leaders, underscoring the important work of Jamaican civil society to combat homophobia in the country. U.S. Influence in Jamaica has long-standing diplomatic, cultural, and commercial relationships with the United States. It is the third-largest U.S. trading partner in the Caribbean, exporting \$421.1 million to the U.S. and importing almost \$2 billion of goods from the U.S. in 2013.<sup>206</sup> Approximately

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<sup>205</sup> Jamaica Observer, “Muslim leader blasts gay lifestyle”, February 1, 2010. Available at: <https://www.jamaicaobserver.com/news/Muslim-leader-blasts-gay-lifestyle/>

<sup>206</sup> Human Rights First, “LGBT Issues in Jamaica”. Available at: <https://humanrightsfirst.org/wp-content/uploads/2022/11/Jamaica-LGBT->

one million American tourists visit Jamaica every year and Jamaican Americans remit billions annually in remittances to the island.<sup>207</sup>

The diplomatic ties between the United States and Jamaica could soon be in jeopardy.<sup>208</sup> There are reports that Jamaica is refusing to accredit the spouse of a gay American diplomat.

While several Caribbean nations took positive steps towards recognition of the LGBTQ+ community in 2022, Jamaica was not among them. The latest signal of a possible diplomatic tiff occurred in July 2023 where a report cited unnamed sources, including a “senior government official” who alleged that “the United States government wrote to the Jamaican government seeking its approval for the married partner of a diplomat about to be posted to Jamaica, to be given diplomatic immunity and all the privileges of a diplomat.”<sup>209</sup> The request was initially ignored, the report says, and after the U.S. government repeated it, it was denied.<sup>210</sup> The media source also asserted that the U.S. government had retaliated by denying a request from the Jamaican government to extend the stay of three diplomats in Jamaica’s embassy in Washington, D.C. and consulates in the United States after a five-year stay — including Jamaica’s ambassador to the U.S., Audrey Marks, and its consul general in

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Fact-Sheet.pdf.

<sup>207</sup> Id.

<sup>208</sup> This is evident from the pressure that America has placed in Jamaica in an effort to have the government strike down the buggery law. However, Jamaica has remained very defiant, and speculations are that the relation is getting sour, especially after the US terminated the visa of 3 Jamaican diplomats and ordered that they leave the US.

<sup>209</sup> GlobalVoices “A ‘*diplomatic tiff*’ over same-sex marriage is downplayed, but differences on LGBTQ+ issues remain in the Jamaica-U.S. relationship”, July 20, 2023. Available at: <https://globalvoices.org/2023/07/20/a-diplomatic-tiff-over-same-sex-marriage-is-downplayed-but-differences-on-lgbtq-issues-remain-in-the-jamaica-u-s-relationship/>.

<sup>210</sup> Id.

Florida, Oliver Mair.<sup>211</sup>

However, many Jamaican netizens were uncomfortable with the news, mostly focusing on the report that the U.S. government was allegedly withdrawing the Jamaican diplomats' immunity and accusing it of "bully tactics."<sup>212</sup> The views off several twitter users on the matter are as follows:

[@CalvinC42722136](#)

I'm imploring [@AndrewHolnessJM](#) [@kaminajsmith](#) to stand your ground. We don't believe nor do we support same sex marriage. Jamaica is a sovereign nation and should not be dictated to by any outside forces.

1:54 AM · Jul 18, 2023<sup>213</sup>

[@CalbertSmith2](#)

Jamaica must keep its sanity, we are a God-fearing country , God says same sex marriage is wrong . You all go read the book Roman's . This is one time I strongly support the jlp's decision, Stand your ground Mr. prime minister

11:37 AM · Jul 18, 2023<sup>214</sup>

[@CreativeCMDER](#)

This is unnecessarily messy. Jamaica could have extended the

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<sup>211</sup> Id.

<sup>212</sup> Id.

<sup>213</sup> Available at:

[https://twitter.com/CalvinC42722136/status/1681180570498285569?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1681180570498285569%7Ctwgr%5Eeafc8c6dbc49aad2c5da0bbcefb715bd04f943d%7Ctwcn%5Es1\\_&ref\\_F](https://twitter.com/CalvinC42722136/status/1681180570498285569?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1681180570498285569%7Ctwgr%5Eeafc8c6dbc49aad2c5da0bbcefb715bd04f943d%7Ctwcn%5Es1_&ref_F)

<sup>214</sup> Available at:

[https://twitter.com/i/flow/login?redirect\\_after\\_login=%2FCalbertSmith2](https://twitter.com/i/flow/login?redirect_after_login=%2FCalbertSmith2).

courtesy with a notation that during official functions we wouldn't introduce the person as ur partner or find another work around. I get you trying to stand in right but sometimes we need to look down the road

11:39 AM · Jul 18, 2023<sup>215</sup>

Though this diplomatic tiff illustrates that the US government is committed to have change for LGBTI individuals, the Jamaican government has remained steadfast to make those changes on its own time. The Ministry of Foreign Affairs and Foreign Trade has complied with these procedures and has, in fact, conducted its customary rotation exercise. Heads of Jamaican Missions in the United States whose tenure will come naturally to an end later this year, are already preparing for their transition.<sup>216</sup>

#### **4. POTENTIAL FOR FUTURE CHANGE**

##### **A. Referendum**

The rulings from the IACHR is an important pressure point and hopefully it will accelerate the repeal of these laws, notwithstanding that the largely symbolic ruling would not lead to immediate change.

Jamaica's Prime Minister Andrew Holness said in 2014, when in opposition, that he wanted to put the gay sex ban to the public in a "Grand Referendum."<sup>217</sup> However, likely to fail because

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<sup>215</sup> Available at:

[https://twitter.com/i/flow/login?redirect\\_after\\_login=%2FCreativeCMDER](https://twitter.com/i/flow/login?redirect_after_login=%2FCreativeCMDER)

<sup>216</sup> GlobalVoices "A 'diplomatic tiff' over same-sex marriage is downplayed, but differences on LGBTQ+ issues remain in the Jamaica-U.S. relationship", July 20, 2023. Available at: <https://globalvoices.org/2023/07/20/a-diplomatic-tiff-over-same-sex-marriage-is-downplayed-but-differences-on-lgbtq-issues-remain-in-the-jamaica-u-s-relationship/>.

<sup>217</sup> The Observer, "Massive agreement with buggery law" Aug 11, 2020.

Available at: <https://www.jamaicaobserver.com/news/massive-agreement->

of the negative stigma that most Jamaican's hold towards LGBTZ people. Perhaps this argument is an attempt by the government to prevent a change because they know that a referendum is likely to fail. This view is fueled by strong support for the buggery law emerged from two surveys conducted March 12-15, 2020 and July 9-12, 2020 by the veteran pollster among 1,200 voting-age Jamaicans across the country.<sup>218</sup> The polls have a sampling error of plus or minus 2.5 per cent.<sup>219</sup> Both were commissioned by the Jamaica Observer, but the March poll was not published due to the outbreak of the novel coronavirus in the island.<sup>220</sup>

Minister of Justice, Delroy Chuck reiterated the Government's position that Jamaica's contentious buggery law will only be changed by a referendum.<sup>221</sup> Responding to what he said were questions being asked about his own position, the minister said: "Let me make it very clear, I do not believe that the anus is a sexual organ. I am against homosexuality (loud applause), quite frankly I believe it's wrong but at the same time I believe it's equally wrong for anyone to promote homophobia (hatred of homosexuals).<sup>222</sup>

Chuck's comments came against the backdrop of harsh criticism directed at him for reportedly suggesting that the church and faith-based groups were hindering the push to repeal the centuries-old buggery law, considered by many to be a breach of basic human rights.<sup>223</sup> The Minister also noted that "the PM has

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with-buggery-law/

<sup>218</sup> Id.

<sup>219</sup> Id.

<sup>220</sup> Id.

<sup>221</sup> The Jamaica Observer, "Chuck: Buggery law will only be changed by a referendum" June 16, 2017. Available at: <https://www.jamaicaobserver.com/news/chuck-buggery-law-will-only-be-changed-by-a-referendum/>

<sup>222</sup> Id.

<sup>223</sup> Id.

in mind referendum on several areas, but he suspect that those will come towards the end of the parliamentary term because there are so many things that need to be dealt with; like concentrating more now on economy and crime and matters like referendum are not really top priorities at this time.<sup>224</sup>

Similarly, Minister of Legal and Constitutional Affairs, Marlene Malahoo Forte, sought to allay fears among members of the religious community, disclosing that the Government did not intend to disturb any savings law clauses in the Constitution or repeal pre-existing laws that would go against fundamental beliefs held by the Church.<sup>225</sup> In her contribution to the Sectoral debate in Parliament on Tuesday, Malahoo Forte “put to ease” concerns held by the Christian community regarding any changes that might be made to savings clauses in the Constitution.<sup>226</sup> The savings provisions in the Charter of Fundamental Rights and Freedoms protects the buggery. “This Andrew Holness-led administration is on no path to collide with the Church or any other well-thinking member of the Jamaican society on issues which define the fabric of our society, even in the presence of challenges,” she said.<sup>227</sup> The minister noted that, as a nation, “we have many problems, and we are going to have to work out these problems and hear from each other and learn to live better with our differences.”<sup>228</sup>

With these positions from high level government officials, LGBTQ advocates in Jamaica have urged the island’s lawmakers

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<sup>224</sup> Id.

<sup>225</sup> The Gleaner, “*Buggery, abortion laws won’t be changed during constitutional reform process – Malahoo Forte*” June 7, 2023. Available at: <https://jamaica-gleaner.com/article/lead-stories/20230607/buggery-abortion-laws-wont-be-changed-during-constitutional-reform>

<sup>226</sup> Id.

<sup>227</sup> Id.

<sup>228</sup> Id.

to note the wind of change blowing across the Caribbean and repeal the country's colonial-era buggery laws that effectively criminalize same-sex relations. Local politicians have been criticized as "cowards" for not standing up against this form of discrimination. The call comes in the wake of the Barbados High Court striking down the law that could lead to life imprisonment for gay men.<sup>229</sup> This follows similar action taken by the Antigua and Barbuda High Court in July and the Eastern Caribbean Supreme Court that repealed buggery law in St Kitts-Nevis in August.<sup>230</sup>

### **B. Savings Law Clause**

Since the 1960s, when the Constitutions of the Commonwealth Caribbean States were first created, courts have been confounded by the savings law clauses in these instruments. Common features of the constitutions of the former British colonies, these clauses had the function of providing continuity of the law during a transitional period. Today they have the result of protecting any law which was valid before the date of independence from being struck down as unconstitutional.<sup>231</sup> In

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<sup>229</sup> See Deniece A. Beaumont Walters, "Commonwealth Caribbean Constitutions and Savings Law Clauses". Available at: <https://dbwlegal.com/constitutions-and-savings-law-clauses/#:~:text=The%20Jamaican%20Constitution%20was%20first%20framed%20with%20a,done%20in%20contravention%20of%20any%20of%20these%20provisions>. The Jamaican Constitution was first framed with a Bill of Rights at Chapter III which in theory protected the liberties and dignity of individuals, however the greatest devaluation of those fundamental rights and freedoms was the general savings clause in section 26(8) (now repealed) to the effect that – Nothing contained in any law in force immediately before the appointed day shall be held to be to be inconsistent with any of the provisions of this Chapter; and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions. So, in practice, these rights and freedoms were weakened by section 26(8) which limited judicial review of the pre-independence laws. This section preserved both common law and statutory principles to the detriment of the fundamental rights and freedoms.

<sup>230</sup> Id.

<sup>231</sup> Id.

other words, if a law existed prior to the date of independence, then that law remains valid even if it is in breach of constitutional safeguards. The result of this is that savings law clauses freeze the law as of the date of independence, so that even if pre-independence law has been overtaken by human rights developments, the law will remain valid thus restraining the legal evolution of the Caribbean. There are two types of savings clauses contained in the Commonwealth Caribbean Constitutions; the general savings clause which carries over all laws from the former system and the special savings clause which protects specific penalties or punishments that were in existence at independence.<sup>232</sup>

The savings law clause was used as a weapon to prevent the first attempt made to challenge the buggery law. In *Tomlinson v. Attorney General of Jamaica*, the attorney general argued that the buggery law was saved from judicial review by Section 13 of the new Charter of Fundamental Rights and Freedoms unless the statute was changed subsequent to the charter coming into force.<sup>233</sup> However, the Supreme Court ruled in Tomlinson's favor and determined that both issues of law and fact are "inextricably connected" and that a separate trial would require additional resources and possibly create more delays with no guarantee that the applicant would succeed.<sup>234</sup>

The attorney general the filed for the matter to be taken to the Court of Appeal for March the following year. Tomlinson believes this is a tactic to impede the case. "The people who are all involved in this case, they're all working to prevent this case

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<sup>232</sup> Deniece A. Beaumont Walters, "Commonwealth Caribbean Constitutions and Savings Law Clauses". Available at: <https://dbwlegal.com/constitutions-and-savings-law-clauses/>.

<sup>233</sup> *Attorney General v. Maurice Tomlinson* [2022] JMSC Civ 6.

<sup>234</sup> *Id.*

from going forward cause it's like they're trying to delay the inevitable. As if by some miracle, they think equality will not come to Jamaica if they just fight hard enough and put up enough roadblocks," he said.<sup>235</sup> Labelling the approach as an "embarrassment", Tomlinson argues that the court's decision is an indication of its keenness to "get this over and done with".<sup>236</sup> "The only way to get rid of the law in Jamaica, it appears right now, is through the courts, because the politicians are cowards. They are afraid of the churches," he said.<sup>237</sup> "Our courts will eventually get rid of these laws which essentially invade people's privacy."<sup>238</sup>

In spite of the tremendous pressure on Jamaica to change the buggery law and implement legislation against discrimination, Jamaica maintains that there is no discrimination and changes will be made on Jamaica's pace. Furthermore, Jamaica argues that the cases brought to the IACHR are not binding because there are no compelling justification for interpreting the American Convention as imposing an obligation on Jamaica to remove the sodomy offence as: 1) there is no evidence that the State parties to the American Convention had any intention to impose such an obligation; 2) no subsequent agreement has been reached by State parties to impose such an obligation; 3) Custom does not impose such an obligation; and 4) even if custom imposes such obligation, Jamaica is not bound by it as it is a persistent objector. Therefore, it requested the IACHR to find that Gareth Henry and Simone Edwards are not victims in the instant case.<sup>239</sup>

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<sup>235</sup> The Gleaner, "Politicians branded 'cowards' in buggery law backlash", December 14, 2022. Available at: <https://jamaica-gleaner.com/article/lead-stories/20221214/politicians-branded-cowards-buggery-law-backlash>

<sup>236</sup> Id.

<sup>237</sup> Id.

<sup>238</sup> Id.

<sup>239</sup> IACHR, Report No. 401/20. Case 13.095. Merits (Publication). T.B AND

Just as the savings law clause has altered the landmark case of *Pratt and Morgan v. Attorney General of Jamaica*,<sup>240</sup> to modify the death penalty that was once considered to be immune from judicial scrutiny, the same approach can be used to modify the buggery law, hence it is not immune from judicial scrutiny. It seems that this approach by the Attorney General is an orchestrated plot to delay the process and stifle the conversation geared towards encouraging change.

## 5. APPRAISAL AND RECOMMENDATION

While Jamaica has resisted change, other Caribbean nations have made significant progress in dismantling their own homophobic laws and protecting their citizens. This position has isolated Jamaica as other Caribbean countries take steps to improve the rights of their LGBTQI+ populations. Courts in Belize and Trinidad and Tobago struck down laws criminalizing same-sex relations as unconstitutional in 2016 and 2018 respectively, with the decision in Trinidad and Tobago subject to appeal from the Government.<sup>241</sup> The equivalent laws in Antigua and Barbuda were struck down as unconstitutional in July 2022, followed by St. Kitts and Nevis in August and Barbados in December 2022, subject to any appeal.<sup>242</sup> Two further judgments are pending in

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S.H. Jamaica. December 31, 2020.

<sup>240</sup> In *Pratt and Morgan v. AG (Jamaica)* [1994] 2 A.C. 1, the Privy Council found a way of bypassing the savings law clauses by finding that their effect is restricted to the authorization of the kind of punishment for which the court may pass sentence. Accordingly, they do not prevent a court finding that the circumstances in which the sentence is to be carried out, including prolonged delay, will violate the right not to be subject to inhuman or degrading treatment or punishment. Thus, the special clause saved the penalty, but not the means of its application. In other words, the mandatory death penalty could not be invalidated by the Privy Council, but it could restrict how it was used .

<sup>241</sup> See Associated Press “At a Glance: Laws in the Caribbean Region That Criminalize Gay Sex” June 11, 2023. Available at: <https://www.usnews.com/news/world/articles/2023-06-11/at-a-glance-laws-in-the-caribbean-region-that-criminalize-gay-sex>.

<sup>242</sup> *Id.*

Dominica and St Lucia.<sup>243</sup> In fact, Jamaica remains one of only six countries in the Americas and Caribbean where colonial-era laws criminalizing consensual same-sex sexual activity remain. While the winds of legal change blow across the Caribbean, Jamaica must urgently begin the process of change to avoid becoming a regional outlier.<sup>244</sup>

Along the same line, the European Court of Human Rights held in the case *Dudgeon v. United Kingdom* that sodomy laws of Northern Ireland violated the right to privacy under the European Convention. According to the European Court: the maintenance in force of the impugned legislation constitutes a continuing interference with the applicant's right to respect his private life (which includes his sexual life) within the meaning of Article 8 par.1.<sup>245</sup> Although no proceedings seem to have been brought in recent years with regard to such acts involving only males over 21 years of age, apart from mental patients, there is no stated policy on the part of the authorities not to enforce the law in this respect.<sup>246</sup> Furthermore, apart from prosecution by the Director of Public Prosecution, there always remains the possibility of a private prosecution.<sup>247</sup>

In addition, several high courts across the world have held that "buggery" laws are incompatible with the right to privacy, liberty and with the principle of non-discrimination and can affect the right to humane treatment of individuals impacted by such laws. For instance, the Supreme Court of the United States

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<sup>243</sup> Id.

<sup>244</sup> Id.

<sup>245</sup> European Court of Human Rights, Case of *Dudgeon v. The United Kingdom*, Judgment, October 2, 1981, para. 41; See also European Court of Human Rights, Case of *Modinos v. Cyprus*, Judgment, April 22, 1993, para 23.

<sup>246</sup> Id.

<sup>247</sup> Id.

determined in the case *Lawrence v. Texas* that a statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violates the right to liberty under the due process clause of the constitution.<sup>248</sup> According to the Court: equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons.<sup>249</sup> When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres - the petitioners are entitled to respect for their private lives.<sup>250</sup> The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the due process clause gives them the full right to engage in their conduct without the intervention of the government.<sup>251</sup> It is a promise of the constitution that there is a realm of personal liberty which the government may not enter. The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.<sup>252</sup>

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<sup>248</sup> Id.

<sup>249</sup> Id.

<sup>250</sup> Id.

<sup>251</sup> European Court of Human Rights, Case of *Dudgeon v. The United Kingdom*, Judgement, October 2, 1981, para. 41; See also European Court of Human Rights, Case of *Modinos v. Cyprus*, Judgment, April 22, 1993, para 23

<sup>252</sup> *Lawrence v. Texas* 539 US 558 (2003). See *Obergefell v. Hodges* 576 US 644, in which the Supreme Court of the United States considered that “while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that

In *Orozco v. The Attorney General of Belize*, the Supreme Court of Belize held the unconstitutionality of section 53 of the Criminal Code that criminalizes sexual intercourse “against the order of nature.”<sup>253</sup> It therefore went to determine that section 53 excludes consensual private sexual acts between adults.<sup>254</sup> In as much as section 53 embraces acts involving both males and females the impact on the dignity of a homosexual man is disproportionate given the deep stigmatization caused by them being the primary targets.<sup>255</sup>

The Court holds that section 53 is in breach of the dignity of the Claimant and in violation of section 3 (c). Further, such breach operates to inform the other rights from which the concept of human dignity emanates.<sup>256</sup>

In the case of *Jones v. The Attorney General of Trinidad and Tobago*, the High Court of Justice of Trinidad and Tobago held as unconstitutional, sections 13 and 15 of the Sexual Offences Act which prohibited “buggery” and “serious indecency” between two men and criminalized consensual same-sex activity between adults. The Court reasoned that: To this court, human dignity is a basic and inalienable right recognized worldwide in all democratic societies. Attached to that right is the concept of autonomy and the right of an individual to make decisions for herself/himself without any unreasonable intervention by the State.<sup>257</sup> In a case such as this, she/he must be able to make

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freedom stops there. outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty”.

<sup>253</sup> Supreme Court of Belize. Caleb Orozco and the Attorney General of Belize, August 10, 2016. P.27.

<sup>254</sup> Id.

<sup>255</sup> Id.

<sup>256</sup> Supreme Court of Belize. Caleb Orozco and the Attorney General of Belize, August 10, 2016. P.27.

<sup>257</sup> High Court of Justice. Jason Jones and the Attorney General of Trinidad and Tobago.

decisions as to who she/he loves, incorporates in his/her life, who she/he wishes to live with and with whom to make a family. A citizen should not have to live under the constant threat, the proverbial “Sword of Damocles”, that at any moment she/he may be persecuted or prosecuted.<sup>258</sup> That is the threat that exists at present. It is a threat that is sanctioned by the State and that sanction is an important sanction because it justifies in the mind of others in society who are differently minded that the very lifestyle, life and existence of a person who chooses to live in the way that the claimant does is criminal and is deemed of a lesser value than anyone else.<sup>259</sup> It has been so expressed in the recent past by leaders in society. In this way, Parliament has taken the deliberate decision to criminalize the lifestyle of persons like the claimant whose ultimate expression of love and affection is crystallized in an act which is statutorily unlawful, whether or not enforced. This deliberate step has meant, in this circumstance, that the claimant’s rights are being infringed.<sup>260</sup>

The court feels compelled to state in conclusion that it is unfortunate when society in any way values a person or gives a person their identity based on their race, color, gender, age or sexual orientation.<sup>261</sup> That is not their identity. That is not their soul. That is not the sum total of their value to society or their value to themselves.<sup>262</sup> The experiences of apartheid South Africa and the USA during and after slavery, even into the mid and late 20th century, have shown the depths that human dignity has been plunged as a result of presupposed and predetermined prejudices based on factors that do not accept or recognize

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<sup>258</sup> Id.

<sup>259</sup> Id.

<sup>260</sup> Id.

<sup>261</sup> Id.

<sup>262</sup> Id.

humanity.<sup>263</sup> Racial segregation, apartheid, the Holocaust - these are all painful memories of this type of prejudice. To now deny a perceived minority their right to humanity and human dignity would be to continue this type of thinking, this type of perceived superiority based on the genuinely held beliefs of some.<sup>264</sup>

These cases clearly outlines that several countries who has this same legislation has taken steps to remove the anti-colonial law that was received from England. Society has changed and so should the laws of a country. Laws should not be static; they should be amendable to change and serve the needs of the people. Consequently, the presence of the buggery law in Jamaica denies homosexuals the right to live feeling without being subjected to discrimination and imprisonment.

### **RECOMMENDATIONS**

Jamaica should adopt the measures of non-repetition necessary to prevent similar incidents from taking place in the future. Specifically:

I) Repeal the sections of the Offences against the Persons Act that criminalizes private consensual sexual activity between adults and consensual sexual conduct between men who have sex with men or gay men.<sup>265</sup>

II) Adopt a legal framework or modify the existing legislation with a view to prohibiting and punishing all forms of discrimination based on sexual orientation, gender identity or expression - real

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<sup>263</sup> High Court of Justice. Jason Jones and the Attorney General of Trinidad and Tobago.

<sup>264</sup> Id.

<sup>265</sup> U.N. Human Rights Comm. [ICCPR], Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Fourth Periodic Report of States Parties, Jamaica, ¶ 1, U.N. Doc. CCPR/C/JAM/CO/4/Add.1 (October 25, 2016).

or perceived - and body diversity.<sup>266</sup>

III) Carry out collection and analysis of statistical data in a systematic and disaggregated manner in the Jamaica Census regarding the prevalence and nature of violence and discrimination based on prejudice, based on their sexual orientation, gender identity or expression - real or perceived- and body diversity.<sup>267</sup>

IV) Adopt the necessary measures to ensure the effective access to health services to LGBTI persons without discrimination.<sup>268</sup>

V) Apply the standard of due diligence in the prevention, investigation, punishment and reparation of violence against LGBTI persons, regardless of whether violence occurs in the context of the family, community or public sphere, including in the workplace, sectors of education and health. Ensure that investigations are not permeated by prejudice based on the sexual orientation and/or real or perceived gender identity of the victim or the perpetrator.<sup>269</sup>

VI) Conduct periodic and sustained training activities for Jamaican public official, particularly for judges, prosecutors, public defenders, other justice operators, security forces and the education, employment and health sectors, on sexual orientation, gender identity and gender expression, body diversity, and the challenges these people face.<sup>270</sup>

VII) Ensure that Jamaica's educational programs are designed with a gender perspective, guaranteeing the deconstruction of

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<sup>266</sup> Id.

<sup>267</sup> Id.

<sup>268</sup> Id.

<sup>269</sup> Id.

<sup>270</sup> Id.

stereotypes and prejudices and based on a model guaranteeing the autonomy of all people, especially LGBTI people. Include comprehensive sexuality education in the school curriculum, in accordance with the progressive capacity of children, which includes a perspective of body, sexual and gender diversity, ensuring that educational policies and programs are specially designed to modify social and cultural patterns of harmful behaviors.<sup>271</sup>

VIII) Have workshops to assist guidance counsellors: to become more knowledgeable and comfortable with topics of adolescent sexuality and reproductive health; become familiar with psychodynamic principles of counselling for behavior change; and to learn and practice communication skills for counselling with a special emphasis on listening.<sup>272</sup>

IX) The Ministries of National Security and Justice and the Jamaica Constabulary Force take leadership action and expand training programs to ensure that relevant persons, including police officers and judges are knowledgeable about human rights, sexual orientation and gender identity. Similarly take measures to ensure police thoroughly investigate all crimes reported, whether committed by or against LGBT people so the perpetrators

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<sup>271</sup> This measure might not work, the government might want to take the approach of taken by the state of Florida. The Florida Board of Education has expanded upon the state's existing "Don't Say Gay" legislation, banning on Wednesday the teaching of sexuality and gender identity in all Florida public schools. Prior to the decision, public school teachers and districts were barred from discussing gender identity and sexuality in kindergarten through third-grade classrooms. Under the new rule, Florida public schools educators cannot "intentionally" instruct students in grades K-12 on sexual orientation or gender identity, with the exception being "unless such instruction is either expressly required by state academic standards...or is part of a reproductive health course or health lesson for which a student's parent has the option to have his or her student not attend.

<sup>272</sup> U.N. Human Rights Comm. [ICCPR], Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Fourth Periodic Report of States Parties, Jamaica, ¶ 1, U.N. Doc. CCPR/C/JAM/CO/4/Add.1 (October 25, 2016).

can be brought to justice.<sup>273</sup>

X) The government should provide funding and support in the creation of safe houses where LGBT people can assemble to seek help and feel supported by a community.<sup>274</sup>

XI) In the event that Jamaica is unwilling to change the law immediately, steps need to be taken to normalize the topic of homosexuality in a positive light. Therefore, the topic of homosexuality should be tapered into the society through programs on television and radio so that discussions can take place and the topic is not taboo.

These recommendations goes to the heart of ensuring that human dignity is preserved and to ensure that human flourishing is attainable. Effective solutions is the concept of an order of human dignity, allowing for the flourishing of all human beings- no minorities left out in the cold - through maximization of access by all to all the processes of shaping and sharing things that human beings value.<sup>275</sup> The ideal of the these recommendations are focused on allowing for an approximation of maximum access by all human beings to the processes of shaping and sharing of all things they value, which is the right to live freely without undue pressure from discrimination. Applying these recommendations would ensure that the normalize acceptance of discriminatory practices against LGBTQ persons would significantly decline and LGBTQ people can live in a society that considers them equal; not less than because of their sexual preference. Jamaica need to not just only talk the talk but walk the talk because the motto of

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<sup>273</sup> Id.

<sup>274</sup> Id.

<sup>275</sup> Siegfried Wiessner, "The New Haven School of Jurisprudence: A Universal Toolkit for Understanding and Shaping the Law" *Asia Pacific Law Review*, Vol 18 No. 1 (2010).

Jamaica after all is “out of many one people.” This should mean that the laws should be inclusive to reflect the differences of the many people that are a part of the Jamaica diaspora. However, this is not evident in the laws and Jamaica has failed those who are different. Lastly, I take great pleasure to remind Jamaica that, ‘the time is ripe to revisit the buggery law.’