

2020

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Donovan McFarlane
Westcliff University

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Recommended Citation

Donovan McFarlane, *Culture, Morality, and The Law: The Treatment of Homosexuals in Jamaica*, 15 Intercultural Hum. Rts. L. Rev. 203 (2020).

Available at: <https://scholarship.stu.edu/ihrlr/vol15/iss1/6>

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CULTURE, MORALITY, AND THE LAW: THE TREATMENT OF HOMOSEXUALS IN JAMAICA

DONOVAN A. MCFARLANE*

Preface

Growing up in rural Jamaica, the author of this paper clearly understood one thing: The “old” culture that characterized his grandmother’s generation and the immediate one that followed, that of his mother, aunts and uncles, and their peers, was extremely harsh against values, behaviors, and deviations from the norms, whether those were of his family or society itself. While the standards became more relaxed with the author’s generation, some things remained taboo and determinably and decisively not in concert with Jamaican cultural traditions and social values. One of these things is homosexuality. The very nature of the expressive language that Jamaican Patois is in its description of this orientation and its regarded “adherents” – since it was and is never regarded as a natural or inborn trait or behavior – communicated enough about the culture’s detestation of homosexuality. For example, across Jamaica, the derogatory terms used to describe homosexuals were not unfamiliar to even the smallest of talking child, even if he or she did not understand its meaning. One thing was clear however, it meant something “disrespectful” and “bad” enough to be hurled as an insult at anyone whom you had a conflict with or whom you did not like or became upset with. Hence, the terms “nasty man”, “battyman”, “batty bwoy”, and “chi-chi man”¹ became not only

* Associate Professor of Business (Adj.) in the College of Business, Westcliff University. The author has been teaching at the college/university level for over 15 years. The academic degrees of M.S.L. (Law, California Southern University School of Law), LL.M. in Intercultural Human Rights (St. Thomas University College of Law), M.B.A. in Management (Nova Southeastern University), and M.I.B. (International Business) and Ed.D. in Educational Leadership (St. Thomas University) are among his credentials. This article is dedicated to the Intercultural Human Rights Program and Law Review teams at St. Thomas University College of Law, and friend, mentor, and dissertation chair, Dr. Agueda G. Ogazon, former professor of management at St. Thomas University. Special thanks to Mary Rojas, M.A. and Ann

derogatory words to describe homosexuals, but also words to disrespect others regardless of knowledge of their sexual orientation. That is, the words were “subhuman” terms that meant the highest forms of disrespect for a person, and they still are today as they are used against homosexuals. Even the beloved dancehall and “reggae”² culture that has placed Jamaica on the globe as one of the Caribbean’s top tourism destinations³ has further strengthened and influenced Jamaica’s negative attitude toward and mistreatment of homosexuals. For example, dancehall and “reggae” artists such as Buju Banton, Elephant Man, Beenie Man, Ninja Man, Vybz Kartel, among others have included in their lyrics and composed entire songs popular across Jamaica and the globe that advocate violence against homosexuals.⁴ One of the most famous of such dancehall songs was “Boom Bye Bye” by dancehall artist Buju Banton, who in his song advocated shooting homosexuals in the head, whether men or women homosexuals. Here is the chorus or hook from the song:

*It’s like boom bye bye inna batty bwoy head
Rude bwoy nah promote no nasty man, dem haffi dead
Boom bye bye inna batty bwoy head
Rude bwoy nah promote no nasty man, dem haffi dead.*⁵

Deam, Esq. for the numerous hours editing to ensure accuracy and quality of this article.

¹ These are derogatory words in Jamaican Patois (the nation’s official dialect), and are used to describe homosexuals, and are also often hurled as disrespectful insults against enemies or those with whom an individual is in conflict regardless of their sexual orientation. These are the equivalence of the word “faggot” which is used to negatively describe gay people.

² Some musicians and artists still differentiate between reggae and dancehall music as distinct based on contents and regard dancehall music as the violent deviating type, while reggae music is regarded as conscious music in the way of the legendary Bob Marley and similar artists.

³ World Travel & Tourism Council, *Travel & Tourism Economic Impact 2018: Jamaica* (Feb. 4, 2018).

⁴ Keon West, *Why do so many Jamaicans hate gay people?* THE GUARDIAN (Jun. 6, 2014, 9:09 PM), <https://www.theguardian.com/commentis-free/2014/jun/06/jamaica-music-anti-gay-dancehall-homophobia>.

⁵ Buju Banton, *Boom Bye Bye*, GENIUS MEDIA GROUP, INC. (Oct. 3, 2019, 11:00 AM), <https://genius.com/Buju-banton-boom-bye-bye-lyrics>.

Put to catchy rhythm, even many gay people worldwide enjoyed and danced to the music, especially those fascinated by Jamaican culture, Jamaican icon and reggae pioneer Bob Marley, and Jamaican dancehall music, until they found out its real meaning; the song is advocating the murder of homosexuals.⁶ One will also notice the derogation and demeaning terms used as previously mentioned above: “batty bwoy” and “nasty man.”⁷ In some cases, another term popular in the culture and spoken and sung language to refer to a gay man is “fish.”⁸

The author can remember an elderly lady in his small rural city who was subjected to this kind of disrespect by young men and others as they would shout “Lesbian!” whenever they saw her – even school children who had no knowledge of the meaning of the concept would call her by this misnomer. Having been a prominent member of the small city, she had attempted to verbally discipline a group of young men for their bad behaviors, and they retaliated by labeling and calling her “Lesbian” as a way of disrespecting her, and the name stuck with her. Of course, this elderly lady was no lesbian, but a heterosexual married lady with many grandchildren.

Homosexuality remains taboo in Jamaican society and culture today, and it is not only culturally and religiously, but also legally and politically assailed. In a *HARDTalk* interview on *BBC News* with then Jamaican Prime Minister Bruce Golding in 2008, the prime minister was asked about Jamaica’s attitude toward homosexuality in light of statements from Human Rights Watch and a *New York Times* article, and his response was as follows: “We do have a longstanding culture that is very opposed to homosexuality.”⁹ When further pressed on the

⁶ Note: When translated from Jamaican Patois to American English, this is the real meaning of the verse: “Shoot homosexuals in their head; I am not promoting any faggot – they must die! (The author of this paper is a native Jamaican, and therefore fully understands the dialect).

⁷ Derogatory words or slurs used to describe gay men or homosexual men in Jamaica.

⁸ Avir Mitra, *After fleeing violence in Jamaica, gay man seeks refuge in America*, THE PULSE (Mar. 8, 2017, 12:00 AM), <https://whyy.org/segments/after-fleeing-violence-in-jamaica-gay-man-seeks-refuge-in-america/>.

⁹ BBC News, *HARDTalk: Bruce Golding 3*, YOUTUBE (May 20, 2008), <https://www.youtube.com/watch?v=9cQx-zmHgg8> [hereinafter *HARDTalk*].

issue of homosexuality and confronted with his 2006 statement of never allowing a homosexual into the Cabinet offices and asked about the kind of signal it sends to the outside world and potential investors and other countries, Prime Minister Golding, replied, “One signal that it sends, is that Jamaica is not going to allow values to be imposed on it from outside.”¹⁰ Furthermore, Prime Minister Golding commented about sociocultural evolution on the matter of homosexuality over time while stating, “It can’t be on the basis that lobby groups, far and away from Jamaica, are going to start to define for Jamaica, how it must establish its own standards and its own morals.”¹¹ When asked about a future where gay people are part of the Jamaican government’s Cabinet, Prime Minister Golding emphasized, “Sure they can be in the Cabinet, not mine ... not mine!”¹² Furthermore, Prime Minister Bruce Golding expressed that he does not want to see a future where Jamaican values are assaulted, referring to his perception of homosexuality’s negative impact on Jamaica’s culture. This was an important interview as it does not only express government’s policy toward the treatment of homosexuals and homosexuality, but fundamentally represents Jamaica’s current stance and attitude toward homosexuals and homosexuality. This stance is known globally, but its bases remain unclear to many, and therefore, this author seeks to educate readers and stakeholders to the issue of homosexuality and human rights so that they can develop a better understanding and approach in addressing and dealing with Jamaica’s attitude toward homosexuality and subsequent mistreatment of homosexuals.

Introduction

Among the issues and human rights challenges that affect our world, lives, social institutions and the process and application of law, is one whose treatment has remained fundamentally rooted in tradition: homosexuality. In a 1986 study, Remafedi defines homosexuality as a general attraction to an individual of the same gender or sex,¹³

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Gary Remafedi, *Male Homosexuality: The Adolescent’s Perspective*, 79 PEDIATRICS 326, 326 (1987).

and this definition has pretty much remained the same despite the diversity of non-heterosexual typologies today to include the acronym LGBTQ (“lesbian, gay, bisexual, transgender, and queer” as has been in use since the 1990s). In this paper, the term “homosexual” is used in the general sense of attraction to and intimacy with someone of the same sex without regard to now informal usage of “homosexuality” to refer to male-male physical social-intimate interaction, and “lesbianism” to describe female-female physical social-intimate interaction. Tradition is rather difficult to define according to Glenn, but is best conceived of as “pastness” according to the writings of T.S. Eliot, or as “*traditio*” since “[t]radition ... involves the extension of the past to the present.”¹⁴ Furthermore, Glenn points out tradition as not only a way of thinking, but also as information.¹⁵ Given this understanding and conceptualization of tradition, it influences what was in the past, as well as the present. Homosexuality is not a modern phenomenon unlike many challenges today that have emerged out of scientific and technological advances, our changing systems, values, and institutions. These have rather affected knowledge about this human issue, its acceptance, and its place in societies across the globe, as well as how cultures, social institutions, and most importantly, the law and the state deal with this as a human rights issue.

The prevailing attitude toward homosexuals and homosexuality in Jamaica stems from a combination of social, cultural, religious, and legal factors embedded in “tradition,” with the state’s stance on the issue giving further credence and power to the views and actions of those who mistreat homosexuals or regard them in subhuman terms and thus violate their human rights. The state’s traditional and current stance stems from the *1864 Offences Against the Person Act* which criminalized homosexuality with 10 years imprisonment and hard labor and which today remains the law. Jamaica is known globally for its tough stance against homosexuality and the mistreatment of homosexuals so much as to arise widespread media attention, including the attention and actions of various international human rights organiza-

¹⁴ H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD* 12 (Oxford U. Press, 3rd ed. 2007).

¹⁵ *Id.*

tions such as Human Rights Watch, an international NGO (non-governmental organization), and other NGOs such as J-FLAG, Women's Empowerment for Change (WE-Change), The Colour Pink Foundation, TransWave, Center for International Human Rights at the Northwestern Pritzker School of Law of Northwestern University, and Global Initiatives for Human Rights of Heartland Alliance for Human Needs & Human Rights. Most importantly, more prominent human rights organizations and bodies such as Amnesty International, the Inter-American Commission on Human Rights, and the United Nations Human Rights Committee have expressed concerns about Jamaica's treatment of homosexuals. Despite this widespread awareness and knowledge about the human rights violations and mistreatment of homosexuals in Jamaica, little action has been taken by the Jamaican government and international human rights stakeholders such as those mentioned above. Key to developing policies, recommendations, and solutions for improving the situation and alleviating the violation of the human rights of homosexuals in Jamaica is a deeper understanding of the factors constituting to the present attitude toward homosexuality in Jamaica. Thus, this paper presents the issue from the diverse contextualities including religion, natural law jurisprudence, culture and rule of law using the New Haven School of Jurisprudence methodology in dissecting the treatment of homosexuals in the island nation of Jamaica.

New Haven School: A Conceptual Analytical Framework

From an issues perspective, homosexuality is multifaceted because it engenders and provokes religious, economic, cultural, social, political, legal, institutional, philosophical and ideological debates and considerations. Religiously, institutionally, culturally, and socially it creates contention in ideals and definitions of values and morality and agitates considerations of norms regarding the agents of socialization. Economically, politically, and legally, it creates challenges in our interpretations and deliberation of rights and resources and their allocation in policy-oriented settings and decision-making across both governmental and nongovernmental, public and private organizations. Philosophically and ideologically, it leads to contemplation of individual paradigms regarding our experience, understanding, and synthesis

of these in the face of personal choice and respect for human dignity, equality, and social justice. Given its weight as a social issue of our time, homosexuality also connects to diversity which has become a normative approach to rights advocacy, equality, social justice, and representation in modern society. Therefore, examination under the New Haven School seems most befitting of such a subject matter involving so many countervailing viewpoints and challenges, not excluding the rule of law. What we ultimately seek is solution and sound policy on the issue under discussion, and the New Haven School of Jurisprudence as policy-oriented jurisprudence dissects the issue by examining conditioning factors, decision makers, and how directions can be made toward a public order of human dignity built on eight values defined as human aspirations: power, wealth, enlightenment, skill, well-being, affection, respect, and rectitude.¹⁶

So, Why New Haven School?

Recognizing homosexuality in its complexity as a challenge, no other legal school of thought lends its methodology so perfectly to analyzing and framing this issue than the New Haven School. Unlike positivism and natural law jurisprudence, the New Haven School lends itself to complex issues and facilitates what can be construed of as a multiple stakeholder perspective in examining the different claimants, trends, and decisions, as well as alternative policy recommendations to an issue. Rule of Law construed from positivist-empirical and naturalist-jurisprudential perspectives is not flexible enough to dissect the countervailing arguments and approaches to understanding and developing informed policies or recommendations on homosexuality since their limitations allow for the issue to be too narrowly construed. However, there is no such limitation with the New Haven School or approach.

The New Haven School, a legal school of thought, was developed by Myres S. McDougal and Harold D. Lasswell with the goal of adapting “analytical methods of the social sciences to the prescriptive

¹⁶ Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence and Human Rights in Internal Conflict: Toward a World Public Order to Human Dignity*, 93 AM. J. INT’L L. 316 (1999).

purposes of law.”¹⁷ This is exactly what makes the New Haven School so appropriate to elucidating the complex issues and processes at play in Jamaica’s treatment of homosexuals and Jamaican’s attitude toward homosexuality. The current state of public and civil order in regards to homosexuality in Jamaica is one where both the people and the government do not recognize the rights of homosexuals or see a place for such lifestyle, individual choice, and sexual freedom in the culture and society, and where human rights and dignity have not come to override such stances. The New Haven School examines the conflicting claims, legal responses, alternatives and appraises these in context to make recommendations that approximate both public and civil order to their goal of human dignity¹⁸ for homosexuals as has been the case for other Jamaicans.

Law in the traditional sense represents a command of sovereign backed by sanctions and as such is static, acontextual, and a body of rules without the deep consideration as to the eight values espoused under the New Haven School.¹⁹ On the other hand, law seen from the New Haven approach is a process of authoritative and controlling decisions in any community and is dynamic, contextual and follows the flow of decisions.²⁰ It is this characteristic of the New Haven School that makes it most appropriate in examining homosexuality in its current, emerging, and potential future contexts in Jamaica, and not only in terms of the subject matter itself as a problem, but addressing it to specifically find solutions through its examination under five essential sequential steps: (1) understanding the problem that the law must address; (2) reviewing the conflicting interests or claims; (3) analyzing past legal responses in light of the factors that produced them; (4) predicting future decisions; and (5) assessing the past legal responses, inventing alternatives and recommending solutions in line with a good

¹⁷ W. Michael Reisman, Siegfried Wiessner & Andrew R. Willard, *The New Haven School: A Brief Introduction*, 32 YALE J. INT’L L. 575, 575 (2007).

¹⁸ *Id.*

¹⁹ *Id.* at 576.

²⁰ Siegfried Wiessner, *The New Haven School of Jurisprudence: A Universal Toolkit for Understanding and Shaping the Law*, 18 ASIA PACIFIC L. REV. 47, 49 (2010).

order or preferred order designated a “public order of human dignity.”²¹ This public order of human dignity can be defined as “one which approximates the optimum access by all human beings to all things they cherish: power, wealth, enlightenment, skill, well-being, affection, respect, and rectitude.”²²

I. *Delimitation of the Problem*

The treatment of homosexuals in the island nation of Jamaica is one that has garnered attention worldwide and on such a level that, “Jamaica has been characterized as one of the most homophobic and transphobic societies globally.”²³ As a country with a high level of violence and high murder rate with placement among the top-five murder rates among the nations of the world, the inclination for violence against homosexuals is not surprising.²⁴ In a 2015 national study by Jamaica’s prominent gay advocacy group, Jamaica Forum for Lesbians, All-Sexuals and Gays (J-FLAG), it was found that 93% of Jamaicans believe that “homosexuality is a sin” while 89% believed that homosexuality is wrong.²⁵ Similarly, 87% believed that female homosexuality is wrong, while 63% cited moral and religious grounds for their rejection of homosexuality.²⁶ Finally, 61% of the participants believed conversion therapy would help change people from being homosexuals to being heterosexuals.²⁷

In a 2016 survey of 316 Jamaican gay, lesbian, bisexual and transgender youths, researchers McFee and Galbraith found that 71% of young gay men, 59% of lesbians, 35% of bisexuals and 29% of

²¹ *Id.*

²² Reisman et al., *supra* note 17, at 575.

²³ Delores E. Smith, *Homophobic and transphobic violence against youth: The Jamaican context*, 23 INT’L J. ADOLESCENCE & YOUTH 250 (2018).

²⁴ Amber Pariona, *Murder Rate by Country*, WORLD ATLAS (Jan. 20, 2020), <https://www.worldatlas.com/articles/murder-rates-by-country-.html>.

²⁵ Jamaica Forum for Lesbians, All-Sexuals and Gays (J-FLAG), *Management Report on Awareness, Attitude, and Perception Survey about Issues Related to Same Sex Relationships* (2015) [hereinafter *Jamaica Forum*]. Note J-FLAG headquarters burned down in 2019, limited source availability. See Smith, *supra* note 23, reference 12 (referring to original article).

²⁶ *Id.*

²⁷ *Id.*

transgender Jamaicans reported high incidences of harassment and discrimination stemming from their sexual orientation.²⁸ Part of the negative attitude toward homosexuals and homosexuality in Jamaica is evident in the fear that Jamaican homosexuals have of the law enforcement system, agencies, and institutions designed to protect the safety of citizens and prevent crime. In McFee's and Galbraith's study, when it came to homosexuals as victims of violence, 40.5% of participants stated that they did not report the crime to the police because the police would not be helpful, while 25.5% feared homophobic responses from the police, 23% felt it would be embarrassing, and 30% felt the incidence against them was too minor to report to the police.²⁹ All in all, fear, lack of trust of authority, shame and embarrassment, as well as insecurity stemming from the prevailing attitude toward homosexuals make reporting violence against homosexuals a major challenge in Jamaica.

One of the challenges in understanding the breadth and depth of mistreatment of homosexuals in Jamaica, which include discrimination, harassment, violence, and various crimes against them, is the lack of coordinated data and statistics since the Jamaican government does not keep or have any interest in keeping such records. As a result, the few studies like those of J-FLAG and McFee and Galbraith as well as news headlines and case studies of such incidents represent the best data available for understanding the problem. In 2016, 23 Jamaicans reported to J-FLAG, Women's Empowerment for Change (WE-Change), The Colour Pink Foundation, TransWave, Center for International Human Rights, Northwestern Pritzker School of Law of Northwestern University, Global Initiatives for Human Rights of Heartland Alliance for Human Needs & Human Rights that they were physically assaulted or attacked as a result of their sexual orientation or gender identity.³⁰ The incidences of mistreatment of homosexuals

²⁸ Rochelle McFee & Elroy Galbraith, *The Developmental Cost of Homophobia: The Case of Jamaica* (2016), at 48.

²⁹ *Id.* at 61.

³⁰ J-FLAG, Women's Empowerment for Change (WE-Change), The Colour Pink Foundation, TransWave, Center for International Human Rights, Northwestern Pritzker School of Law of Northwestern University & Global Initiatives for Human Rights of Heartland Alliance for Human Needs & Human Rights, *Human Rights*

in various forms can be speculated as rampant and high, but fear and danger to life keep many homosexuals from reporting or even speaking out to authorities as well as international bodies on this issue. Case studies and incidents of violent attacks against homosexuals which make headlines and are reported to J-FLAG and other NGOs provide evidence of the continued problem. Here are several prominently known cases below from *Unresolved* (a podcast) and J-FLAG:

Case 1: In 2004, Brian Williamson, who was one of Jamaica's most vocal gay rights activists, was murdered, and upon announcement of his death, a large group of Jamaicans gathered and celebrated his death by chanting homophobic slurs.³¹

Case 2: In 2005, Jamaican gay rights advocate, Steve Harvey, who had long advocated for those living with HIV/AIDS, was abducted from his home and shot dead by a group of masked men, who were eventually charged with his murder, but acquitted.³²

Case 3: In 2009, John Terry, a British diplomat who lived in Jamaica, was found strangled inside of his home with a note beside his body containing a number of homophobic slurs.³³

Case 4: In 2011, a 16-year old gay Jamaican youth named Oshane Gordon was abducted from his mother's home and hacked to death by his kidnappers, who used machetes and other similar weapons to dismember him.³⁴

Case 5: On March 6, 2016 in the City of New Kingston, a transgender woman was severely beaten and left

Violations Against Lesbian, Gay, Bisexual, and Transgender (LGBT) People in Jamaica: A Shadow Report (2016) [hereinafter J-FLAG].

³¹ *Unresolved* (Podcast), *Dwayne Jones (Gully Queen)*, UNRESOLVED (Nov. 16, 2019, 12:00 AM), <https://radiopublic.com/unresolved-6N9k1J/episodes> [hereinafter *Unresolved*].

³² *Id.*

³³ *Id.*

³⁴ *Id.*

for dead in a gully after attending an event at the National Stadium. She and her friends had stopped at a gas station, where they were blocked by a group of men in a vehicle.³⁵

Case 6: On July 15, 2015, a group of men in Kingston approached a lesbian woman and threatened to rape her to cure her of her homosexuality. At the same time, her neighbors harassed her causing her to move to another part of the country.³⁶

Case 7: On August 22, 2014, in the City of Portmore, two men broke into the home of a 37-year old lesbian and raped her, beat her, and broke her arm before stabbing her in her chest with a 12-inch knife while referring to her as “sodomite, lesbian, dirty girl.”³⁷

Case 8: On June 15, 2014, in the City of May Pen in the Parish of Clarendon, a transgender teen, who was in the process of transitioning her appearance, was attacked when she attempted to purchase lip gloss at a store. A mob outside of the store chanted, “Kill her and set her on fire”, in Jamaican Patois, and the police were called. The mob was difficult to disperse, and the teen only escaped with help of the store workers and two police officers who ensured the teen’s safety.³⁸

Case 9: In January 2013, a gay man was being attacked by a mob of about 30 people who were armed with knives, machetes and sticks as they shouted homophobic insults while beating him. The victim was separated from the mob by the police and handcuffed and placed in a car where the attending police officers beat him.³⁹

Case 10: On July 21, 2013, 16-year-old Dwayne Jones was murdered by a mob in Irwin, St. James, after he attended a dance party wearing women’s clothing. He

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

was discovered by partygoers to biologically be a male and as a result, was stabbed several times, severely beaten, shot and ran over by a car. His body was dumped by the side of a road. No one has ever been charged with this crime.⁴⁰

Case 11: In March 2013, in the popular metropolitan City of Montego Bay, a gay man and his gay male friends were attacked by a mob of about ten men armed with machetes, stones and other weapons, yelling “Battyman fi dead.” The man and his friends escaped with one victim suffering a broken nose. The incident was reported to the police, but nothing was done.⁴¹

Case 12: On October 6, 2013, in the City of New Kingston, a gay man was severely beaten in the parking lot of his workplace by three male co-workers for fifteen minutes while his company’s security guard looked on and ignored his cries for help.⁴²

Case 13: In August 2013, in the City of Green Mountain, five men who were believed to be gay were trapped in their house by a mob of attackers until the police escorted them to safety.⁴³

The above are only some cases that have been well documented and reported to J-FLAG and that have made news and shared online by reporters and, in some cases, by victims themselves. For every incident reported it is believed that hundreds, if not thousands of incidents of violence, threat, sexual assault, discrimination and the like against homosexuals in Jamaica go unreported.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

II. Conflicting Claims, Claimants, Perspectives, Identifications and Bases of Power

When it comes to the treatment of homosexuals in Jamaica, it is obvious that this human rights issue has its various proponents and opponents or claimants that affect definition of public order and the prevailing rule of law and its treatment of the issue. Furthermore, the stakeholders in the treatment of homosexuals and homosexuality in Jamaica all contribute to the current climate, and most unfortunate is the fact that most claimants within the island nation are what can be called “negative claimants” as they represent the derogation of fundamental and basic human rights to which gay people are entitled on the basis of being human beings. “Positive claimants” or those in favor of justice, equality, dignity, and respect for the rights of Jamaican homosexuals are very few, and the same problems of fear, intimidation, shame, and threat keep these claimants from speaking out for the rights of homosexuals, and against mistreatment by ordinary citizens, police officers and law enforcement agencies, corporations or businesses and the government. Here are the claimants and their contentions and perspectives on the issue of homosexuality as a societal problem in Jamaica.

A. The Victims

The victims of mistreatment and subhuman regard in reference to homosexuality in Jamaica do not include only those who identify themselves as homosexuals – whether male or female – but also those who are part of what has come to be known today as the LGBTQ (lesbian, gay, bisexual, transgender and queer) community; none is acceptable in Jamaica under its current law, the *1864 Offences Against the Person Act*, or protected under Jamaica’s *Charter of Fundamental Rights and Freedom*,⁴⁴ and they are shunned by Jamaica’s tradition and culture so ruling to include social norms, beliefs, and religion. Homosexuals and those of the LGBTQ community seek to be treated with respect and human dignity like any other Jamaican citizens and are seeking recognition under the law as Jamaican law currently does not

⁴⁴ J-FLAG, *supra* note 30.

recognize or protect sexual orientation. Furthermore, even the *Charter of Fundamental Rights and Freedom*, which was drafted and enhanced in 2011, excludes sexual orientation as a protected and recognized fundamental right and freedom of individuals.⁴⁵ Homosexuals and members of the LGBTQ community in Jamaica seek equal protection and justice under Jamaica's law and freedom from violence and physical assault, sexual harassment, sexual abuse, and ill-treatment. Homosexuals and members of Jamaica's LGBTQ community seek protection from and by law enforcement agencies and government who often turn a blind eye to their plight. Most importantly, homosexuals and members of Jamaica's LGBTQ community seek recognition of their privacy and individual choice as to their sexual freedom without persecution, prosecution, harassment, and exclusion from Jamaican cultural, social, and institutional memberships and celebrations including having the right to be represented and participate in government and other activities to which all Jamaicans have a right.

Homosexuals and members of Jamaica's LGBTQ community seek human dignity and freedom from discrimination as they have been displaced and constitute a major percentage of the homeless population in Jamaica, often forced on the fringes of cities or to live in squalor. As Human Rights Watch notes, "LGBT Jamaicans are vulnerable to both physical and sexual violence and many live in constant fear. They are taunted, threatened, fired from their jobs, thrown out of their homes, or worse: beaten, stoned, raped, or killed."⁴⁶ In 2014, Human Rights Watch featured the non-facial photo of a homeless youth from Jamaica's LGBT community sitting in the sewer where he lives in Kingston, Jamaica.⁴⁷ This is a commonplace occurrence and condition of homosexuals and LGBTQ people in Jamaica who are chased out of their homes, abandoned by their family members, their communities, and their government. For example, consider the globally-known case of Jamaican LGBTQ youth Dwayne Jones who was killed in July 2013. He was chased out of his home by family as early as the

⁴⁵ *Id.* at 16.

⁴⁶ *Jamaica: Unchecked Homophobic Violence*, HUMAN RIGHTS WATCH NEWS (Oct. 21, 2014), <https://www.hrw.org/news/2014/10/21/jamaica-unchecked-homophobic-violence> [hereinafter Human Rights Watch].

⁴⁷ *Id.*

age of 14 and was left to survive on his own, living on the streets; he was bullied in school; he was abandoned by the community.⁴⁸ Homosexuals and LGBTQ people in Jamaica are seeking change by having their rights recognized and protected and their dignity and humanity preserved and respected by everyone including private citizens and governmental agencies and organizations. Gay Jamaicans are seeking well-being, affection, and respect⁴⁹ for who they are as human beings and individuals with equality under Jamaica's law and culture.

B. Law Enforcement Agencies and Personnel

Law enforcement personnel and agencies across Jamaica are representative of part of the human rights struggles and challenges that homosexuals and members of the LGBTQ community in Jamaica face in asserting their dignity and fundamental human rights. According to Canada: Immigration and Refugee Board of Canada, police harassment is a major part of the mistreatment and subhuman experience faced by homosexuals and vulnerable groups in Jamaica. This mistreatment oftentimes comes in the form of verbal harassment.⁵⁰ As a result, homosexuals and members of the LGBTQ community are afraid to report crimes against them or violations of their fundamental general rights to authorities.⁵¹ Jamaican authorities, including law enforcement agencies and personnel claim that they do strive to protect everyone equally, and that homosexuals are the ones not reporting crimes perpetrated against them.⁵² Other law enforcement agencies and professionals point to the need for improvement in protecting all people equally including LGBTQ community members and provide examples of improvements such as during Jamaica's 2008 annual carnival celebration when the police protected a group of men who were

⁴⁸ Unresolved, *supra* note 31.

⁴⁹ Reisman et al., *supra* note 17.

⁵⁰ Canada: Immigration and Refugee Board of Canada, *Jamaica: How Police Treat Complaints Made by Lesbian, Gay, Bisexual, and Transgender (LGBT) People (2007-2010)*, December 10, 2010, <https://www.refworld.org/docid/4d2abcb52.html> (Nov. 15, 2019, 16:07 GMT).

⁵¹ *Id.*

⁵² *Id.*

attacked by a mob based on perceptions regarding their sexual orientation.⁵³ The men were at that time escorted to safety by the police.⁵⁴ Police agencies often defer to their lack of resources to protect LGBTQ citizens of Jamaica as the police agencies have been facing critical shortage of resources in dealing with what they perceive are other more serious crimes.⁵⁵ Jamaica has one of the highest murder rates globally, with Jamaica's current murder rate being eight times the global average.⁵⁶ But included prominently in the murders taking place in Jamaica are homosexuals and members of the LGBTQ community, killed solely for their sexual orientation or suspicion thereof.

C. *The Church and Religious Groups of Jamaica*

The Church and religious groups in Jamaica have a powerful impact on perceptions and teachings of right and wrong and morality in Jamaica. Jamaica is a majority Christian country with "almost equal percentages of Anglicans, Baptists and members of the Church of God."⁵⁷ There are several other popular protestant groups, including Methodists, Seventh Day Adventists, Pentecostals, and the United Church of Christ.⁵⁸ There are also Roman Catholics in Jamaica with mostly Chinese, Lebanese and East Indian community members.⁵⁹ With such complexity of religious groups in the island, and all opposed to homosexuality, the religious establishment in Jamaica has had a powerful influence on how Jamaicans view homosexuality via biblical teachings and principles as they have so interpreted. Despite some Christian denominations or religious groups in the United States having more flexible teachings and acceptance of homosexuals in their

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Basil Roman, *Jamaica Murder Total Climbs*, THE NEW YORK CARIBNEWS (Aug. 15, 2019), <https://www.nycaribnews.com/articles/jamaica-murder-total-climbs/>.

⁵⁷ Marcia Davidson, *Jamaica and Religion*, JAMAICANS.COM (Aug. 01, 2003), <https://jamaicans.com/religion/>.

⁵⁸ *Id.*

⁵⁹ *Id.*

congregations, this is not the case in Jamaica as the Christian denominations in the island nation view it as the ultimate sin and abomination. For example, these denominations are replete with sermons and teachings on homosexuality with the popularity of the “Sodom and Gomorrah” story from the *Book of Genesis* in the Christian Bible being used as a lesson and deterrent to homosexual values and behaviors.

Part of why “Jamaica has been characterized as one of the most homophobic and transphobic societies globally”⁶⁰ is the influence of the Church or religion on teachings about sex and homosexuality.⁶¹ The various religions and religious authorities across Jamaica believe that homosexuality is a sin⁶² and that they are tasked with preaching against homosexuality and other behaviors directly against God’s principles per reading of the Bible. While religion preaches equal opportunity and tolerance of all people, it is noted that religious persons are often more intolerant of homosexuals than non-religious persons.⁶³ In a study involving 204 undergraduate male and female students age 18 to 34 years from the University of the West Indies, results of the studies confirmed that the highly religious were more intolerant of homosexuality than their non-religious counterparts, even in a diverse religious community or environment.⁶⁴ In other words, religious denominational differences in Jamaica do not create a difference in views of the various religious groups and church toward homosexuality. Keon West in an extensive study across 40 communities in Jamaica in 2014 concluded that, “Religiosity, which is often the reason offered by anti-gay lobbyists, also predicted more anti-gay bias.”⁶⁵

Despite claims by the Christian establishment that they do not encourage discrimination against homosexuals, homosexuals and members of the LGBTQ community across Jamaica are excluded from

⁶⁰ Smith, *supra* note 23, at 250.

⁶¹ *Id.* at 252.

⁶² *Id.*

⁶³ Derek Chadee, Chezelle Joseph, Claire Peters, Vandana Siew Sankar, Nisha Nair & Jannel Philip, *Religiosity, and Attitudes Towards Homosexuals in a Caribbean Environment*, 62 SIR ARTHUR LEWIS INST. SOC. & ECON. STUD. 1-28 (2013).

⁶⁴ *Id.*

⁶⁵ West, *supra* note 4.

worship.⁶⁶ This has led to what is termed “closeted worship” as Jamaicans who identify themselves as part of the LGBTQ community must worship in underground church. Micah Fink provides a description of this:

Two boxes and a white sheet make up the pulpit. The altar is a card table. Folding chairs constitute the pews. Then Rev. Robert Griffin, a solidly built gay American minister in his mid-40s, unpacks a battered cardboard box; inside is a wooden chalice, two candle holders, a communion plate and a dog-eared copy of the King James Bible. Add a pianist warming up on an electric keyboard and suddenly an empty meeting room is transformed into the Kingston branch of the Sunshine Cathedral, Jamaica’s only gay church.⁶⁷

Interestingly, members of the Christian clergy and community across Jamaica quote and cite the Bible that the Kingdom of God is not for homosexuals. According to Rev. Griffin, “[Religious] ministers here are endorsing violent acts, calls for murder, to incite riots They tell me: ‘We don’t believe in homosexuality and homosexuals should be killed because that’s what the scripture says.’”⁶⁸ As Rev. Griffin notes, Jamaican religious figures and their followers view gayness as an ungodly and unnatural act, and thus one to be condemned both religiously – divinely, and according to the law acting in accordance with God’s Will.⁶⁹

D. Jamaican Business Community

Jamaican businesses are claimants with mixed views on homosexuality, and there is a desire by some businesses to remain neutral on the subject because of the strong Jamaican entrepreneurial value

⁶⁶ See Micah Fink, *Jamaica’s Gays Worship in the Closet*, PUB. RADIO INT’L (May 30, 2010), <https://www.pri.org/stories/2009-09-22/jamaicas-gays-worship-closet-0>.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

that one “does not mix business with pleasure.”⁷⁰ Jamaican businesses recognize the potential impact on tourism and entertainment that could potentially stem from the violent culture against homosexuals and members of the LGBTQ community.⁷¹ As McFee and Galbraith argue, “[t]o create a vibrant economy, all people must be given the opportunity to contribute fully and to share in its success.”⁷² Jamaican business owners will not come forward on the issue of treatment of homosexuality openly because of fear of backlash from their customers and even business partners because as McFee and Galbraith note, “it’s a problem...for the businesses that employ them [members of the LGBTQ community] or want to sell them goods and services.”⁷³

Some sectors of the Jamaican hospitality and tourism industry are attuned to the issue of homosexuality as a matter that affects their business due to tourism flowing from different societies and cultures where homosexuality is not treated with the level of hostility as in Jamaica, and where homosexuals and members of the LGBTQ community have rights. Therefore, they practice non-discrimination with regard to such visitors in some popular resorts. They are keenly aware that “[e]conomic partners increasingly look at how countries treat their LGBT citizens when they make important business decisions and have noted that organizations that encourage diversity and openness display greater productivity and creativity.”⁷⁴ McFee and Galbraith argue for a rational-economic-business approach to homosexuals and LGBTQ people in Jamaica by arguing that, “In a global economy, countries that provide their citizens with an excellent education, quality health services, and a tolerant social climate are likely to have an advantage in attracting business investment, local entrepreneurs, and international tourists.”⁷⁵ Homosexuality is perceived by some business owners in Jamaica to come at a developmental economic cost, but outright support of homosexuality is seen as even worse for business.⁷⁶ There-

⁷⁰ McFee, *supra* note 28, at 27.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 3.

⁷⁵ *Id.*

⁷⁶ *Id.* at 18.

fore, those who choose to support homosexuality in terms of recognition, right, and services without discrimination must do so with a certain level of risk and secrecy within the business and the general community.

E. J-FLAG, Human Rights Watch, United Nations Human Rights Council, Amnesty International and Other NGOs

There are several groups that are strong advocates for gay rights and rights for the LGBTQ community in Jamaica. This includes Jamaica's most prominent gay rights advocacy group, Jamaica Forum for Lesbians, All-Sexuals and Gays (J-FLAG), as well as prominent international-global organizations such as Human Rights Watch, United Nations Human Rights Council, and Amnesty International. Other organizations that have advocated and brought attention to the mistreatment and discrimination against homosexuals and members of the LGBTQ community in Jamaica include Women's Empowerment for Change (WE-Change), The Colour Pink Foundation, TransWave, Center for International Human Rights, Northwestern Pritzker School of Law of Northwestern University, and Global Initiatives for Human Rights of Heartland Alliance for Human Needs & Human Rights.⁷⁷

These groups advocate for total human rights for homosexuals and LGBTQ Jamaicans, claiming that they are entitled to equal rights, equal protection under the law, respect and human dignity, and have a right to life just as any other human being. The United Nations Human Rights Council has invoked the principles of the Universal Declaration of Human Rights (UDHR) and the two human rights covenants to which Jamaica has subscribed. Jamaica is one of the 168 States that have ratified the International Covenant on Civil and Political Rights (ICCPR),⁷⁸ and the International Covenant on Economic, Social and

⁷⁷ See J-FLAG, *supra* note 30.

⁷⁸ U.N. Human Rights Office of the High Commissioner, *Jamaica's Human Rights Record to be Reviewed by UN Committee*, (Oct. 13, 2016), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20671&LangID=E> [hereinafter *Jamaica's Record*].

Cultural Rights (ICESCR) which Jamaica ratified in 1975.⁷⁹ Jamaica has been specifically asked by the United Nations Human Rights Committee to address *Non-discrimination and equality between men and women (arts. 2, 3 and 26)* regarding what “steps will be taken to prevent acts of violence and hate crimes that reportedly occur against the lesbian, gay, bisexual and transgender population.”⁸⁰ This request by the UN Human Rights Committee follows shadow reports and information gained through media and other sources on Jamaica’s widespread aggression toward homosexuals and other members of the LGBTQ community and violation of their human rights.

III. Past Trends in Decision and Their Conditioning Factors

Jamaica is not an Islamic nation, and there is no Sharia Law in Jamaica despite the similarly hard stance it takes against homosexuals and homosexuality. However, 70% of Jamaicans identify themselves as Christians and strongly believe that homosexuality is wrong and sinful.⁸¹ The majority of Jamaican Christians are Protestants, who take a harsh stance on homosexuality compared to their Catholic counterparts. Jamaica has a law against homosexuality and is currently not the only country with a law of this nature. According to an article by Daniel Avery in *Newsweek*, there are 71 countries where homosexuality is still illegal.⁸² Furthermore, Jamaica has laws on the book that outlaw

⁷⁹ G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, (Dec. 16, 1966). *See also* United Nations, *Treaty Series*, vol. 993, p. 3; depositary notification C.N.781.2001.TREATIES-6 of 5 October 2001 [Proposal of correction to the original of the Covenant (Chinese authentic text) and C.N.7.2002.TREATIES-1 of 3 January 2002 [Rectification of the original of the Covenant (Chinese authentic text)], https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en (noting the date Jamaica ratified the Covenant).

⁸⁰ U.N. Human Rights Committee (HRC), *List of issues in relation to the fourth periodic report of Jamaica: Human Rights Committee*, at 2 (May 9, 2016).

⁸¹ Roxy Rezvany, *The Challenges of Running a Queer Homeless Shelter in Jamaica*, VICE.COM (Mar. 22, 2016) <https://www.vice.com/sv/article/yvx7bk/the-struggle-for-queer-shelters-in-jamaica>.

⁸² *See* Daniel Avery, *71 Countries Where Homosexuality is Illegal*, NEWSWEEK.COM (Apr. 4, 2019) <https://www.newsweek.com/73-countries-where-its-illegal-be-gay-1385974>.

and criminalize homosexuality and homosexual or same-sex behaviors and interactions, namely, the *1864 Offences Against the Person Act*, and Jamaica's *Charter of Fundamental Rights and Freedom* offers no protection against discrimination based on sexual orientation. Jamaica's Constitution does not recognize sexual orientation as a protected right or freedom, and neither do the country's vast and dense religious institutions.

A. Rule of Law

Rule of law has become an important concept in pointing to the need for civilized society and government to abide under an established body of law that is inherited in public order. According to Professor Tamanaha, a Washington University St. Louis School of Law Lehmann University Professor and renowned jurisprudence and law and society scholar, "the rule of law is a major source of legitimation for governments in the modern world," and "[a] government that abides by the rule of law is seen as good and worthy of respect" by its citizens.⁸³ Professor Tamanaha defines rule of law as meaning that "government officials and citizens are bound by and abide by the law."⁸⁴ As such, he argues, "a society in which government officials and citizens are bound by and abide by the law is a society that is living under the rule of law."⁸⁵ However, a system of laws must exist that sets forth the rules in advance, and they must be stated in general terms.⁸⁶ Furthermore, such "law must be generally known and understood" and "the requirements imposed by the law cannot be impossible for people to meet."⁸⁷ The law must also be equally applied to every citizen, and there must be available mechanisms or institutions to enforce the legal rules whenever there is a breach of the law.⁸⁸ Beyond Professor Tamanaha's requirement of the system of law not having impossible requirements that people are unable to meet is Professor

⁸³ Brian Z. Tamanaha, *The History and Elements of the Rule of Law*, SING. J. LEGAL STUD. 233, 232-247 (2012).

⁸⁴ *Id.*

⁸⁵ *Id.* at 233.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

Wiessner's reminder to his students that a law ought to be in line with a public order of human dignity,⁸⁹ citing Justice Louis D. Brandeis' cogent remark, "If we desire respect for the law, we must first make the law respectable."⁹⁰

The United Nations also defines rule of law more extensively than Professor Tamanaha, stating that,

rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to the laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.⁹¹

This definition of rule of law is comprehensive and is not being lived up to by many governments and entities across the globe. In having discriminatory laws and enforcing laws that do not respect human dignity and equality for all, Jamaica, like many other nations, is not functioning completely under the rule of law. Jamaican homosexuals and members of Jamaica's LGBTQ community are not being given equality before the law in terms of protection of their rights and liberties.

⁸⁹ Siegfried Wiessner, *The Rule of Law: Prolegomena*, ZEITSCHRIFT FÜR DEUTSCHES UND AMERIKANISCHES RECHT [Journal of German and American Law] 82, 84 (2018).

⁹⁰ *Id.* at 83.

⁹¹ U.N. and the Rule of Law, *What is the Rule of Law*) <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/> (last visited Nov. 16, 2019).

B. The Law Against Homosexuality

Jamaica's law against homosexuality is called the *1864 Offences Against the Person Act*, "Unnatural Offences," Article 76 states, "Whosoever shall be convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable to be imprisoned and kept to hard labour for a term not exceeding ten years."⁹² This law has been around from before Jamaica's independence, and unlike several other sections of the *Offences Against the Person Act*, has not been revised or repealed. Thus, it is the law under which Jamaica operates today in regard to homosexuality as criminalized behavior.

Homosexuality is made illegal in Jamaica under the *Offences Against the Person Act*, "Unnatural Offences", and is not just embedded in Article 76, but subsequently in Article 77 and Article 79. Article 77 of the *Offences Against the Person Act* states:

Whosoever shall attempt to commit the said abominable crime, or shall be guilty of any assault with intent to commit the same, or of any indecent assault upon any male person, shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to be imprisoned for a term not exceeding seven years, with or without hard labour.⁹³

Thus, any attempt at intimate act with a person of the same sex is considered an illegal act by nature of sexual assault being a crime itself, and furthermore, as a violation of the *Offences Against the Person Act* that forbids homosexual behaviors or male-male intimate sexual contact and interaction. Article 79 of the *Offences Against the Person Act* also prohibits homosexual behavior as stated:

Any male person who, in public or private, commits, or is a party to the commission of, or procures or attempts

⁹² The Offences Against the Person Act (OAPA), Article 26 Unnatural Offences, 26, 1-28 (1969).

⁹³ *Id.*

to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanour, 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 labour.⁹⁴

The stance on homosexual behavior is quite clear via the law, and though it specifically mentions “male”, has been applied to homosexual behavior outright whether by men or women, and as such, also has been extended to cover any kind of sexual behaviors outside of heterosexual intimate relationships to include transgender and transsexuality. It is a law that has been used not just to codify homophobia into law, but other non-heterosexual designations. Interestingly, the majority of Jamaicans, and especially average Jamaicans, do not know of the existence of this law but are influenced in their attitudes and oppositions to homosexuality and homosexuals by natural law ideals instilled in them by the religious culture of the island.

There have been no significant cases or case law upon which to draw inferences as to the future status of Jamaica’s government and the law on homosexuality and the rights of homosexuals and members of the LGBTQ community. In 2013, a private citizen identifying as a member of Jamaica’s gay community filed a case against the *1864 Offences Against the Person Act*, which criminalizes homosexuality, but the case was withdrawn by the complainant due to numerous threats against the individual’s and his family’s safety.⁹⁵ In November 2015, a constitutional challenge was filed against the *1864 Offences Against the Person Act* which criminalizes homosexuality in Jamaica by lawyer Maurice Tomlinson, a gay Jamaican activist,⁹⁶ who in 2011 had to flee to Toronto, Canada after his life was threatened when a newspaper

⁹⁴ *Id.*

⁹⁵ J. Lester Feder, *This Man Is Challenging Jamaica's Ban on Homosexuality*, BUZZFEED NEWS (Dec. 8, 2015), <https://www.buzzfeednews.com/article/lesterfeder/jamaicas-law-criminalizing-homosexuality-challenged-in-supre>.

⁹⁶ *Public Defender Blocked from Joining Anti-buggery Law Court Challenge*, LOOPNEWS (Nov. 10, 2018), <http://www.loopjamaica.com/content/public-defender-blocked-joining-anti-buggery-law-court-challenge> [hereinafter Public Defender Blocked].

revealed his sexuality and marriage to his Canadian partner.⁹⁷ As of November 2018, the case had reached Jamaica's Supreme Court where Maurice Tomlinson will have to stand on his own after the Court blocked Jamaican Public Defender Arlene Harrison Henry from joining Maurice Tomlinson in the lawsuit.⁹⁸ No further update has been found regarding the case as of the writing of this paper. However, it is doubtful that Tomlinson will be successful in striking down this old and powerful statute.

C. *Charter of Fundamental Rights and Freedoms*

Jamaica, like so many other Caribbean nations, has very little human rights laws, and it was only in 2011 under the inducement of the United Nations via the Universal Declaration of Human Rights (UDHR) that Jamaica enhanced the *Charter of Fundamental Rights and Freedoms*, which outlaws discrimination but does not include sexual orientation and gender identity among the list of protected rights. The Charter was ratified as an amendment to Jamaica's Constitution enshrining the following rights:

- The right to life, liberty and security of person except in the execution of the sentence of a court in respect of a criminal offense of which the person has been convicted[;]
- The right to freedom of thought, conscience, belief and observance of political doctrines[;]
- The right to freedom of expression[;]
- The right to seek, receive, distribute or disseminate information, opinions and ideas through any media[;]
- The right to peaceful assembly and association[;]
- The right to freedom of movement, that is to say, the right (i) of every citizen of Jamaica to enter Jamaica; and (ii) of every person lawfully in Jamaica, to move

⁹⁷ Feder, *supra* note 95.

⁹⁸ Public Defender Blocked, *supra* note 96.

around freely throughout Jamaica, to reside in any part of Jamaica and to leave Jamaica[;]

- The right to equality before the law[;]
- The right to equitable and human treatment by any public authority in the exercise of any function[;]
- The right to freedom from discrimination on the ground of (i) being male or female (ii) race, place of origin, class, colour, religion, political opinions[;]
- The right to everyone to (i) protection from search of the person and property (ii) respect for protection of private and family life, and privacy of the home; and (iii) protection of other property and of communication[;]
- The right of every child to be protected by virtue of being a minor, part of a family, society and the State[;]
- The right of every child who is a citizen of Jamaica, to public educational institution at the pre-primary and primary levels[;]
- The right to enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage[;]
- The right of every citizen of Jamaica to be registered to vote[;]
- The right of every citizen of Jamaica who is so registered, to vote in free and fair elections[;]
- The right of every citizen of Jamaica to be guaranteed a passport and not to be detained or deprived except by due process of the law[;]
- The right to protection from torture, or inhuman or degrading punishment or other treatment[;]
- The right to freedom of the person[;]
- The protection of property rights[;]
- The right to due process[;]

- The right to freedom of religion[.]⁹⁹

It is important to note that while there is a “right to protection from torture, or inhuman or degrading punishment or other treatment” under Jamaica’s *Charter of Fundamental Rights and Freedoms*, homosexuals in Jamaica do not seem entitled to such a right based on extensive persecution and the government’s lackluster attitude and reluctance to admit that homosexuals are dehumanized and mistreated.¹⁰⁰ Additionally, “right to equality before the law” does not seem to apply to homosexuals who are often ridiculed or must fear the police who should ensure their protection. Especially poignant is “right to freedom of the person” in a nation where homosexuals have no freedom to be who they are or govern their own private sexual lives. Homosexuals in Jamaica do not enjoy “the right to freedom of expression” but must live in fear and may be killed if they should express their lifestyle or claim rights to their lifestyle. The rights described in Jamaica’s *Charter of Fundamental Rights and Freedoms* seem to be designed to evade homosexuals asserting any right, and rationally so, since the *Offences Against the Person Act* which codifies homosexuality as criminal behavior has not been repealed and remains the law.

D. International Human Rights Law

According to the United Nations, “[i]nternational human rights law lays down the obligations of Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.”¹⁰¹ The United Nations Charter and the Universal Declaration of Human Rights (UDHR), adopted by the UN General Assembly in 1945 and 1948 are the foundations of international human rights. The UDHR along with the International Covenant on Civil and Political Rights

⁹⁹ Jamaicans for Justice, *The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011*, JAMAICAN FOR JUSTICE (Nov. 3, 2019), <https://www.jamaicansforjustice.org/charter-of-fundamental-rights/>.

¹⁰⁰ *Id.*

¹⁰¹ *Global Issues: Human Rights*, U.N., <https://www.un.org/en/sections/issues-depth/human-rights/> (last visited Nov. 15, 2019).

(ICCPR) and its two Optional Protocols (on the complaints procedure and on the death penalty) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) and its Optional Protocol, form the International Bill of Human Rights.¹⁰² Jamaica has ratified both the ICCPR and ICESCR, and as international treaties, Jamaica is expected to abide by their principles and rules, and that gives the United Nations Human Rights Committee the power and authority to examine its adoption of and progress on these principles.

The ICCPR and its First Optional Protocol entered into force in 1976, while its Second Optional Protocol was adopted in 1989.¹⁰³ The ICCPR focuses on rights such as,

freedom of movement; equality before the law; the right to a fair trial and presumption of innocence; freedom of thought, conscience and religion; freedom of opinion and expression; peaceful assembly; freedom of association; participation in public affairs and elections; and protection of minority rights. It prohibits arbitrary deprivation of life; torture, cruel or degrading treatment or punishment; slavery and forced labour; arbitrary arrest or detention; arbitrary interference with privacy; war propaganda; discrimination; and advocacy of racial or religious hatred.¹⁰⁴

These rights are especially critical to understanding the gross violation of rights taking place in Jamaica with regard to homosexuals and members of the LGBTQ community. The other important treaty, the ICESCR, was entered into force in 1976 and seeks to protect and promote human rights such as “the right to work in just and favorable conditions; the right to social protection, to an adequate standard of living and to the highest attainable standards of physical and mental well-being; and the right to education and the enjoyment of benefits of cultural freedom and scientific progress.”¹⁰⁵ Jamaica has ratified

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

both the ICCPR and ICESCR and must therefore abide by the conventions' principles in its treatment of all citizens including homosexuals and members of the LGBTQ community, respecting their right to life, dignity, property, and various freedoms. Unfortunately, a number of NGOs, private citizens, and concerned publics have demonstrated Jamaica's lack of compliance on these principles, especially regarding the treatment of homosexuals.

E. Perceptions of Natural Law and Homosexuality in Jamaica

The idea of "Natural Law" has been a longstanding one, and as Professor Brian Bix, Frederick W. Thomas Professor of Law and Philosophy at University of Minnesota Law School, notes, there are standards against which legal norms can be compared called "higher law."¹⁰⁶ Professor Bix sees such "higher laws" for many as standards derived from divine revelations and religious texts.¹⁰⁷ Such is the law derived from Christian principles based upon the Bible as the "Word of God." Professor Bix reminds us that a Natural Law position has been long established; therefore, we should not be remonstrative toward its existence and application to human behaviors and actions from a social and cultural perspective. As Bix notes, Roman orator Cicero (106 BC – 43 BC) fluently communicated some of the themes active in Natural Law, and which we still apply to human and institutional actions and behaviors today.¹⁰⁸ Cicero referred to Natural Law as the "true law" and states, "[t]rue law is right reason in agreement with nature; it is of universal application, unchanging and everlasting."¹⁰⁹ Here, we see an equivalent reference to what Titus describes as the Law of Nature and Nature's God, in line with the language of the Declaration of Independence, or the divine law, which stands

¹⁰⁶ FRANZ WIEACKER, *A HISTORY OF PRIVATE LAW IN EUROPE* 205 (T. Weir, trans., Clarendon Press, Oxford, 1995).

¹⁰⁷ BRIAN BIX, *JURISPRUDENCE: THEORY AND CONTEXT* 65 (Carolina Academic Press, 4th ed. 2006).

¹⁰⁸ *Id.*

¹⁰⁹ Cicero, *The Republic in De Republica; De Legibus* 211 (C.W. Keyes, trans., Harv. U. Press, Cambridge, Mass., 1928).

above any legislative acts or civil codes.¹¹⁰ Such law has become tradition for many through their religious cultural teachings and practices, and as is often noted from a Biblical perspective, is “written upon the heart of men” as such.¹¹¹ It is this law referenced from religious or sacred texts and regarded as the “Law of God,” “Higher Law,” “Divine Law,” or by other descriptors that connote its prominence and importance over any other law of man that informs many Jamaicans’ views on homosexuality rather than simply the legislative act of 1864 known as *Offences Against the Person Act* and which has codified homosexuality as illegal.

A large percentage of Jamaicans attend church, and church lessons typically have themes that reinforce traditional moral and cultural values influenced by religious perspectives, specifically the Bible and its texts which are regarded as the “Word of God.” A biblical story that is frequently used to emphasize the prohibition of homosexuality and sexual deviance is the story of Sodom and Gomorrah.¹¹² These two cities were said to have been destroyed in part because of homosexuality, and hence the origination of the word “sodomy” to describe homosexual intimate physical interaction.¹¹³ Interestingly, the destruction of these two cities is described in both the New and Old Testaments of the Bible as well as in the *Quran* and the Hadith.¹¹⁴ These cities have been used as metaphors for homosexuality and the words “sodomite” as a derogatory term to describe male homosexuals, and “sodomy” as a legal term to describe “crimes against nature”, are derived from the names of the people of Sodom, the Sodomites.¹¹⁵ Thus, a popular pejorative term used to refer to homosexuals in Jamaica is “sodomite.”¹¹⁶

¹¹⁰ HERBERT W. TITUS, GOD, MAN, AND LAW: THE BIBLICAL PRINCIPLES 18 (Institute in Basic Life Principles, 1994).

¹¹¹ *Id.*

¹¹² *Genesis* 19:1-25 (New International).

¹¹³ This is not intended as a literal Biblical interpretation but rather the religious teaching as experienced by the author.

¹¹⁴ *Genesis* 19.1-25, *Jude* 1.7 (New International) and Sura (54), Holy Q’ran.

¹¹⁵ SHIRELLE PHELPS, WORLD OF CRIMINAL JUSTICE: N-Z 179 (Gale, 2001).

¹¹⁶ DAVID NEWTON, GAY AND LESBIAN RIGHTS: A REFERENCE HANDBOOK PAGE (ABC-CLIO, 2nd ed. 2009).

Tradition is powerful, and religion is a tradition that shapes the minds and hearts of Jamaicans just as it does any other people and culture. As Professor Glenn notes, “[t]radition ... involves the extension of the past to the present.”¹¹⁷ In the views of many Jamaicans, and particularly those taking a religious and natural law perspective, homosexuality has long been condemned by the “Law of Nature and Nature’s God” or natural law as it has come to be known, and hence even without codifying its prohibition under the enacted and written law of man or *lex scripta*, homosexuality would still be seen as “illegal” in the way of natural law jurisprudence. An example of the Biblical Law or natural law precept that Jamaicans and many others use to condemn homosexuality outright can be seen in Leviticus 18:22, and which is often quoted by those citing religion to oppose homosexuality: “You shall not lie with a male as with a woman. It is an abomination.”¹¹⁸ Knowing this verse, many Jamaicans view homosexuality as an abomination to God, and in the tradition of religion, an abomination is seen as an unforgivable sin and hence the culture’s unforgivably harsh condemnation of homosexuality and treatment of homosexuals including using violence against them, justified on religious grounds. In my experience, they view any law devised by man going against what is stated in their religious texts or by their religion as “immoral.” Thus, in the views of Jamaicans who believe in the Bible, the government can never pass a law allowing homosexuality as such as law would be “immoral.” The immorality of law is not an artificial argument as Professor Harold J. Berman notes, “law may be immoral and much of our law is immoral. ... Christianity requires us ... to exert every effort to conform our legal system morality.”¹¹⁹ Christians and those of the religious establishment who condemn homosexuality do so under the idea of God’s divine moral law.

There are six notable Bible verses that have been most often used in modern times to condemn and oppose homosexuality:

¹¹⁷ Glenn, *supra* note 14, at 101.

¹¹⁸ *Leviticus* 18:22 (King James).

¹¹⁹ HAROLD J. BERMAN, FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION 389 (Wm. B. Eerdmans, 1993).

1. *Genesis 19:5*: “And they called unto Lot, and said unto him, ‘Where are the men which came in to thee this night? bring them out unto us, that we may know them.’”¹²⁰ This verse is often used to characterize the twin cities of Sodom and Gomorrah as places of sexual sins, and in particular, homosexuality as a sinful act against God’s law that led to their destruction. However, *Ezekiel 16:49-50* seems to communicate other than this popular interpretation as it states, “This was the guilt of your sister Sodom: she and her daughters had pride, excess of food, and prosperous ease, but did not aid the poor and needy. They were haughty, and did abominable things before me; therefore, I removed them when I saw it.”¹²¹ This does not alleviate the popular interpretation of Sodom and Gomorrah being destroyed because of homosexuality, especially as seemingly implied in *Genesis 19:5*, when further credence is not given to the passage and subsequent verses.
2. *Leviticus 18:22*: “You shall not lie with a male as with a woman; it is an abomination.”¹²² This verse is used to assert the idea that things abominable to God are not seen as deserving of love, mercy, or care.
3. *Leviticus 20:13*: “If a man lies with a male as with a woman, both of them have committed an abomination; they shall be put to death; their blood is upon them.”¹²³ A typical theme in opposing homosexuality and toward homosexuals in Jamaica is that of death or calling for their death whether by fire, as typified by the antigay song “Chi Chi Man Yard,” or by execution using guns and other weapons as conveyed in the popular dancehall song “Boom Bye Bye.”
4. *Romans 1:26–27*: “For this cause God gave them up unto vile affections: for even their women did change the natural use

¹²⁰ *Genesis 19:5* (King James).

¹²¹ *Ezekiel 16, 49-50* (New International).

¹²² *Leviticus 18:22* (King James).

¹²³ *Leviticus 20:13* (King James).

into that which is against nature: And likewise also the men, leaving the natural use of the woman, burned in their lust one toward another; men with men working that which is unseemly, and receiving in themselves that recompence of their error which was meet.”¹²⁴ This verse is used to support the idea of homosexuality as an “unnatural act” or act against nature and nature’s God.

5. *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.”¹²⁵ The term effeminate in this verse is interpreted by many modern Christians to refer to effeminate or homosexual men.
6. *1 Timothy 1:9–10*: “We also know that the law is made not for the righteous but for lawbreakers and rebels, the ungodly and sinful, the unholy and irreligious, for those who kill their fathers or mothers, for murderers, for the sexually immoral, for those practicing homosexuality, for slave traders and liars and perjurers—and for whatever else is contrary to the sound doctrine.”¹²⁶ Many view homosexuality as a condemned behavior and an unrighteous act based on this verse.

It is argued that “animosity towards gays in Jamaica is deeply-rooted in the country’s Christian traditions.”¹²⁷ Those Jamaicans who through religious values condemn and fail to support recognition or rights for homosexuals subscribe to the belief that both human rights and human justice should be grounded in a higher and larger order of things,¹²⁸ reflective of a divine law that neither government nor men as private

¹²⁴ *Romans 1:26-27* (King James).

¹²⁵ *1 Corinthians 6:9* (King James).

¹²⁶ *1 Timothy 1:9-10* (New International).

¹²⁷ *Jamaica’s Portia Simpson-Miller and Gay Rights*, PUB. RADIO INT’L (PRI) (Oct. 02, 2012), <https://www.pri.org/stories/2012-10-02/jamaicas-portia-simpson-miller-and-gay-rights> [hereinafter Portia Simpson-Miller].

¹²⁸ ROBERT LOWRY CLINTON, *GOD AND MAN IN THE LAW: THE FOUNDATION OF ANGLO-AMERICAN CONSTITUTION* 71 (U. Press of Kan. 1997).

citizens must set aside; hence the inflexibility on homosexuality as an issue in Jamaican society, even by the most religious and “tolerant” of ministers and church leaders.

F. Interaction of Positive and Natural Law in Addressing Homosexuality

Jamaicans’ negative attitude toward homosexuality and its harsh stance against homosexuals represents a strong intersection of both positive and natural law convictions. Positive law refers to statutes which have been laid down by a legislature, court, or other human institution and are known as human-made laws.¹²⁹ Natural law refers to a body of law or rules emanating from religious or divine sources and thought to be “higher law” that is unchangeable and irreducible because of the universal, unchanging and divine nature.¹³⁰ For Herbert W. Titus, it is the Law of Nature and Nature’s God.¹³¹

Very few Jamaicans condemn homosexuality based on having a knowledge of the Jamaican Constitution and specifically, the *1864 Offences Against the Person Act*. Most Jamaicans do so out of cultural and religious values.¹³² The valence of condemnation against homosexuality in Jamaican culture and society is a mixture of religious views and sociocultural influence of tradition, and these same factors condition government’s or leaders’ attitude on the matter as well.¹³³ Table 1 below shows the interaction of positive law and perceived natural law via biblical principles and rules shaping Jamaican’s overall attitude toward and treatment of homosexuality and homosexuals. What we see here is the distinction between perspectives of those who take a positive law approach to opposing homosexuality versus those who use a natural law approach. The positive law approach is based on established legislative law or statute, while the natural law approach is based on ideas of higher law or divine principles accredited

¹²⁹ Bix, *supra* note 107, at 89.

¹³⁰ *Id.*

¹³¹ Titus, *supra* note 110.

¹³² Smith, *supra* note 23, at 252 and 255.

¹³³ *Id.* at 255.

as the inspired words and Law of God via biblical interpretation. Author Matthew Vines reinterprets these popular Bible verses that are used in *Table 1* to condemn homosexuals.¹³⁴ He believes they are misconstrued through errors in linguistic translation from the original text and ideological influence on their value and meaning. According to Vines being gay is not a sin, and the Bible does not condemn loving, committed same-sex relationships.

Table 1: Positive and Natural Law Perspectives on Homosexuality in Jamaican Society

<i>Positive Law (Legislative Statutes)</i>	<i>Natural Law (God's Divine Biblical Principles)</i>
1864 Offences Against the Person Act (<i>Criminalizes homosexuality</i>)	Homosexuality is against God's Principles (<i>Leviticus 18:22: "Do not lie with a man as one lies with a woman; that is detestable."</i>)
Charter of Fundamental Rights and Freedom [2011] (<i>Does not protect or recognize sexual orientation as a right or freedom</i>)	Homosexuals have no place in God's Kingdom; (<i>1 Corinthians 6:9-10: "Do you not know that the wicked will not inherit the kingdom of God? Do not be deceived: Neither the sexually immoral nor idolaters nor adulterers nor male prostitutes nor homosexual offenders nor thieves nor the greedy nor drunkards nor slanderers nor swindlers will inherit the kingdom of God."</i>)

Jamaica's barrier to progress on rights for homosexuality and recognition for members of the LGBTQ community is a complex of political-legal, sociocultural, and religious issues, but from a legal perspective is caught between two jurisprudential schools: positive law and natural law conceptions, with positive law being in the form of Jamaica's statute known as the *1864 Offences Against the Person Act*, which criminalizes homosexuality, and natural law ideas stemming

¹³⁴ MATTHEW VINES, *GOD AND THE GAY CHRISTIAN: THE BIBLICAL CASE IN SUPPORT OF SAME-SEX RELATIONSHIPS* 24 (The Crown Publishing Group 2014).

from what Glenn designates “*traditio*”¹³⁵ and more specifically, religious principles and ideas as divine law or the Law of God as constituting a higher law to which both men and government must accede,¹³⁶ and which by its nature is infallible, and any law contrary is not considered a moral law. For most Jamaicans including those who are in positions to make the greatest impact in terms of positive change on the rights of homosexuals and members of the LGBTQ community, matters of law and morality are subordinated to conceptions of higher law.¹³⁷ In this respect, neither manmade laws nor laws written or unwritten stemming from divine influence, sources or tradition, allow for flexibility on the matter of homosexuality, leaving the issue in limbo.

IV. Future Decisions, Considering Homosexuality and its Current Conditions in Jamaica

In 2008, then-Prime Minister of Jamaica, Honorable Bruce Golding, made clear the government’s stance on homosexuality both as a sociocultural and legal problem; “We do have a longstanding culture that is very opposed to homosexuality.”¹³⁸ Furthermore, Golding made it quite clear that Jamaica is determined to develop its own rules and determine its own legal, cultural, and social acceptance of homosexuality.¹³⁹ This position has not changed despite some glimmer of hope for homosexuals and members of the LGBTQ community upon the election of Jamaica’s first female Prime Minister, the Honorable Portia Simpson-Miller in March 2005, who served until September 2007, and then again from January 2012 to March 2016.¹⁴⁰ Prime Minister Simpson-Miller became the first high government official to express a positive response on the rights of homosexuals and members of the LGBTQ community when she stated that, “[n]o one should be

¹³⁵ Glenn, *supra* note 14, at 96.

¹³⁶ Titus, *supra* note 110.

¹³⁷ Clinton, *supra* note 128.

¹³⁸ HARDTalk, *supra* note 9.

¹³⁹ *Id.*

¹⁴⁰ *Thousands Gather for Simpson Miller’s Swearing-In*, THE GLEANER (Jan. 5, 2012), <http://jamaica-gleaner.com/power/34353>.

discriminated against because of their sexual orientation”¹⁴¹ and remarked that Jamaica’s government should revisit its anti-gay law (specifically, the *1864 Offences Against the Person Act*).¹⁴² Unfortunately, the Prime Minister’s promising tone and language did not result in any action in her administration as rumors about her plans regarding gay rights created great opposition and hostility that might have also contributed to her losing the election in 2016.

Homosexuality still faces strong opposition in Jamaica despite some progress over the last two decades stemming from international media attention and attempts by private individual activists and non-governmental organizations (NGOs). For example, organizations such as the United Nations via its Human Rights Council, Amnesty International, Human Rights Watch, Jamaica Forum for Lesbians, All-Sexuals and Gays (J-FLAG), Women’s Empowerment for Change (WE-Change), The Colour Pink Foundation, TransWave, Center for International Human Rights, and the Alliance for Human Needs & Human Rights have spoken out on this issue as well as taken necessary actions within their power. The United Nations Human Rights Council has through enforcement of the ICCPR and call for reports, addressed the issue, and shadow reports have documented required changes in Jamaica’s treatment of lesbians, gays, transgender and members of the LGBTQ community, and human rights in general. Despite all these efforts, the criminalization of homosexuality has not been eliminated as evident by the continued existence of the *1864 Offences Against the Person Act* which criminalizes homosexuality and other non-heterosexual consensual adult intimate behaviors and sexual orientations and identities. Furthermore, gay rights activists and organizations necessary to win the fight for gay rights have not increased in Jamaica, and Jamaica’s only significant gay rights organization is JFLAG — Jamaica Forum for Lesbians, All-Sexuals and Gays, continues to fight a tough battle.¹⁴³

¹⁴¹ Portia Simpson-Miller, *supra* note 127.

¹⁴² *Id.*

¹⁴³ *Id.*

In 2011, in response to demand from the UN Human Rights Council for Jamaica to improve its human rights protection and address issues of discrimination,¹⁴⁴ the Jamaican legislature (its parliament) drafted and ratified the *Charter of Fundamental Rights and Freedom*. However, it failed to mention “sexual orientation” as a right or freedom, and failed to address issues concerning specifically, the mistreatment including widespread violence and crimes against homosexuals and members of the LGBTQ community, as well as the continued violation of their rights as citizens and as human beings. In 2016, another call went forward from the United Nations Human Rights Office after shadow reports were received from J-FLAG in association with other nongovernmental human rights organizations. Jamaica’s government has yet to make any significant changes to altering its legal position on the rights of homosexuals and members of the LGBTQ community despite strides in rights of citizens specifically related to the protection of women and children.

G. General Comments, Concluding Observations and Recommendations of the Human Rights Committee under the ICCPR

The Human Rights Committee under the ICCPR has continuously expressed concern about human rights violation and problems in Jamaica, and in response, Jamaica withdrew as a state party to the Optional Protocol to the ICCPR.¹⁴⁵ The withdrawal was made effective on January 23, 1998 despite expressions of concern from several bodies in the human rights community and concerned figures from Jamaica’s civil society.¹⁴⁶ Given its official withdrawal, no person is able to petition the Human Rights Committee to seek redress for any alleged violations by Jamaican authorities of their rights under the ICCPR.¹⁴⁷ Thus, attempts at redress and correcting human rights violations have been mainly spearheaded by human rights groups including Jamaica Forum for Lesbians, All-Sexuals, & Gays (J-FLAG);

¹⁴⁴ Jamaica’s Record, *supra* note 78.

¹⁴⁵ AMNESTY INT’L, UNACCEPTABLY LIMITING HUMAN RIGHTS PROTECTION (Mar. 1999).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

Women for Women (Kingston); Heartland Alliance for Human Rights and Human Dignity; International Gay and Lesbian Human Rights Commission (IGLHRC); AIDS-Free World (AFW); and The George Washington University Law School International Human Rights Clinic, which jointly submitted a scathing report on Jamaica's treatment of its LGBTQ citizens at the 103rd Session of the Human Rights Committee at Geneva in October 2011.

The Human Rights Council has been working to get Jamaica's compliance on recognizing and protecting sexual identity since 1997 without success. While Jamaica's government amended its Constitution by adding some protections into its human rights Charter in 2011, this issue was bypassed for the protection of sex and substituted in the Charter (*Charter of Fundamental Rights and Freedoms 2011*) with protection based on being "male" or "female."¹⁴⁸ It is believed that the Jamaican government and legislative authorities deliberately excluded "sex" from its amended Charter to circumvent protections guaranteed under the ICCPR which prohibits discrimination on the basis of sexual orientation and gender identity under the category of "sex."¹⁴⁹ Jamaica has been reported by various organizations in a shadow report for the following violations of the ICCPR: (1) Jamaica's Government's language of intolerance toward LGBTQ citizens and its consequences, (2) Jamaica's failure to protect and investigate violations against LGBTQ citizens, (3) the effects of Jamaica's laws criminalizing same-sex conduct on LGBTQ citizens, (4) Jamaica's "Savings Laws" that prevent any constitutional challenge to criminalization of same-sex conduct by the Offences Against the Person Act Article 76, and (5) Jamaica's aggressive differential treatment of people in same-sex relationships.¹⁵⁰

Articles 2(1) and 26 of the ICCPR impose obligations on each state party to the treaty not to discriminate against individuals within their jurisdiction on the basis of sexual orientation or gender identity. Article 2 imposes both positive and negative obligations on state parties such as Jamaica in terms of their obligation to adopt and educate,

¹⁴⁸ Jamaica Forum, *supra* note 25.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

as well as to enforce and protect the rights of LGBTQ members of their society.

Article 2(1) states:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹⁵¹

Article 26 states:

[All] persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹⁵²

The ICCPR Human Rights Committee regrets that Jamaica has not been making significant and bona fide attempts to live up to these articles and obligations, and hence, has not been acting in good faith of its obligations and responsibilities as a state party to the treaty on human rights.¹⁵³ In June 2011, the Human Rights Council reaffirmed its commitment to LGBT issues through passage of Resolution 17/19, entitled “Human rights, sexual orientation and gender identity.”¹⁵⁴ A

¹⁵¹ G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, (Dec.16, 1966).

¹⁵² *Id.* (emphasis added).

¹⁵³ H.R.C. Res. 17/19, U.N. Doc. A/HRC/17/L.9/Rev.1, 216 (June 17, 2011).

¹⁵⁴ *Id.*

further call was issued for compliance and change in 2016 from the Human Rights Committee.

The Human Rights Committee issued its “Concluding observations on the fourth periodic report of Jamaica” on November 22, 2016, and the many issues brought forward in the 2011 report were still major concerns, especially the treatment of LGBTQ citizens with little improvement noted except for “the adoption of the Diversity Policy by the Jamaica Constabulary Force, in 2011, and a reported increase in the level of tolerance within Jamaican society.”¹⁵⁵ In these “Concluding Observations,” the Human Rights Committee expressed deep concerns on reports of “discrimination, harassment, and violent attacks against lesbian, gay, bisexual, and transgender persons and the alleged failure” of the Jamaican government to “prevent and investigate such attacks (arts. 2, 6 and 26).”¹⁵⁶ While extensive rights violations and issues were communicated, including those of the rights of women, children, refugees, among others, the focus of this paper is the LGBTQ community in Jamaica. Thus, continuing on that subject, under “Concluding observations No. 16 and No. 18,” the Committee recommended the following:

(1) *Amending its Laws and Broadening the Charter of 2011:*

The State party should amend its laws and enact comprehensive anti-discrimination legislation to prohibit all forms of discrimination. It should also decriminalize sexual relations between consenting adults of the same sex in order to bring its legislation into compliance with the Covenant and put an end to prejudices and the social stigmatization of homosexuality. Saving clauses in the *Charter of Fundamental Rights and Freedoms* relating to the Offences against the Person Act and Sexual Offences Act should be removed where they obstruct the amendment of legislation that enhances the rights of women or any other group.¹⁵⁷

¹⁵⁵ U.N. Human Rights Committee, *Concluding Observations on the Fourth periodic Report of Jamaica*, 3 (Nov. 22, 2016).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

(2) *Investigating, Prosecuting and Convicting Hate Crimes against LGBTQ citizens:*

The State party should ensure that cases of violence against lesbian, gay, bisexual and transgender persons are thoroughly investigated, that the perpetrators are prosecuted, and if convicted, punished with appropriate sanctions, and that the victims have access to effective remedies. The State party should conduct a national campaign to disseminate information about human rights and promote respect for diversity and the rights of all persons, especially lesbian, gay, bisexual and transgender persons.¹⁵⁸

Jamaica's lack of a broad national human rights organization or body and agenda was a major concern of the Human Rights Committee. The Committee has requested Jamaica to "submit its next periodic report by November 4, 2021."¹⁵⁹ The potential for positive change in the near future will be unlikely given the lack of achievement on these matters in the last 22 years.

H. General Comments, Observations and Recommendations of the Committee on Economic, Social and Cultural Rights under the ICESCR

The Committee on Economic, Social and Cultural Rights (CESCR), a body of 18 independent experts that monitors implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR),¹⁶⁰ expressed continued and similar concerns to those expressed by the Human Rights Committee under the ICCPR. For example, in the June 2013 "Concluding observations on the combined third and fourth periodic reports of Jamaica," adopted by the

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 7.

¹⁶⁰ *Committee on Economic, Social and Cultural Rights*, U.N. HUM. RTS. OFF. HIGH COMM'R, <https://www.ohchr.org/en/hrbodies/cescr/pages/cescrindex.aspx> (last visited Nov. 14, 2019).

Committee at its 50th session (29 April–17 May 2013), the CESCR commented:

While noting the adoption of the Charter of Fundamental Rights and Freedoms in April 2011, the Committee is concerned at the narrow scope of prohibited grounds for discrimination, which is limited to “(i) being male or female; (ii) race, place of origin, social class, colour, religion or political opinions”, thus failing to prohibit discrimination on the basis of other grounds, such as sexual orientation, disability and health.¹⁶¹

Similar to the Human Rights Committee, the CESCR expressed concerns over Jamaica’s law that criminalizes consensual same-sex relations under the *Offences Against the Person Act*, and has thereby created an environment perpetrating discrimination against homosexual, bisexual and transsexual persons in all spheres of life, including their enjoyment of economic, social and cultural rights (art. 2).¹⁶² The CESCR Committee calls on Jamaica to amend its laws to adopt a comprehensive anti-discrimination framework law, in accordance with article 2, paragraph 2, of the ICESCR by executing the following recommendations:

- (a) Decriminalize same-sex relations between consenting adults through necessary legislative amendments;
- (b) Take concrete, deliberate and targeted measures to eliminate discrimination on the grounds of sexual orientation; and

¹⁶¹ U. N. Economic and Social Council, Committee on Economic, Social and Cultural Rights, *Concluding observations on the combined 3rd and 4th periodic reports of Jamaica, adopted by the Committee at its 50th session (29 April–17 May 2013)*, U.N. ECON. SOC. COUNCIL 3 ¶ C.8 (Jun. 10, 2013), <https://www.refworld.org/publisher,CESCR,JAM,52d54a854,0.html>.

¹⁶² *Id.*

- (c) Send a clear public message that any form of discrimination, harassment or violence against individuals for their sexual orientation is not tolerated, and swiftly and effectively investigate, prosecute and sanction individuals for such acts.¹⁶³

Despite Jamaica's unchanging stance on homosexuality from a legal and political viewpoint, gay rights activism has increased significantly as many activists have used social media, fundraising, and outreach to international human rights and gay rights bodies across the United States to make advances in protecting as well as bringing more recognition to the human rights plight and status of homosexuals and LGBTQ Jamaicans. Unfortunately, based on understanding the nature of Jamaican society, the role of religious values and tradition, and its colonial past, rights for homosexuals will not be recognized by the law for a long time into the future, and changes and amendments to Jamaica's statute that criminalizes homosexuality will be unlikely for the near future under Jamaica's parliament of legislature. Nevertheless, many in the gay community both in Jamaica and abroad as well as human rights organizations are hopeful and optimistic. It seems that Jamaica's violence and opposition to homosexuality will continue with aggression, abuse, and violence as well as discrimination as part of this community of people's experience. Christian principles and values will continue to exert oppositional influence along with stubborn cultural traditions and values.

V. Appraisal

An important aspect of applying the New Haven School methodology in analysis of issues and problems to formulate policy and for decision making is to appraise existing frameworks and laws in terms of the goal of an order of human dignity. An order of human dignity is defined as "one which approximates the optimum access by all human beings to all things they cherish: power, wealth, enlightenment,

¹⁶³ *Id.*

skill, well-being, affection, respect, and rectitude.”¹⁶⁴ The *1864 Offences Against the Person Act* which criminalizes homosexuality in Jamaica, the prevailing religious, social, and cultural atmosphere that result in the incidence of violence against homosexuals and other LGBTQ Jamaican citizens, their mistreatment and dehumanization, unequal access to justice, lack of equal protection under Jamaica’s laws, and inability to seek social justice, are contrary to the goal of an order of human dignity as they deprive homosexuals and other LGBTQ members of power, wealth, enlightenment, skill, well-being, affection, respect, and rectitude.

As a result of the criminalization of their sexual orientation and violation of their human rights, homosexuals and other LGBTQ Jamaican citizens are not able to satisfactorily and fully achieve the following: (1) *power* to make and participate in decisions with regard to their well-being and rights; (2) *enlightenment*, because there is limited to no freedom to gather, disseminate and share information in their community and participate in the media without fear or harassment; (3) *wealth*, because the criminalization, discrimination and violence against them in business and the workplace affect their prosperity and ability to make equal living; (4) *well-being*, as their opportunities for safety, health, and comfort and access to relevant services including medical care and disease prevention are lessened and interrupted by threats, fear, violence, discrimination, intimidation and refusal of services; (5) *skill*, as their full participation in programs and educational and social institutions is stymied by discrimination, lack of access, and lack of cooperation, and many are forced to live in environments where flourishing intellectually becomes difficult if not impossible; (6) *affection*, as their feelings of intimacy and care, and relationships are criminalized, and their bonds with family, social institutions including church and community organizations are severed by cultural values, the law, and mistreatment and ostracism or exclusion; (7) *respect*, as their choice and privacy are not respected by the law or society and hence, they are deprived of the roles, positions, and responsibilities necessary to gain the respect of their communities and nation; and (8) *rectitude*, as their sexual orientation and social behaviors are

¹⁶⁴ Reisman et al., *supra* note 17.

seen as abominable and deviant from moral, legal, and cultural perspectives.¹⁶⁵

The analysis of the current human rights situation concerning Jamaica's treatment of members of its LGBTQ community by the Human Rights Committee under the ICCPR, and the CESCR Committee under the ICESCR, represents an amalgamation of the many concerns expressed by Jamaica's own J-FLAG gay rights advocacy group, external international and global human rights organizations, and other NGOs that have also been instrumental in the shadow reports submitted to these bodies. The concluding observations and general comments, as well as recommendations from ICCPR-HRC and ICESCR-ESC are consistent with the reality exposed through case studies, media reports, private research studies, sponsored university and organizational research, joint research and calls to a public order of human dignity concerning the treatment of Jamaica's LGBTQ citizens and human rights violations against this highly oppressed and vulnerable group. The consistency of reports by these different human rights stakeholders demonstrate not only the existence of a continuing human rights crisis for LGBTQ Jamaican citizens, but demonstrates the veracity of observations and rationale behind each issue raised and each recommendation made.

The current stance taken by the Jamaican government, culture and religion, as well as majority of Jamaicans on homosexuality and the rights of homosexuals and members of the LGBTQ community is not one corresponding to the full and complete order of human dignity because these stances create an atmosphere of fear, inhumanity, mistreatment, deprivation of life, liberty and happiness for LGBTQ Jamaicans, criminalizes them and does not afford them equal protection of law or equal rights and access to justice and opportunities available to every Jamaican. The stance of the church and religious denominations which fail to condemn the persecution and abuses of LGBTQ Jamaicans is inconsistent with biblical teachings and religious Christian values of love, equality, dignity and care.

Given the above evaluation of the impact of Jamaica's *1864 Offences Against the Person Act* as well as the resulting treatment of homosexuals and members of the Jamaican LGBTQ community who

¹⁶⁵ *Id.*

are citizens entitled to equal protection under the law and equal rights, it can be assessed that the existing law is not a good law as it disregards human dignity by disregarding the fundamental rights and freedoms of homosexuals and LGBTQ Jamaicans. Furthermore, the law can be said to lack general respectability because of its consequential negative impact and discriminatory nature as many Jamaican citizens have been made criminals by the law without committing a crime, and the law is not realistic from the perspective of homosexuals and LGBTQ members since it is a law against the very nature of who they are.

There has been very little progress in the way of rights and recognition for homosexuals and members of the LGBTQ community in Jamaica. What little progress has been made has been mainly spear-headed by Jamaica's prominent gay rights advocacy group, Jamaica Forum for Lesbians, All-Sexuals and Gays (J-FLAG) which was founded in 1998, as well as by activists such as Maurice Tomlinson, a gay Jamaican lawyer who has constitutionally challenged the law. There have been no real actions or policies by government or governmental agencies and agents to address the issue of the rights and mistreatment and abuse of homosexuals and LGBTQ Jamaicans. The least action expected by the LGBTQ community, which is repeal of the law that criminalizes homosexuality in Jamaica, seems impossible at present. Nevertheless, more and more Jamaicans from the LGBTQ community seem to be taking a more active role in fighting for their freedom with US-based and international gay rights and human rights organizations. What is clear is that Jamaica is not fully living up to the principles of the ICCPR, ICESCR, and the Universal Declaration of Human Rights, and human dignity is not being fully respected with equality across the island, thereby failing its very motto, "Out of Many, One People." Affording Jamaicans equal opportunities to better living standard and high quality of life must begin with equality and dignity afforded to and for all members of the Jamaican community.

VI. Alternatives and Recommendations

Jamaica's criminalization of homosexuality and its inhumane treatment of homosexuals and members of the LGBTQ community across Jamaica is known internationally. This has created both an image and reputation challenge for the nation, as well as resulted in calls

from the United Nations Human Rights Council, nongovernmental organizations (NGOs), and influential individuals across the globe to change the current situation and bring about a public order of human dignity. Several recommendations have been made by different parties. For example, the United Nations Human Rights Council has called for more comprehensive protection of human rights, and this has resulted in the *2011 Charter of Fundamental Rights and Freedoms* in the Jamaican Constitution. Organizations such as Jamaica Forum for Lesbians, All-Sexuals and Gays (J-FLAG), Human Rights Watch, and several other NGOs mentioned throughout this paper have called for the following:

1. Repeal the *1864 Offences Against the Person Act*, and its “Un-natural Offences” articles 76, 77, and 79, and specifically Article 76, 42/1969, 3rd Sch., which criminalizes homosexuality.¹⁶⁶
2. Call for government and governmental law enforcement agencies including the police to protect LGBTQ people from violence, investigate violent crimes, and prosecute offenders.¹⁶⁷
3. Call for the United States to take diplomatic and other necessary political actions to influence Jamaica to improve its treatment of homosexuals and other LGBTQ Jamaicans, including respecting and protecting their rights.¹⁶⁸
4. Appointment of a Special Envoy by the United States to Jamaica, to specifically deal with advancing the human rights of LGBTQ people.¹⁶⁹
5. The Global Equality Fund to continue to support organizations that are working on behalf of LGBTQ people.¹⁷⁰

¹⁶⁶ Human Rights Watch, *supra* note 46.

¹⁶⁷ *Id.*

¹⁶⁸ Jamaica Forum for Lesbians, All-Sexuals, and Gays (J-FLAG), *LGBT Issues in Jamaica*, HUMAN RIGHTS FIRST (2012).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

6. Make greater efforts to protect the rights of Jamaicans of all class and backgrounds from discrimination and abuse.¹⁷¹

The above community responses are similar across several organizations that have made recommendations for change. These solutions can certainly further LGBTQ rights and protection, as well as improve treatment and preserve some level of dignity for this vulnerable group in Jamaican society. However, far more needs to be done, and thus, this researcher recommends the following:

- (1) Adopting a more comprehensive body of human and civil rights laws in Jamaica since the *2011 Charter of Fundamental Rights and Freedoms* is inadequate in its coverage and excludes protection for individuals based on sexual orientation, disability, and health status.
- (2) Following the U.S. Model in developing comprehensive antidiscrimination laws to include gender and sexual orientation.
- (3) Actively punish those who mistreat and carry out violent acts against persons based on their sexuality or sexual orientation.
- (4) Developing strong privacy laws that encompass protection of sexuality and sexual identity.
- (5) Strengthening adherence to the Universal Declaration of Human Rights and ICCPR and promote a public order of human dignity for all.

¹⁷¹ *Jamaica-Joint Civil Society Report with CCPR Centre*, Civil Society Report on the Implementation of the International Covenant on Civil and Political Rights, at 9 (Oct. 2016).

- (6) Initiating education and diversity programs to destigmatize beliefs and myths about homosexuals and homosexuality including condemnation based on religion.
- (7) Completely striking article 76, 42 3rd Sch. of the *Offences Against the Person Act* as a beginning national initiative on recognizing the rights and giving dignity and respect to LGBTQ people in Jamaica.
- (8) Signaling a “New National Direction and Policy on Homosexuality and LGBTQ citizens” by recognizing sexual orientation as a right and freedom of choice and affording protection of individuals of this vulnerable minority group.

The above recommendations will certainly create a more respectable rule of law and public order of human dignity for all Jamaicans. Among these alternatives, striking the *1864 Offences Against the Person Act* (art. 76) would prove most beneficial as it will decriminalize homosexuality; citizens who are criminalized cannot have equal access to protection of the law and social justice, and neither can they enjoy the eight principal values of “power, wealth, enlightenment, skill, well-being, affection, respect, and rectitude.”¹⁷² Secondly, Jamaica’s government signaling a “New National Direction and Policy on Homosexuality and LGBTQ citizens” by recognizing sexual orientation as a right and freedom of choice and affording protection of individuals of this vulnerable minority group will set a leadership stance and example for the nation and its opposing groups and citizens, and will communicate that the government is determined to pursue equal protection and rights for all citizens. Above all, following these recommendations will bring Jamaica closer to compliance with its obligations as a state party under the rules of the ICCPR and ICESCR, and more in accordance with the goal of a public order of human dignity.

¹⁷² Reisman et al., *supra* note 17, at 576.

VII. Conclusion

“Recognition and protection of the human rights of Lesbian, Gay, Bisexual and Transgender (LGBT) persons in Jamaica is insufficient.”¹⁷³ It is hoped that in response to calls from various organizations, the plights of Jamaica’s LGBTQ citizens who suffer various injustices including emotional, physical, and psychological abuse, in respect and care for human dignity and in fulfilling its obligation as a responsible government and signatory to the ICCPR, ICESCR, and as a member of the United Nations which has created the greatest order of international human rights, Jamaica will recognize why the current public order and law regarding homosexuals and other LGBTQ Jamaicans is neither respectable nor a good stance for the country and the well-being, health, rights, freedom and happiness of the nation and its citizens.

¹⁷³ McFee, *supra* note 28.

