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## **I. Introduction**

This paper examines whether Barbados is “ready” for same-sex marriage. After providing background as to the legal status of Barbados as a Commonwealth Caribbean country, the legal changes that would be necessary to legalize same-sex marriage in Barbados are explored. This is done by first proposing Marriage Act reforms. These reforms will make the changes necessary to remove the implied prohibition of same-sex couples from the Marriage Act. A review of the Barbados criminal statutes, Constitution, and international treaties will ensue to see whether the Marriage Act reforms would mandate any revisions in, or be in conflict with,

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these bodies of law. Next, the social tensions existent within Bajan<sup>2</sup> culture that both oppose and support same-sex marriage are explored. These social tensions will be examined through a domestic lens, looking at the microcosm of Bajan culture. A discussion of law as a reflector and displacer of social norms follows. This leads to a section on whether the social norms opposing homosexuality in Barbados impose a duty on the legislature and judiciary to carefully explore whether the law should act as a reflector or displacer of these norms, when considering whether Barbados should include same-sex couples in marriage.

## II. Background

Barbados is a member of the Commonwealth Caribbean.<sup>3</sup> The term Commonwealth Caribbean refers to a group of countries that are bound by the Caribbean Sea, all of which were previously colonies of Great Britain.<sup>4</sup> The Commonwealth Caribbean is comprised of dependent and independent nations.<sup>5</sup> Unlike the independent nations of the Commonwealth Caribbean, the law and legal systems of the dependent nations have only a limited identity of their own since the United Kingdom Parliament retains the right to legislate these countries.<sup>6</sup> An example of this is seen in the recent decriminalization of private homosexual activities in the five remaining dependent British Colonies, which was imposed upon them after their colonial legislatures had refused to decriminalize these acts.<sup>7</sup> This is something that the British Parliament could not

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<sup>2</sup> While the official name of Barbados citizens is Barbadians, the local culture often refers to Barbadians as Bajans.

<sup>3</sup> Dennis Morrison, Q.C., *The Judicial Committee of the Privy Council and the Death Penalty in the Commonwealth Caribbean: Studies in Judicial Activism*, 30 NOVA L. REV. 403 n. 1 (2006).

<sup>4</sup> *Id.* at 403.

<sup>5</sup> See ROSE-MARIE BELLE ANTOINE, COMMONWEALTH CARIBBEAN LAW AND LEGAL SYSTEMS, 10 (1999).

<sup>6</sup> *Id.*

<sup>7</sup> *Gays in Jamaica: Sexuality and the Law*, THE JAMAICAN GLEANER, <http://www.jamaicagleaner.com/pages/gay/sexandthelaw.html>.

force upon the independent sovereigns of the Commonwealth Caribbean, such as Barbados—which gained full independence from the Crown on November 30, 1966.<sup>8</sup>

Although Barbados gained independence in 1966, and is no longer under British rule as a colony, the Queen remains the Head of State of Barbados.<sup>9</sup> The Queen is represented by the Governor General, appointed by the Queen on the advice of the Prime Minister of Barbados, who exercises executive powers and who assents to bills in her name before they can become law.<sup>10</sup> The Barbados Constitution limits the power of the Governor General, however.<sup>11</sup> This effectively limits the power of the Queen as the Governor General, in most instances, exercises authority on the advice of the Prime Minister, or other person or body *within* Barbados.<sup>12</sup>

On independence, Barbados continued to retain the British Judicial Committee of the Privy Council [JCPC] as its highest court of appeal.<sup>13</sup> The JCPC is the court of final appeal for the United Kingdom overseas territories, Crown dependencies, and Commonwealth countries who have retained appeals to Her Majesty in Council or who have retained the right to appeal to the Judicial Committee.<sup>14</sup> In 2001, however, the Caribbean Court of Justice [CCJ] was formed and designed to act as a court of last resort for member states of the Caribbean community.<sup>15</sup>

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<sup>8</sup> The Honourable Mia Mottley, Q.C., M.P., *Walking the Tightrope*, 30 NOVA L. REV. 425, 430 (2006).

<sup>9</sup> W. LEROY INNISES, *THE CONSTITUTION AND YOU—BARBADOS* 12 (1991). Although, the Prime Minister of Barbados

<sup>10</sup> *Id.*

<sup>11</sup> *See* BARBADOS CONST. Ch. IV, § 32.

<sup>12</sup> *See* Innises, *supra* note 9, at 13.

<sup>13</sup> *See* Mottley, *supra* note 8, at 431.

<sup>14</sup> For more information on the JCPC, see the JCPC website at: <http://www.privycouncil.org.uk/output/page5.asp>.

<sup>15</sup> *See* <http://www.caribbeancourtsofjustice.org/about.htm> (“Introduction” on the Caribbean Court of Justice’s webpage, providing background information on the CCJ’s formation and member states). For more on the CCJ, its history, formation, and jurisdiction, *see also* Morrison, *supra* note 3; Leonard Birdsong, *The Formation of the Caribbean Court of Justice: The Sunset of British Colonial Rule in the English Speaking Caribbean*, 36 U. MIAMI INTER-AM. L. REV. 197

Since Barbados joined the CCJ in 2001, it was already a member state when the CCJ was inaugurated on April 16, 2005.<sup>16</sup> The CCJ has both appellate jurisdiction, over matters on appeal from its member states, and original jurisdiction on matters of international law in respect to the interpretation and application of treaties between member states.<sup>17</sup> This, however, does not mean that Barbados' appeals would automatically begin to go to the CCJ as its highest court of appeal.

In Barbados, appellate jurisdiction is a matter of constitutional law.<sup>18</sup> The Constitution, from its inception, provided for appeals to the JCPC in certain cases.<sup>19</sup> Given the constitutional mandate establishing the JCPC as the final court of appeal in domestic cases, Parliament would have to have taken action and amend the Constitution to reflect the CCJ as the court of last resort for all criminal and civil appeals before Barbados could effectively pull its appeals from the JCPC and take them to the CCJ without contravening the Constitution.<sup>20</sup> In Barbados, the process of constitutional amendment that would change the court of last resort from the JCPC to the CCJ requires an Act of Parliament to be passed by a 2/3 vote of both Houses.<sup>21</sup> Such an Act must also state its intent to amend the Constitution in order to be more than a mere statute.<sup>22</sup>

Barbados has, in fact, passed the necessary enabling legislation. The Caribbean Court of Justice Act of 2003 and the Constitution Amendment Act of 2003, both of which were brought in

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(2005); Honorable Sir David Simmons, *The Caribbean Court of Justice: A Unique Institution of Caribbean Creativity*, 29 NOVA L. REV. 171 (2005) [hereinafter *Court of Justice*].

<sup>16</sup> See *id.* (the first question in the introduction section lists Barbados as a member state).

<sup>17</sup> See *id.* (third question in introduction section—addresses appellate versus original jurisdiction of the court). See also *Court of Justice*, *supra* note 15, at 188-190.

<sup>18</sup> BARBADOS CONST. Ch. VII, PART II (“Appeals”).

<sup>19</sup> See BARBADOS CONST. Ch. VII, § 87 and 88 (“Appeals relating to fundamental rights and freedoms” and “Appeals to Her Majesty in other cases,” respectively).

<sup>20</sup> See *Court of Justice*, *supra* note 15, at 198 (discussing “De-linking from the JCPC,” which discusses the need for some of the Caribbean countries, such as Barbados, to pass constitutional amendments in order to sever their link with the JCPC).

<sup>21</sup> See BARBADOS CONST. Ch. VII, § 49 (1, 2) (requiring a 2/3 vote of both Houses to amend Ch. VII, § 87-88, which are the provisions that constitutionally establish appeals to the JCPC).

<sup>22</sup> BARBADOS CONST. Ch. VII, § 49 (6).

force by Proclamation on April 8, 2005, effectively made the CCJ the court of last resort for Barbados on new cases on appeal, and also allowing for transitional jurisdiction for certain cases pending before the JCPC.<sup>23</sup>

As of November 8, 2006, the CCJ has already heard two cases from Barbados- one civil and one criminal.<sup>24</sup> It did not take long for the CCJ's appellate jurisdiction to be addressed. A short six months after its inauguration, the CCJ addressed the issue of jurisdiction in a civil case on appeal from Barbados.<sup>25</sup> Addressing an objection to jurisdiction, the CCJ ruled that it had jurisdiction to hear the appeal under the terms of the enabling legislation passed by Parliament.<sup>26</sup> The jurisdiction of the court was not challenged thereafter in the criminal case.<sup>27</sup> Thus, it appears that new cases on appeal are now to be heard by the CCJ, rather than the JCPC.

### III. Legal Constructs

A. Draft Proposal for Marriage Act Reforms. Following are proposed reforms to the Marriage Act which, if enacted, would result in the extension of marriage to same-sex couples. These proposed reforms are presented to establish framework for the discussions on legal constructs that follow.

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<sup>23</sup> This enabling legislation is discussed in *Barbados Rediffusion Services Limited v. Merchandani*, CCJ Application No. AL 0001 of 2005, 3-5, *available at* <http://www.caribbeancourtofjustice.org/judgments/Mirchandani%20judgment.pdf> (last visited Nov. 19, 2006).

<sup>24</sup> *Barbados Rediffusion Services Limited v. Merchandani*, CCJ No. CV 1 of 2005, *available at* <http://www.caribbeancourtofjustice.org/judgments/Mirchandani%20appeal%20judgment.pdf> (civil case); *Attorney General v. Boyce*, CCJ Appeal No. CV 2 of 2005, *available at* <http://www.caribbeancourtofjustice.org/judgments.html> (links in box dated 08 November 2006 lead to decisions of various CCJ Justices in a Barbados death penalty case).

<sup>25</sup> *See Barbados Rediffusion Services Limited*, CCJ Application No. AL 0001 of 2005.

<sup>26</sup> *Barbados Rediffusion Services Limited*, CCJ No. CV 1 of 2005 at 2-3 (the case fell within the transitional clause of the enabling legislation, which allowed for substituting the CCJ's jurisdiction for cases pending before the JCPC under certain circumstances).

<sup>27</sup> *See generally Attorney General*, CCJ Appeal No. CV 2 of 2005.

1. Background on Proposed Reforms. While same-sex marriage is not currently legal in Barbados, the Marriage Act does not *expressly* define marriage as being between members of the opposite sex. Rather, it uses the word “person(s)” throughout most of the marriage statute, rendering the majority of the statute gender neutral.<sup>28</sup> The Act does, however, *impliedly* define marriage as being a solely heterosexual institution insofar as the consanguinity statute, addressed in the “Prohibited and Void Marriages” section, only prohibits marriages between degrees of related persons of the opposite sex<sup>29</sup>—implying that marriage is solely an opposite sex institution.

These proposed reforms remove the traces of gender-based language that create an *implied exclusion* of same-sex marriage and replace it with gender-neutral language that would allow the inclusion of same-sex couples in marriage. Because the Marriage Act is fairly extensive, spanning 21 pages in length,<sup>30</sup> the presentation of the proposed reforms is limited to the relevant sections needing gender-neutral language, although some surrounding text is included in order to establish context. Since most of the Marriage Act uses the word “persons,” which is gender neutral, the reforms needed to allow the inclusion of same-sex couples in marriage are rather few.

The proposed reforms are presented in the following format: relevant Barbados Marriage Act portions are presented, the portions to be revised are stricken, and the proposed revisions are added in brackets [ ]. Explanatory language is inserted between provisions for clarity.

2. Proposed Marriage Act Reforms. Part I of the Marriage Act defines some of the basic language that is used in the statute. In order to remove any argument regarding the legislative

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<sup>28</sup> See generally Marriage Act, Cap 218A, *Laws of Barbados* (1995).

<sup>29</sup> See Marriage Act, Cap 218A, § 3(1), *Laws of Barbados* (1995).

<sup>30</sup> See generally Marriage Act, Cap 218A, *Laws of Barbados* (1995).

intent of extending marriage to same-sex couples, a definition of “marriage” is added to this section, as follows:

**Chapter 218A**<sup>31</sup>  
MARRIAGE  
PART I  
*Preliminary*

1. This Act may be cited as the *Marriage Act*.
2. For the purposes of this Act  
“brother” includes a brother of the half blood;  
“church” includes chapel, meeting-house or place set aside for religious worship;  
“civil marriage” means a marriage solemnized by a magistrate under section 31;  
“magistrate certificate” means a certificate for marriage issued by the magistrate under section 24;  
[“marriage” shall be defined as the union, religious or civil, of any two persons who meet the legal requirements of this Act, whether they be of the same-sex or opposite-sex.]  
“marriage *in extremis*” means a marriage solemnized under Part VII’  
.....

Part II of the Marriage Act addresses “Prohibited and Void Marriages.” These include the consanguinity statutes, which prohibit marriage between certain degrees of relatives. The language in the section is almost entirely gender neutral. Following are the changes necessary to render *all* of the language in this section gender neutral.

PART II  
*Prohibited and Void Marriages*

3. (1) A marriage solemnized between ~~a man and a woman~~ [two persons] standing to ~~him~~ in any of the relationships mentioned in ~~column 1~~ [the *Prohibited Degrees of Relationship*] of the *First Schedule* ~~or between a woman and a man standing to her in any of the relationships mentioned in column 2 thereof~~ is void.

(2) Any relationship specified in the *First Schedule* includes a relationship traced through, or to, a person who is or was an adopted child, and for that purpose the relationship between an adopted child and his adoptive parent, or each of his adoptive parents, shall be deemed to be or to have been the natural relationship of the child and parent.  
.....

Note: omitted subsections in Part II define the parentage of children adopted more than once, address marriage of persons under 16 years of age, and define classes of void marriages.

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<sup>31</sup> See generally Marriage Act, Cap 218A, *Laws of Barbados* (1995).

Part III of the Act discusses *Marriage Officers* and addresses who *may perform a marriage*, not who *may marry*. Part IV addresses the formalities of marriage. Part V covers provisions relating to minors. The language in these subsections is gender neutral and does not contribute to the implied exclusion of same-sex couples. Therefore, they have been omitted.

PART VI  
*Solemnisation of Marriages*

**27.** (1) Subject to subsection (2), a religious marriage, other than a marriage *in extremis*, shall be solemnized

- (a) between the hours of 6:00 a.m. and 9:30 p.m.;
- (b) by a marriage officer in the presence of at least 2 witnesses, other than the marriage officer; and
- (c) according to the rules, forms, usages and ceremonies of the denomination, faith or creed to which the marriage officer belongs.

(2) During the ceremony the consent of each party to the marriage to accept the other as ~~his~~ wife or ~~her~~ husband, as the case may be, shall be clearly expressed in the presence of the marriage officer and the witnesses.

....

**28.** A marriage officer may refuse to solemnize

- (a) a marriage which is contrary to . . . the rules, forms, usages and ceremonies of the denomination, faith or creed to which he belongs; or
- (b) a marriage between persons which is forbidden by the rules, forms, usages and ceremonies of the denomination, faith or creed to which he belongs.

....

**34.** Notwithstanding section 5, if the parties to a marriage solemnised in good faith and intended to be in compliance with this Act are not under a legal disqualification to contract such a marriage and after such solemnization have lived together as ~~man and wife~~ [spouses], such marriage shall be deemed a valid marriage, notwithstanding that the person who solemnised the marriage was not authorized to solemnise marriages . . . .

....

Note: omitted sections of Part VI address the duties of the minister after solemnisation, issuance of a certificate of marriage, terms of solemnisation of marriages by magistrates, adding religious ceremony to civil marriages, protection for persons solemnizing in good faith. Part VII

deals with marriage *in extremis*. Part VIII addresses housekeeping items such as numbering and returns of marriage registers, false statements, and marriage fraud. These were omitted because the language in those subsections is gender neutral and does not contribute to the implied exclusion of same-sex couples. While section 28 did not require amending, it was included because it counters concerns the religious voice may have that legalizing same-sex marriage could force them to act against their faith.

The First Schedule, below, is the schedule referred to in the consanguinity statute, in Part II, section 3 (amended above). These define the degrees of relationship that are prohibited to marry. Column one addressed degrees of relationships to a male relative, while column two addressed degrees of relationship to a female relative. The proposed reforms render the language in *Column one* gender neutral. Consequentially, *Column two* is no longer needed because the gender neutrality of column one makes it applicable to all relatives, male or female.

FIRST SCHEDULE	
PROHIBITED DEGREES OF RELATIONSHIP	
<i>Column 1</i>	<i>Column 2</i>
<del>Mother</del> [Parent]	<del>Father</del>
<del>Daughter</del> [Child]	<del>Son</del>
Father's <del>mother</del> [parent]	<del>Father's father</del>
Mother's <del>mother</del> [parent]	<del>Mother's father</del>
Son's <del>daughter</del> [child]	<del>Son's son</del>
Daughter's <del>daughter</del> [child]	<del>Daughter's son</del>
<del>Sister</del> [Sibling]	<del>Brother</del>
Father's <del>sister</del> [sibling]	<del>Father's brother</del>
Mother's <del>sister</del> [sibling]	<del>Mother's brother</del>
Brother's <del>daughter</del> [child]	<del>Brother's son</del>
Sister's <del>daughter</del> [child]	<del>Sister's son</del>

In sum, the changes necessary to remove the implied exclusion of same-sex couples are rather few since most of the Marriage Act already uses gender-neutral language. In its current state of affairs, however, it would be fair to say that Barbados could not ratify the proposed reforms to extend marriage to same-sex couples. Namely, this is due to the fact that, although

rarely enforced between consenting adults,<sup>32</sup> the types of sexual acts<sup>33</sup> that most commonly take place in same-sex marriages are currently criminalized in Barbados.

B. Criminal Statutes. “Buggery” is currently illegal in Barbados.<sup>34</sup> Although the Sexual Offenses Act does not define buggery, the Supreme Court of Judicature has defined buggery as including anal sexual intercourse between two men,<sup>35</sup> which criminalizes one of the most common forms of sex between gay men.<sup>36</sup> Buggery is punishable by a term up to life imprisonment,<sup>37</sup> a sentence that hardly seems commensurate to the offense. Even though buggery criminalizes not only anal sex between men but also acts of anal sex with a woman,<sup>38</sup> the decriminalization of buggery has oft been referred to as the decriminalization of homosexuality.<sup>39</sup> This evidences, perhaps, that the social condemnation of buggery in Barbados is more closely related to the condemnation of homosexuality than to the act of anal sex in and of itself.

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<sup>32</sup> See The International Lesbian and Gay Association’s World Legal Survey page on Barbados at [http://ilga.info/Information/Legal\\_survey/americas/barbados.htm](http://ilga.info/Information/Legal_survey/americas/barbados.htm) (last visited 9/24/2006) (stating that “The law [against male/male and female/female same-sex acts] is rarely enforced against discreet (private) behaviour.”). See also *Barbados: Life in prison for Gay Sex v. Change the Law*, NATIONS NEWS, Nov. 2003, available at <http://www.globalgayz.com/barbados-news.html> (quoting a citizen who states the buggery law is not enforced).

<sup>33</sup> The “acts” referred to include anal sex, *cunnilingus*, and *fellatio*.

<sup>34</sup> See Sexual Offenses Act, Cap 154, § 9, *Laws of Barbados* (1993).

<sup>35</sup> *Hunte v. The Queen*, Criminal Appeal No. 43 of 2001 [16], unreported case (Barbados).

<sup>36</sup> The other form being *fellatio*.

<sup>37</sup> Sexual Offenses Act, Cap 154, § 9, *Laws of Barbados* (1993).

<sup>38</sup> See *Woodall v. The Queen*, Criminal Appeal No. 11 of 1986 (Barbados), *reversed on other grounds* (man convicted of buggery for forcing anal sex with a woman).

<sup>39</sup> For example, see *Time to get rid of bigotry in our country*, BARBADOS ADVOCATE, Jan. 3, 2003, available at <http://www.globalgayz.com/barbados-news.html> (advocating Barbados should “de-criminalise homosexuality”). See also, *Barbados: Life in prison for Gay Sex v. Change the Law*, NATIONS NEWS, Nov. 2003, available at <http://www.globalgayz.com/barbados-news.html> (referring to “buggery” as “The law on homosexuality”); *Barbados debates decriminalizing homosexuality, prostitution*, LATINOAMERICA, Nov. 7, 2003, <http://www.latinamerica-online.info/caraibi03/barbados01.03.html> (also referring to buggery as the “law on homosexuality”).

In addition, the law against serious indecency, which defines “serious indecency” as “an act, whether natural or unnatural[,] by a person involving the use of the genital organs for the purpose of arousing or gratifying sexual desire,”<sup>40</sup> has been used to criminalize acts of *cunnilingus* between lesbians.<sup>41</sup> Acts of “serious indecency” are punishable for ten to fifteen years in prison, depending on whether they are committed with persons over or under the age of sixteen.<sup>42</sup>

That these laws are rarely enforced between consenting adults is substantiated by the fact that a search of the Barbados’ Supreme Court of Judicature<sup>43</sup> and Carilaw<sup>44</sup> databases only returned seven recent cases dealing with buggery,<sup>45</sup> none of which dealt with an act of buggery

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<sup>40</sup> Sexual Offenses Act, Cap 154, § 12, *Laws of Barbados* (1993).

<sup>41</sup> Daniel Ottosson, *With the Government in our Bedrooms—A Survey of the Laws Over the World Prohibiting Consenting Adult Homosexual Acts* 25 (2006), <http://www.ilga.org/state-homophobia/LGB%20in%20World%20Criminal%20Codes%20July%202006.pdf> (last visited September 24, 2006) (Daniel Ottosson, a student of Public Law at Södertörn University, Stockholm, Sweden, conducted this survey in 2005-06).

<sup>42</sup> Sexual Offenses Act, Cap 154, § 12, *Laws of Barbados* (1993).

<sup>43</sup> Database can be accessed at [http://www.lawcourts.gov.bb/site\\_search.asp](http://www.lawcourts.gov.bb/site_search.asp).

<sup>44</sup> Database may be accessed by subscription. Carilaw is a website that has been built by the University of the West Indies in an effort to create a collection of Commonwealth Caribbean primary legal materials.

It should be noted that as of May 2006, gaps continue to exist in the Law Reports of Barbados, based on the Guide to Caribbean Law Research. See Yemisi Dina, *The Guide to Caribbean law Research*, May 2006, <http://www.nyulawglobal.org/globalex/caribbean1.htm>. Therefore, the cases revealed by researching the Supreme Court of Judicature’s website and Carilaw may not be a complete reflection of all appeals on buggery and serious indecency cases.

<sup>45</sup> See *Holder v. The Queen*, Criminal Appeal No. 30 of 2002, unreported case (Barbados) (issue of rape and buggery of a woman) and *Hunte v. The Queen*, Criminal Appeal No. 43 of 2001, unreported case (Barbados) (issue of buggery against a 13 year old boy); *Folkes et al. v. The Queen*, Criminal Appeal No. 43 and 44 of 1992 (Barbados) (anal rape of a woman); *Stanford v. R.*, Criminal Appeal No. 6 of 1993 (Barbados) (issue of buggery of a 12 year old); *Yearwood v. R.*, Criminal Appeal No. 21 of 1992 (Barbados) (issue of buggery of a 9 year old); *Bovell et al. v. The Queen*, Criminal Appeal No. 19 and 20 of 1987 (Barbados) (issue of buggery of a gay man by a police officer); *Woodall v. The Queen*, Criminal Appeal No. 11 of 1986 (Barbados) (issue of buggery of a woman with a deadly weapon).

between consenting adults.<sup>46</sup> Similarly, only three cases dealing with “serious indecency” were found in the databases, none of which involved lesbians and all of which involved non-consent.<sup>47</sup>

Even though the laws that criminalize anal sex, *cunnilingus*, and *fellatio* appear to be rarely enforced in Barbados against consenting parties, the legalization of same-sex marriage would nonetheless effectively condone breaking the current criminal law on buggery and serious indecency, since same-sex unions would inevitably result in acts of buggery and serious indecency—as they are currently defined under Barbados’ Sexual Offenses Act. Therefore, amendments to these laws would have to be enacted in order to eliminate a statutory conflict between the Marriage Act and the criminal law if marriage were to extend to same-sex couples.

Amendments to the Sexual Offenses Act would be needed because the current language of the Act for buggery and serious indecency criminalizes these acts unconditionally. For example, subsection 9 of the Sexual Offenses Act states that “Any person who commits buggery is guilty of an offense . . . .”<sup>48</sup> Similarly, subsection 12 of the Act states that “A person who commits an act of serious indecency . . . is guilty of an offense.”<sup>49</sup> This language assigns strict liability for committing the prohibited acts and subjects anyone who commits the prohibited act to criminal sanctions, whether or not they are a consenting party. The fact that consensual acts of anal sex, *fellatio*, and *cunnilingus* do not appear to be prosecuted in Barbados does not reduce or eliminate their criminal element under the current statute. It does, however, support amending

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<sup>46</sup> See *supra* note 45 parentheses.

<sup>47</sup> See *Greene v. the Queen*, Criminal Appeal No. 13 of 2002, unreported decision (Barbados) (man committing an act of serious indecency with a woman, without consent); *Hewitt v. The Queen*, Criminal Appeal No. 28 of 2002, unreported decision (Barbados) (male defendant’s past act of serious indecency against a female being used in determining the sentence in the instant case); *Parris v. The Queen*, Criminal Appeal No. 57 of 2001 (Barbados) (male defendant committed act of indecency—sexual intercourse—with a 13 year old girl, without consent).

<sup>48</sup> Sexual Offenses Act, Cap 154, § 9, *Laws of Barbados* (1993).

<sup>49</sup> Sexual Offenses Act, Cap 154, § 12 (1) and (2), *Laws of Barbados* (1993) (both subsections track the language quoted).

the Sexual Offenses Act to eliminate the criminality of consensual male/male and female/female sex. This would add a *mens rea* element of criminal intent to the statute, bringing the statute in line with the current practice of the non-prosecution of consensual acts.

Decriminalizing buggery and serious indecency between *consenting* parties does give rise to other considerations—such as age of consent, for example. One recommendation, in addressing these concerns, proposes that the language of the Sexual Offenses Act be changed to reflect that buggery will only be criminalized if it is committed as part of an offense defined within another part of the Act.<sup>50</sup> For example, if buggery were committed during the act of rape, then buggery would act as an aggravator to the rape charge. The serious indecency subsection could be modified similarly. Since sex with a minor would remain criminalized under subsections 4 and 5 of the Sexual Offenses Act (addressing sexual intercourse with a child under fourteen and between ages fourteen and sixteen, respectively), and non-consensual sex may be prosecuted under subsections 1 and 11 (addressing rape and indecent assault, respectively), the buggery and serious indecency statutes would then effectively serve to increase the criminal liability/sanctions for these other crimes of intent. While this course of action would likely maintain a certain increased prejudice toward same-sex intimacy, by virtue of these acts serving

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<sup>50</sup> Prof. The Honourable E.R. Walrond, *Report on the Legal, Ethical and Socio-Economic Issues Relevant to HIV/AIDS in Barbados* 34, <http://www.bamp.org.bb/pdf/HIV%20Report%20-June%202004.pdf#search=%22report%20on%20the%20legal%20ethical%20and%20socio%20economic%20issues%22>.

E.R. Walrond is the former Dean of the School of Clinical Medicine and Research at UWI, Cave Hill; the former Chairman of the National Advisory Committee on AIDS; former member of the Management Committee, Global Programme on AIDS; and a member of the National Commission on HIV/AIDS. He was commissioned by the Barbadian government to do a thorough survey of the legislation and produce recommendations for changes in the law that would remove barriers to the prevention and treatment of HIV/AIDS. The recommendation to decriminalize buggery was included, based on the fact that such a law promotes a social stigma that impedes those infected with the virus from getting treatment. *Id.* at 29-34.

as “aggravators” to other sex crimes, it would at least effectively decriminalize sexual intimacy between consenting adults.

Another possibility would be to eliminate from the statutes the crimes of buggery and serious indecency altogether. Since other sections of the Sexual Offenses Act would still allow for prosecution of all non-consensual sex acts and of sex acts with minors, the decriminalization of buggery and serious indecency would remove any conflict with the Marriage Act reforms that would allow same-sex marriage without removing the government’s ability to prosecute them as crimes of non-consent. And, the complete elimination of buggery and sexual indecency from the statute, as opposed to keeping the acts as aggravators to other sexual crimes, would also remove any remaining undertones of governmental bias against its gay populace.

In sum, enacting the proposed Marriage Act reforms would create a statutory conflict with the current criminal law in Barbados. The criminal law would have to be amended, before the proposed reforms could be enacted, to eliminate the criminal liability that would attach to consensual acts of sexual intimacy of same-sex couples. While there is more than one way to address the needed amendments, at minimum the subsections dealing with buggery and serious indecency would have to be revised so as to decriminalize acts of buggery and serious indecency in such a manner that any same-sex persons who may legally marry under the reformed Marriage Act, whether a minor or an adult, would not incur criminal liability when engaging in consensual acts of sexual intimacy.<sup>51</sup>

C. Constitution. There are two angles from which we can approach looking at Constitutional issues insofar as same-sex marriage is concerned. One considers whether the ongoing exclusion of same-sex couples from the institution of marriage amounts to a

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<sup>51</sup> These protected acts of intimacy would include all acts of sexual expression typical to same-sex couples and include acts of anal sex, vaginal penetration, as well as non-penetrative acts.

constitutional violation. The other considers whether the draft reforms legalizing same-sex marriage would amount to a constitutional violation. Each is examined in turn. First, a review of the rules of constitutional interpretation in Barbados—as well as the relevant constitutional provisions—is in order.

The Barbadian Constitution is the supreme law of Barbados.<sup>52</sup> The Constitution is not interpreted subject to the statutes below it; rather, interpretation of all other law in Barbados is subordinate to the terms of the Constitution. Therefore, if any law<sup>53</sup> is in conflict with the Constitution, the law is null and void and has no effect to the degree that it is in conflict with the Constitution. Similarly, Parliament may not pass a law that is in conflict with the Constitution. Alleged constitutional conflicts are subject to judicial review. Should the court find the statutory provision in conflict with the Constitution, it will be declared unconstitutional and of no effect.<sup>54</sup> The power of Parliament to make law is also limited by the Constitution to “laws for the peace, order and good government of Barbados.”<sup>55</sup> A law passed by Parliament enjoys a presumption of constitutional validity; therefore, the onus of proving that the law is unconstitutional lies on the challenger of the statute.<sup>56</sup> The Latin maxim *ut res magis valeat quam pereat* (the matter ought to be treated as valid rather than destroyed) underlies this presumption of validity.<sup>57</sup> Thus,

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<sup>52</sup> BARBADOS CONST. Ch. I, § 1.

<sup>53</sup> The word law “includes any instrument having the force of law and any unwritten rule of law.” BARBADOS CONST. Ch. X, § 117.1.

<sup>54</sup> *Id.*

<sup>55</sup> BARBADOS CONST. Ch. V, § 48.1 and 48.2.

<sup>56</sup> *See* Gulf Rentals Ltd. V. Evelyn and Carvalho (Trading as Buccaneer Restaurant), No. 538 of 1982, 15.

<sup>57</sup> Re: References by the Director of Public Prosecutions, D.P.P.’s References Nos. 1 and 3 of 2002, [49].

statutes are to be interpreted in such a way as to ensure their harmony with the Constitution when possible.<sup>58</sup>

Notwithstanding these rules, the Savings Clause of the Constitution exempts laws existing before the Constitution was enacted—on November 30, 1966—from being constitutionally challenged as a violation of the fundamental rights and freedoms afforded in the Constitution. Also exempted from such a constitutional challenge are laws that repeal or re-enact an “existing law” (defined as a law enacted before November 30, 1966) without causing a substantive alteration to the law itself. Laws that alter “existing” law but do not render it inconsistent with any provisions of the Constitution’s fundamental rights and freedoms—to the extent that it was not, previous to amendment, inconsistent—are also saved from constitutional challenge under the Savings Clause.<sup>59</sup> Based on the wording of the Savings Clause, these laws are to be read as being consistent with the fundamental and freedoms provisions of the Constitution.

In making determinations on the constitutionality of statutes, then, the courts will look to the principles embodied within the Constitution, look to the statutory history to see if it is exempt from challenge through the savings clause, and look to the text to see if the statute can be reconciled with the constitution’s mandate. If the court finds the statute contravenes the Constitution, the court seeks to harmonize the statute to the Constitution to the extent possible.<sup>60</sup>

1. Constitutionality of Current Exclusion of Same-Sex Couples. It has been argued that the Marriage Act is in conflict with the Constitution—by impliedly excluding same-sex

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<sup>58</sup> *Id.*

<sup>59</sup> See BARBADOS CONST. Ch. III, § 26.

<sup>60</sup> See generally *Boyce et al. v. R.*, Criminal Appeal Nos. 7 and 8 of 2001, 32-34 (looking to Constitution, text, history, in order to try and reconcile the statute with the Constitution in a death penalty case).

marriage—because the Constitution protects freedom of conscience, freedom of expression, freedom of association, and freedom of privacy in the home.<sup>61</sup> One Barbados scholar, questioning the validity of the criminalization of homosexual intimacy between consenting adults in private, commented:

Constitutional democratic rule is the only form of political rule that makes a strong claim to moral distinction. It is the form of political rule that is predicated on an assumption of persons as rational, free and moral equals, capable of making critical choices about their lives and, therefore, of formulating and pursuing their own conceptions of a good life.

Constitutional democracy is therefore the only form of political rule that seriously respects the basic moral rights of persons, of which our constitutional bill of rights are but contingent and particular attempts at a more specific political instantiation. . . .<sup>62</sup>

This line of reasoning could be extended to support an argument that same-sex couples—as rational, free, and moral equals, able to make critical life choices—should be granted an equal right to marry right since the right to freedom of conscience, expression, association, and privacy in the home should protect their right to marriage.

The Barbadian courts have not yet brushed with the issue of same-sex marriage. More likely than not, this is in part because gay sex has been criminalized in Barbados, thus focusing the recent debate more on the decriminalization of homosexuality rather than on the extension of marriage rights to same-sex couples. However, if the Marriage Act were to be challenged as

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<sup>61</sup> BARBADOS CONST. Ch. III, § 11.

<sup>62</sup> Simeon McIntosh, *Homosexuality-Constitutional Question*, THE ST LUCIA MIRROR, Jun. 3, 2005, available at <http://www.stluciamirroronline.com/2005/june3/art1.htm>.

Simeon McIntosh is Professor of Jurisprudence and Dean at the University of West Indies, Cave Hill campus. For another view challenging the constitutionality of the criminalization of homosexuality in Barbados, see Jeff Cumberbatch, *Demurrer, Replication and Dejoinder*, BARBADOS ADVOCATE, Feb. 7, 2005, available at <http://www.sodomylaws.org/world/barbados/bbeditorial009/htm> (Jeff Cumberbatch is a senior lecturer at the University of the West Indies in Barbados).

unconstitutional, based on the argument presented above, the arguments would not fly under current constitutional jurisprudence in Barbados. The reasons are at least two-fold.

First, the constitutional protections of these freedoms may protect a gay<sup>63</sup> person's right to socialize with whom they choose (freedom of association), to choose what is moral and what is immoral insofar as consensual sexual practices are concerned (freedom of conscience and freedom of privacy in the home), to be free to express who they are and what they believe (freedom of expression)—and thus render it unconstitutional to *criminalize* homosexuality. But, unlike the United States, where the Supreme Court declared a fundamental right to marriage,<sup>64</sup> there is nothing to indicate that the fundamental rights and freedoms, embodied in the Barbados Constitution, have been found to imply a constitutional right to marry.

Second, even if marriage were seen as a fundamental right, since marriage was already defined as a heterosexual institution before Barbados became an independent state,<sup>65</sup> marriage as

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<sup>63</sup> Although the terms “gay” has been known to have broad definitions, for the purposes of this paper, the term “gay” refers to same-sex couples.

<sup>64</sup> See Céline Abramschmitt, *The Same-Sex Marriage Prohibition: Religious Morality, Social Science, and the Establishment Clause*, 2 FIU L. REV. \_\_\_\_\_, n. 31-35 (2007) (forthcoming in Spring/Summer 2007) (discussing *Loving v. Virginia*, 388 U.S. 1 (1967), where Mildred Jeter, a black woman, and Richard Loving, a white man, were found guilty of violating the ban on interracial marriages in Virginia and were ordered to leave the state. The United States Supreme Court found Virginia's law to violate the Equal Protection Clause due to its racial classification. In so finding, however, the Court also indicated that the law violated the Due Process Clause of the United States Constitution as an unwarranted interference with “the fundamental freedom” of marriage).

<sup>65</sup> This is evident based on the fact that Barbados was a British Colony until its independence November 30, 1966. Britain has never allowed same-sex marriage, although same-sex couples may now gain nearly all the benefits of marriage under the recently enacted civil union laws which, although granting many benefits similar to marriage, have oft been viewed as ‘separate but equal’ institutions. See *Same-Sex Marriage in the United Kingdom*, [http://en.wikipedia.org/wiki/Same-sex\\_marriage\\_in\\_the\\_United\\_Kingdom](http://en.wikipedia.org/wiki/Same-sex_marriage_in_the_United_Kingdom), for more information on this.

A search of the Supreme Court cases did not yield any case that has challenged the Savings Clause. However, one case, *Boyce et al. v. R.*, Privy Council Appeal No. 99 of 2002 at 23 (death penalty case), reiterated that the constitutional challenge to a statute would be subject to the Savings Clause provision.

a heterosexual institution is to be interpreted as being consistent with the fundamental rights and freedoms provisions of the Constitution based on the Saving Clause.<sup>66</sup> Similarly, any alteration to the Marriage Act since November 30, 1966, does not render the Act unconstitutional for the purposes of same-sex marriage because the relevant portion of the Act—defining marriage as being between a man and a woman—is not inconsistent with the pre-constitutional definition of marriage.<sup>67</sup>

2. Constitutionality of Marriage Reforms. There is nothing in the Barbados Constitution that would expressly prevent the enactment of the revisions proposed in the Marriage Act reforms. In an interesting twist, however, if the definition of marriage were changed to include same-sex marriage, rendering it inconsistent with the pre-independence definition of marriage as an opposite sex institution, that portion of the statute would no longer be exempt from constitutional challenge based on the Savings Clause.<sup>68</sup> Therefore, although I cannot imagine any such claim that would not fail on merit, there would arguably be standing for a party who could formulate an argument to challenge the constitutionality of the revised Marriage Act. For example, assume that the draft Marriage Act reforms are adopted and that the Act now extends marriage to same-sex couples. A claim that the Marriage Act revisions unconstitutionally granted same-sex couples a right that prejudiced one of the challenger’s fundamental rights or the public interest may stand. The Barbados Constitution limits certain fundamental rights and

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<sup>66</sup> BARBADOS CONST. Ch. III, § 26 (1).

<sup>67</sup> See BARBADOS CONST. Ch. III, § 26 (1) (c) (not inconsistent with fundamental rights and freedoms provisions (§ 12-23) “to the extent that the law in question . . . alters an existing law [enacted before November 30, 1966] and does not thereby render that law inconsistent with any provision of sections 12 to 23 in a manner in which . . . *it was not previously inconsistent*” (emphasis added)).

<sup>68</sup> *Id.*

freedoms when they prejudice the rights and freedoms of others and the public interest.<sup>69</sup> Thus, since the Constitution specifically limits certain *fundamental rights* or freedoms, then one could argue that a *lesser right*—e.g., one granted by statute, such as marriage—could not create a prejudice that a fundamental right is constitutionally estopped from creating.

In sum, while it may not be unconstitutional to maintain the Marriage Act as it is—thus keeping marriage as a heterosexual institution, neither would it be unconstitutional to adopt the draft Marriage Act reforms—thus allowing equal access to the legal benefits of marriage for both heterosexual and same-sex couples. However, while the Savings clause protects the current pre-constitutional definition of marriage as between members of the opposite sex from constitutional challenge, a post-constitutional definition of marriage that includes of same-sex couples would not be shielded from constitutional challenge.

D. International Treaties. This section will focus on whether the International duties that Barbados undertook when signing certain treaties are in conflict with its current prohibition on same-sex marriage and, therefore, whether these treaties would promote support for the proposed Marriage Act reforms in order to maintain compliance with the treaties.

In addition to safeguarding fundamental rights within its Constitution, Barbados also joined the Organization of American States [OAS] in 1967, and acceded to a number of international human rights treaties.<sup>70</sup> Those most relevant to this discussion include: The International Covenant on Civil and Political Rights [ICCPR] in 1973; the International

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<sup>69</sup> See BARBADOS CONST. Ch. III, § 11 (placing a limit on rights when they prejudice the rights and freedoms of others and the public interest).

<sup>70</sup> For a complete listing of the international human rights treaties Barbados has acceded to, see *The University of Minnesota Human Rights Library- Barbados*, <http://www1.umn.edu/humanrts/research/ratification-barbados.html>.

Covenant on Economic, Social and Cultural Rights [ICESCR] in 1973; and the American Convention on Human Rights [ACHR] in 1982.<sup>71</sup>

Membership in OAS also required adherence to its charter, which includes “an obligation in very general terms to respect the fundamental rights of the individual;” the fundamental rights the treaty refers to are elaborated in the American Declaration of the Rights and Duties of Man [ADRDM].<sup>72</sup> Similarly, the ICCPR, ICESCR, and ACHR have provisions that seek to provide for the preservation of certain basic rights.<sup>73</sup> While the ICCPR and ICESCR are extremely similar—insofar as the wording of their enumerated rights is concerned—<sup>74</sup> the ACHR differs significantly to the degree that it considers and embodies principles promulgated in the Charter of the Organization of American States, the American Declaration of the Rights and Duties of Man, the Universal Declaration of Human Rights, as well as those of other international

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<sup>71</sup> *Id.*; see also *Boyce et al. v. R.*, Privy Council Appeal No. 99 of 2002, paragraph no. 16.

<sup>72</sup> *Boyce et al. v. R.*, Privy Council Appeal No. 99 of 2002, paragraph no. 16. See also *See Organization of the American States, American Declaration of the Rights and Duties of Man, Approved by the Ninth International Conference of American States, Bogotá, Colum., 1948*, <http://www.cidh.org/Basicos/basic2.htm> (provides for the rights: to life, liberty, personal security; to equality before the law; to religious freedom; freedom of investigation, expression, and dissemination; protection of honor, personal reputation, and private and family life; to a family and protection thereof; protection of mothers and children; to residence and movement; to inviolability of the home; to the preservation of health and well being; to education; to benefit of culture; to work and have fair remuneration; to leisure time; to social security; to juridical personality and civil rights; to a fair trial; to nationality; to vote and participate in government; to assemble; to associate; of property; to petition; protection from arbitrary arrest; due process of law; asylum. This is limited in scope by the rights of others).

<sup>73</sup> See generally *International Covenant on Civil and Political Rights [ICCPR]*, Jan. 5, 1973, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, available at <http://www1.umn.edu/humanrts/instree/b3ccpr.htm>; *International Covenant on Economic, Social and Cultural Rights [ICESCR]*, Jan. 5, 1973, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, available at <http://www1.umn.edu/humanrts/instree/b2esc.htm>; *Organization of American States, American Convention on Human Rights [ACHR]*, Jun. 20, 1968, OAS Treaty Series No. 36; 1144 UNTS 123; 9 ILM 99 (1969).

<sup>74</sup> Compare, e.g., ICCPR, art. 1-2 (enumerating a number of rights); with ICESCR, art. 1-2 (tracking language very similar to the ICCPR’s article 1 and 2 language).

instruments.<sup>75</sup> Not surprisingly, the fundamental rights and freedoms in the Barbados Constitution—those that could perhaps support an argument in favor of extending marriage to same-sex couples, were it not for the Savings Clause<sup>76</sup>—are also reflected within the various treaties that Barbados has acceded to. These include the freedom of association,<sup>77</sup> freedom of privacy in the home,<sup>78</sup> freedom of conscience,<sup>79</sup> and freedom of expression.<sup>80</sup>

These treaties, however, also promulgate additional protections and dictates that are not directly analogous to any rights in the Barbados Constitution, which could support an argument that marriage in Barbados ought to be extended to include same-sex couples. For example, the Barbados Constitution protects from invidious discrimination of a person’s fundamental rights and freedoms based on “race, place of origin, color, creed or sex.”<sup>81</sup> The ICCPR, ICESCR, and ACHR each state that parties to the treaty undertake to protect the fundamental rights enumerated in the treaty based not only on race, place of origin (treaties’ language: national or social origin), color, creed (treaties’ language: religion, political or other opinion), sex, and other enumerated classifications, but also extends protections to “*other status/other social condition*”

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<sup>75</sup> See ACHR, at “Preamble.”

<sup>76</sup> See *supra*, notes 61-62 and accompanying text.

<sup>77</sup> Compare, e.g., BARBADOS CONST. Ch. III, § 11 (d) (freedom of association), with ICCPR and ICESCR, art. I, § 1 (both recognizing a right to self determination to determine cultural development- arguably analogous to a right of freedom of association), and ADRDM, art. XXII (recognizing a right of association).

<sup>78</sup> Compare, e.g., BARBADOS CONST. Ch. III, § 11 (d) (freedom of privacy in the home), with ACHR, art. 11, § 2 (recognizing right to privacy in the home), and ADRDM, art. X and XXIII (recognizing the right to inviolability of the home, and of private property and dignity in the home, respectively).

<sup>79</sup> Compare, e.g., BARBADOS CONST. Ch. III, § 11 (d) (freedom of conscience), with ICCPR, art. 18, § 1 (recognizing the right to freedom of thought and conscience) and ACHR, art 12 (titled “Freedom of conscience and religion”).

<sup>80</sup> Compare, e.g., BARBADOS CONST. Ch. III, § 11 (d) (freedom of expression), with ICCPR (recognizing a right to hold opinions without interference- arguably analogous to freedom of expression), and ADRDM, art. IV (right to freedom of investigation, opinion, expression and dissemination).

<sup>81</sup> BARBADOS CONST. Ch. III, § 11.

that are not expressly and specifically enumerated.<sup>82</sup> Based on such inclusive language, one can easily conceive of a shrewd lawyer arguing that marriage rights should not be denied to those of gay and lesbian orientation solely based on their sexual orientation *status*.

For at least one treaty, however, reaching into the “other status” language does not appear to be a necessity: the ICCPR. In *Toonen v. Australia*, the Human Rights Committee [HRC] held that references to “sex” in the ICCPR’s articles 2 (non-discrimination) and 26 (equality before the law) included “sexual orientation.”<sup>83</sup> It was as a result of this case that Australia repealed the criminalization of sex acts between males in the state of Tasmania.<sup>84</sup> This case set a precedent within the United Nations system to protect the rights of gays, lesbians, and bi-sexuals.<sup>85</sup>

With the Human Rights Committee deciding to include “sexual orientation” within the penumbra of articles 2 and 26 of the ICCPR, the question arises whether this means that Barbados should eradicate its current exclusion of same-sex couples from marriage.<sup>86</sup> The answer is: not necessarily. This is based on several reasons.

As previously discussed, there is nothing in the Barbados statutes or case law reflecting that *marriage* is recognized as a fundamental right. Even if it were, the ICCPR, ICESCR, and ACHR demand there be no discrimination, on the basis of a protected status, of the *rights that*

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<sup>82</sup> See ICCPR, art. 2, § 1 and ICESCR, art. 2, § 2 (“other status” language); ACHR, art 1, § 1 (“other social condition” language).

<sup>83</sup> Sexual Orientation and Human Rights, Human Rights Education Associates, <http://www.hrea.org/learn/guides/lgbt.html> (scroll down to “International and Regional Instruments for Protection”: International Covenant on Civil and Political Rights section).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> Nothing in my research has revealed an international norm that being gay or lesbian is recognized as a protected *status*. The discussion merely explores what it would mean to Barbados, in light of its international treaty obligations, if being gay or lesbian were to be recognized as a protected status.

*are enumerated in the respective treaties.*<sup>87</sup> And, none of these treaties expressly embody, or recognize, a right to marry. Thus, even if being gay or lesbian were a protected status or protected social condition, to use the words of these treaties, the wording of the treaties would still not impose an obligation on Barbados to extend marriage to same-sex couples, because the right to marriage is not a right enumerated within the treaties themselves.

That is not to say that an argument for same-sex marriage based on the treaties is precluded, however. If the respective judicial bodies that hear cases arising under these treaties were to hold that marriage is a right that is protected by the right to freedom of expression or the freedom of privacy via a *penumbra analysis*—as was the case for including “sexual orientation” within the meaning of “sex” in the ICCPR—for example, then the right to marry would have become a right protected by the terms of the treaty. In such a case, one could argue—under the ICCPR, for example—then a duty to include same-sex couples in marriage would arise for the member states of that particular treaty.

The odds that a duty to extend marriage to same-sex couples would arise in the immediate future may appear somewhat tenuous given the two hurdles that would have to be overcome in regards to the terms of any given treaty: a finding that marriage is a protected right implied within one of the protected freedoms included in the given treaty, *and* a finding that sexual orientation constitutes a protected status or social condition. There is, however, a “very strong international trend towards treating sexual orientation as a suspect classification under

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<sup>87</sup> See ICCPR, art.2, § 3 (imposing a duty on member states “To ensure . . . rights or freedoms *as herein recognized*” (emphasis added)); ICESCR, art. 2, § 2 (imposing a duty on member states to “guarantee . . . the rights *enunciated in the present covenant*” (emphasis added)); ACHR art. 1, § 1 (imposing a duty on member states to “respect the rights and rights and freedoms *recognized herein*” (emphasis added)).

national constitutions and international human rights treaties.”<sup>88</sup> This becomes evident in light of the fact that full marriage rights to same-sex couples are currently recognized in five countries—Belgium, Canada, the Netherlands, Spain, and South Africa,<sup>89</sup> and at least one U.S. state—Massachusetts.<sup>90</sup> In addition, although they are not truly equal to marriage, there are at least twenty countries granting civil union, domestic partnership, or registered partnership rights to same-sex couples, along with some U.S. states.<sup>91</sup>

However, while an international human rights instrument may, obviously, be invoked before an international tribunal, it cannot always be invoked before a domestic court. As explained by the CCJ (in a civil case unrelated to this topic), the classic view in regards to treaties is that even if ratified by the Executive, a treaty would have to be specifically incorporated by the legislature before it could form a part of domestic law.<sup>92</sup> “Ratification of a treaty cannot *ipso facto* add to or amend the Constitution and laws of a state because this is a function reserved strictly for the domestic Parliament.” Barbados, where the Constitution requires Parliament to enact legislature to incorporate international conventions and instruments within the national system, appears to be aligned with the classic view.<sup>93</sup>

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<sup>88</sup> Robert Wintermute, *The Massachusetts Same-Sex Case: Could Decisions from Canada, Europe, and South Africa Held the SJC?*, 38 NEW ENGLAND L. REV. 505, 506 (2004).

<sup>89</sup> *Development in Legal Recognition of Same-Sex Relationships*, Oct. 2005, at \*2, <http://www.glen.ie/public/docs/Marriage%20and%20Civil%20Union%20Resource%20Paper%20171105.doc> (listing Netherlands, Belgium, Spain, and Canada as having legalized same-sex marriage). See also *SA Same-sex Marriage Law Signed*, BBC News, Nov. 30, 2006, <http://news.bbc.co.uk/2/hi/africa/6159991.stm> (discussing South Africa as the first African country to legalize same-sex marriage by passing of the Civil Union Act).

<sup>90</sup> See Abramschmitt, *supra* note 64 (section discussing the legalization of same-sex marriage in Massachusetts).

<sup>91</sup> See Wintermute, *supra* note 88, at 517-26 (appendix, listing countries that recognize marriage-like rights in civil partnerships).

<sup>92</sup> *Barbados Rediffusion Services Limited*, CCJ No. CV 1 of 2005 at 26.

<sup>93</sup> U.N. GOAR, 88th Sess., Barbados Report at 19, U.N. Doc. CCPR/C/BRB/3 (Spet. 25, 2006).

Under the classic view, a court will typically presume that Parliament intended to legislate in conformity with a treaty where there is ambiguity or uncertainty in a subsequent (to the treaty) act of Parliament.<sup>94</sup> In Barbados, marriage has been defined as being between a man and a woman in Barbados since prior to independence, which predates ratification of the relevant treaties discussed in this paper.<sup>95</sup> However, the current Marriage Act has been revised since its inception, and the current statute is dated much more current than the treaties discussed above.<sup>96</sup> Thus, where the fundamental rights embraced in international human rights conventions are already reflected within the Constitution of Barbados, it is *possible* that a domestic court in Barbados would try to construe domestic law to avoid a breach of the international covenant.

As one Privy Council judge explained:

The rights of the people in Barbados in domestic law derive solely from the Constitution. But international law can have a significant influence upon the interpretation of the Constitution because of the well established principle that the Courts will so far as possible construe domestic law so as to avoid creating a breach of the State's international obligations. "So far as possible" means that if the legislation is ambiguous ("in the sense that it is capable of a meaning which either conforms to or conflicts with the [treaty]"): <sup>97</sup> the Court will, other things being equal, choose the meaning which accords with the obligations imposed by the treaty.<sup>98</sup>

In sum, the current exclusion of same-sex couples from marriage in Barbados does not appear to be in express conflict with Barbados' current treaty obligations. However, sexual orientation has already been defined as a protected class under the penumbra of at least one treaty. Should the judicial body for that treaty decide that marriage is a right protected within the

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<sup>94</sup> *Barbados Rediffusion Services Limited*, CCJ No. CV 1 of 2005 at 26.

<sup>95</sup> See *supra* notes 70-71 (treaties ratified between 1967 and 1982).

<sup>96</sup> Marriage Act, Cap 218A, *Laws of Barbados* (1995) (showing revisions to the marriage act dating much more current than the treaties referred to in notes 69-70).

<sup>97</sup> *Boyce et al. v. R.*, Privy Council Appeal No. 99 of 2002, 8 (quoting Lord Bridge of Harwich in *R. v. Home Secretary, ex parte Brind* [1991] 1 A.C. 696, 747).

<sup>98</sup> *Boyce et al. v. R.*, Privy Council Appeal No. 99 of 2002, 8.

penumbra of the treaty, it would be possible that Barbados would then have to reconcile its marriage law with its undertaken treaty obligation in order to accord itself with the obligations imposed by the treaty.

#### IV. Social Constructs

A. Bajan Views on Homosexuality. Same-sex marriage has not been a topic of major social debate in Barbados, since the Constitution's Savings Clause has shielded the Marriage Act from constitutional challenge.<sup>99</sup> The fact that homosexuality has essentially been seen as criminalized within Bajan society is another likely factor underlying the lack of a local lobby for same-sex marriage since, after all, challenging the exclusion of same-sex marriage before challenging the criminalization of homosexuality would be like putting the cart before the horse. In spite of the lack of opposing social voices on the issue of same-sex marriage, the social attitudes on same-sex marriage can be gauged and explored by taking a look at the social attitudes towards homosexuality in general. In Barbados, the heated debate on what has come to be known as the "decriminalization of homosexuality" provides a good way to measure the social attitudes and norms towards homosexuality.<sup>100</sup>

The "decriminalization of homosexuality" became a heated debate in Barbados in 2003. It was in 2003 that Attorney General Mia Mottley suggested that the government might need to consider decriminalizing homosexuality in the interest of high-risk groups.<sup>101</sup> In February 2004, the office of the Attorney General commissioned E.R. Walrond to review the legislation relevant

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<sup>99</sup> BARBADOS CONST. Ch. III, § 26 (1). *See also* Jeff Cumberbatch, *A Changing Morality Within our Society*, THE BARBADOS ADVOCATE, Feb. 28, 2005, available at <http://www.sodomylaws.org/world/barbados/bbeditorial014.htm> (discussing section 26 as negating a constitutional issue with same-sex marriage not being included and that there has been no local lobby to challenge it, in the last paragraph of the article).

<sup>100</sup> *See, e.g.*, Cumberbatch, *supra* note 62.

<sup>101</sup> *Barbados Debates Decriminalizing Homosexuality*, Latinoamerica-online, <http://www.lati-noamerica-online.info/caraibi03/barbados01.03.html> (referring to Mia Mottley's comment).

to HIV/AIDS, and its attendant socio-economic impact. The report was to include “recommendations for changes in existing law, laws that should be removed from the statute books and the socio-economic benefit of such actions.”<sup>102</sup> Among the purposes of the report was to find ways to combat the social stigma and exclusion associated with HIV/AIDS. Adding fuel to an increasingly fiery social debate, the resulting report recommended, among other things: adding sexual orientation as a protected class in anti-discrimination legislation, and decriminalizing consensual sex acts—specifically recommending criminalizing buggery only if it occurs during the commission of another sexual offense.<sup>103</sup> These events, calling for decriminalization of buggery, laid the foundation for what is now commonly referred to as the ‘decriminalization of homosexuality.’<sup>104</sup>

In gauging social attitudes, it is highly relevant that the criminalization of buggery has become known as the *criminalization of homosexuality*. The statute, in fact, makes no distinction between buggery (anal sex) with a man, a woman, or even an animal for that matter.<sup>105</sup> It simply criminalizes buggery. Period. The criminalized act of anal sex could take

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<sup>102</sup> See Walrond, *supra* note 50, at 6.

<sup>103</sup> *Id.* at 7, 20.

<sup>104</sup> In trying to reduce social stigma so that more people would seek help if they are at risk for HIV/AIDS, recommendation to decriminalize buggery, widely viewed in Barbados as the ‘decriminalization of homosexuality,’ may have fueled stigma towards gays by implying a connection between HIV/AIDS—a disease seen by many as the gay plague. Since this has fueled such strong debates, the reactions may be a strong indicator of the current social attitudes towards homosexuality in Barbados. See Kumar et al., *Changing HIV Infection—Related Mortality Rate and Causes of Death Among Persons With HIV Infection Before and After the Introduction of Highly Active Antiretroviral Therapy*, 5(3) J. INT. ASSOC. PHYS. AIDS CARE 109, 112 (2006).

However, the fact that the government wants to decrease the stigma of a group in order to facilitate that group’s ability to seek help does not imply that this group is held responsible per se for the epidemic. It merely implies that the group in question suffers from social impediments that make seeking medical advice more difficult, which other social groups (*e.g.* heterosexuals) may not suffer from.

<sup>105</sup> See generally Sexual Offenses Act, Cap 154, § 9, *Laws of Barbados* (1993).

place between heterosexual persons just as well as between homosexual men or two lesbian women. That it has become so widely accepted as the criminalization of homosexuality is unearthing of the fact that the history of the law perhaps lies more in the social prejudices against homosexuality than in an interest to prevent acts of anal sex in and of itself. It seems to also signal a pervasive public denial in the heterosexual community that anal sex, *fellatio*, and *cunnilingus* are consensual sexual acts that occur in the heterosexual community as well.<sup>106</sup>

The majority of the opposition to the decriminalization of homosexuality has come from the religious voice in Barbados. An unscientific telephone survey showed that of 616 of 667 persons surveyed were opposed to decriminalizing buggery, and 51 were in favor. The majority of the persons opposed were self-declared Pentecostal Christians (295), while the second largest group self-identified as simply “Christian” (123), making a majority religious voice of 418 of 667 in the survey. Nearly all those opposed to decriminalizing buggery said that homosexuality was an “abomination,” and based their view on the Bible and their perceptions of God’s teachings.<sup>107</sup>

On the other hand, those surveyed who favored decriminalizing buggery were “passionately protective of the rights of individuals, saying that what consenting adults did in private was no one else’s business.”<sup>108</sup> A review of the written media opinions on the issue

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<sup>106</sup> Although the ‘decriminalization of homosexuality’ is a misnomer, for the reasons stated in the text, it will be used in this paper when referring to decriminalizing consensual acts between people of the same sex since this reflects the predominant social view and language of the debate in Barbados.

<sup>107</sup> *Barbados Debates Decriminalizing Homosexuality*, Latinoamerica-online, <http://www.latinamerica-online.info/caraibi03/barbados01.03.html>. See also Carol Martindale, *Barbados: Life in Prison for Gay Sex v. Change the Law*, NATIONS NEWS.COM, Nov. 2003, available at Gay Barbados News & Reports 2003-06, report no. 5, <http://www.globalgayz.com/barbados-news.html>.

<sup>108</sup> *Barbados Debates Decriminalizing Homosexuality*, Latinoamerica-online, <http://www.latinamerica-online.info/caraibi03/barbados01.03.html>.

seems to collaborate the results of the unofficial survey and of the Walrond report—that those favoring criminalization are rooted chiefly in religious ideals, while those opposing are concerned predominantly with rights.<sup>109</sup>

In addressing the socio-economic impact of the recommendation, the Walrond report rightly recognized that one of the greatest oppositions to decriminalizing consensual sex acts between homosexuals would lie in the religious voice, who had gone so far as dubbing HIV/AIDS the “gay plague” and “the wrath of God against homosexuality.”<sup>110</sup> In responding to the religious concerns, the report points out that a constitutional right to privacy for homosexual could be read into the Barbadian Constitution, as it has in other countries.<sup>111</sup> In recognizing that the religious voice is the majority opposition, Walrond also points to the constitutionally

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<sup>109</sup> Compare, e.g., Derek Dale, *Time to Get Rid of Bigotry in Our Country*, BARBADOS ADVOCATE, Jan. 3, 2003, available at Gay Barbados News & Reports 2003-06, report No. 1, <http://www.globalgayz.com/barbados-news.html> (discussing homophobic Christianity); Betty Holford, *Gay Rights Debate Continues*, BARBADOS ADVOCATE, Jun. 27, 2003, available at Gay Barbados News & Reports 2003-06, report No. 3, <http://www.globalgayz.com/barbados-news.html> (discussing religious opposition to Barbados’ first gay pride parade); Angus Wilkie, *Issue if Gay Rights Raises Legal Questions*, BARBADOS ADVOCATE, Jul. 1, 2003, available at Gay Barbados News & Reports 2003-06, report No. 4, <http://www.globalgayz.com/barbados-news.html> (discussing God’s purpose of procreation and how homosexuality could lead to the human race’s extinction if legalized); with Simeon McIntosh, *Homosexuality-Constitutional Question*, THE ST-LUCIA MIRROR, Jun. 3, 2005, available at <http://www.stluciamirroronline.com/2005/june3/art1.htm> (discussing constitutional rights and basis for decriminalizing homosexuality); Cumberbatch, note 62 (discussing lack of prosecution for consensual acts in Barbados and the fact that religion should not drive this debate since, after all, other things like taking God’s name in vain, etc., are not criminalized).

<sup>110</sup> See Walrond, note 50, at 18 (religious groups seeing HIV/AIDS as gay plague and God’s wrath against homosexuals), 29-30 (discussing religious views against same-sex practices), and 32 (discussing how homosexual practices being legalized in Barbados will not be supported by the Christian church or minority religions in Barbados).

For a discussion questioning the reliability of the bases in the Walrond report for decriminalizing buggery, see Dr. Leonard Shorey, *The Walrond Recommendations: Caution Needed, Part I*, BARBADOS ADVOCATE, Jan. 24, 2005, and Dr. Leonard Shorey, *The Walrond Recommendations: Caution Needed, Part II*, BARBADOS ADVOCATE, Jan. 31, 2005, both available at <http://www.sodomylaws.org/world/barbados/bbeditorial006.htm>.

<sup>111</sup> *Id.* at 25.

mandated separation of church and state in Barbados, and advocates that laws should not be driven by the religious majority's views.<sup>112</sup>

Pulling away from the fiery arguments that both oppose and support decriminalizing homosexuality, an examination of Bajan culture reveals that homosexuality is becoming increasingly tolerated, if not accepted by a few, within the society. There are telltale signs of this shift in the social paradigm. For example, on June 27, 2003, the first gay pride parade was held in Barbados despite widespread condemnation of the event.<sup>113</sup> In addition, amidst strong religious opposition to homosexuality in Barbados, an Anglican priest stepped forward and publicly declared that while he believed homosexuality was a sin, it was not a crime and should not be criminalized—essentially affirming that the law should not be driven by religious theocracy.<sup>114</sup> Some have even reported that a couple of the nightclubs in Barbados are known for being mixed (allowing gays).<sup>115</sup>

A change in the social view of homosexuality in Barbados can also be seen in the calypso culture. Calypso is a form of pop music with rhythms that trace back to the African slaves brought to the Caribbean in the seventeenth century.<sup>116</sup> Calypso combines storytelling, singing, and instrument making, and usually involves a commentary, often a satire on social or political events, put to “an infectious beat.”<sup>117</sup> Calypso has become highly organized in Barbados, with

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<sup>112</sup> *Id.* at 32-33.

<sup>113</sup> Betty Holford, *Gay Rights Debate Continues*, BARBADOS ADVOCATE, Jun. 27, 2003, available at Gay Barbados News & Reports 2003-06, report No. 3, <http://www.globalgayz.com/barbados-news.html>.

<sup>114</sup> *Barbados: Anglican Priest Stirs Gay Debate*, JAMAICA GLEANER, Jul. 24, 2006, available at <http://www.jamaica-gleaner.com/gleaner/20060724/carib/carib2.html>.

<sup>115</sup> *Tales from a Small Planet*, <http://www.talesmag.com/resources/glbts.html> (scroll down to Bridgetown, Barbados).

<sup>116</sup> *Barbados Music: Calypso*, <http://www.barbados.org/music/calypso.htm>.

<sup>117</sup> *Id.*

annual competitions at festivals.<sup>118</sup> In Barbados, calypso is known as “the voice of the people.”<sup>119</sup> As such, calypso is believed to have a central place in research addressing issues of identity in English-Speaking Caribbean.<sup>120</sup>

One scholar, closely studying the final calypso performance of the 2001 competition, looked at the final calypso performance in the competition, “The Wedding”—performed by “The Mighty Gabby”—and found that it played with dialogue of sexual identity.<sup>121</sup> In this performance, featuring a gay bride, the artist playfully redrew the boundaries of the Barbadian community by calling on the audience to “question ideas they might have of a fixed community boundary that places gays firmly beyond the pale.”<sup>122</sup> The author comments that by “performing across the borders that are supposed to separate gay and straight, moral and immoral, [the performer] Gabby call[ed] into question the legitimacy of these categories.”<sup>123</sup> The calypso performance’s challenge of the legitimacy of separating gay/straight and moral/immoral reflect a shift away from the views that condemn homosexuality in Bajan culture that challenges traditionally embraced views towards homosexuality in Barbados.

In sum, while there is definite strong opposition to homosexuality in Barbados, there are telltale signs that indicate, in the least, a shift in the cultural paradigm regarding homosexuals.

B. Law and Social Norms. In evaluating whether Barbados is ready for same-sex marriage in light of the current social constructs underlying the opposition on homosexuality, it is helpful to examine the role of the law in dealing with social norms. Because legal norms are

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<sup>118</sup> *Id.*

<sup>119</sup> Susan Harewood, *Masquerade Performance and the Play of Sexual Identity in Calypso*, 5(2) *Cultural Studies—Critical Methodologies* 189, 189 (2005).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 197.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 197-98.

enforced by the state, they have an authoritarian status over social norms. This does not mean they are necessarily inconsistent with social norms, however.

Barbadian social norms are, perhaps, best analyzed in light of the work of Richard Posner, who wrote about the law and social norms. Posner has proposed that the law can either displace or reinforce social norms. In his discussion, Posner explained the different levels of norm internalization. Posner's theory, discussed below, will lay the framework for discussing whether the law should reinforce the current majority norm (and continue to exclude same-sex marriage), or displace the majority norm (and extend marriage to same-sex couples).

*1. Law as a Reflection and Displacer of Social Norms.* Social norms have been defined as "rules, about which there is some degree of consensus, that are enforced through social sanctions."<sup>124</sup> Richard Posner wrote an article that described the interplay of law and social norms in terms of cost/benefit analysis.<sup>125</sup> Some norms are self-enforcing because obedience yields a benefit. Other norms are enforced by emotions, such as fear of being shunned or fear of revenge.<sup>126</sup> Norms are enforced through the use of social sanctions against those who break the norms, including social disapproval, ridicule, and being ostracized.<sup>127</sup> The social sanctions are deterrents that help to produce the social behavior of norm compliance. Once norms are internalized, through habituation, they are obeyed out of a sense of guilt or shame.<sup>128</sup> Norm internalization reduces one's freedom to the degree that it guides the scope of choice the person feels free to make, based on guilt and shame avoidance. Posner posits that when the norm is

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<sup>124</sup> Christine Horne, *Collective Benefits, Exchange Interests, and Norm Enforcement*, 82 SOCIAL FORCES 1037 (2004).

<sup>125</sup> Richard A. Posner, *Social Norms and the Law: An Economic Approach*, 87 AMER. ECON. REV. 365 (1997).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 366.

<sup>128</sup> *Id.*

fully internalized, however, there is no longer a choice because the choice has been made for the person, by their parents or peers, for example.<sup>129</sup>

Often, law is a reflection of social norms, meaning that the law is aligned with what the majority of society approves of.<sup>130</sup> Examples of such an alignment of legal and social norms are the enforcement of contracts and the criminalization of murder. At times, however, the law also acts as a substitute for social norms when the benefits of legal sanction are seen as exceeding the social costs.<sup>131</sup> In the latter example, the law can act as a disincentive for following a bad norm. For example, where the cost of negligence would be less than the benefit of the negligence, one might be induced to neglect following a norm of due care. But by imposing tort liability for negligence, the law effectively decreases the benefits of negligence and increases the benefit of compliance with the norm of due care, guiding behavior back toward the desired norm. The greater the imposed deterrent is, the greater the displacement of the bad norm will be. By acting as a reflector of social norms, then, the law can reinforce a given norm and promote the continuation of a desired behavior. But, by acting as a displacer for a social norm, the law can effectively minimize or eradicate an undesired norm and promote, in its place, the desired norm and behavior related to that desired norm.

2. Social Norms and Homosexuality in Barbados.<sup>132</sup> As was previously discussed, the strongest voice opposing homosexuality in Barbados is the religious voice. Building on Posner's

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<sup>129</sup> *Id.* at 367.

<sup>130</sup> *See Id.* at 368 (explaining when law complements social norms).

<sup>131</sup> *Id.*

<sup>132</sup> An entire paper could likely be written on the interplay of social norms and social views towards homosexuality in Barbados. The purpose of this paper is not to cover these in depth, but rather to explore the possibilities and what these may mean, if anything at all, to the legislature of Barbados.

theory of social norms, the majority of the members in these religious bodies may not feel that they have a choice in determining whether to support the decriminalization of homosexuality.

To illustrate this, let us look at the Barbados Evangelical Association [BEA], for example. The BEA published a twenty-four page document expressing its views on homosexuality and prostitution (the other hot topic of decriminalization in Barbados), of which thirteen pages are dedicated to the topic of homosexuality.<sup>133</sup> In the introduction, the BEA states, among other things, that Evangelicals are oft seen as being unduly judgmental and asks for forgiveness from those they harmed, affirms that God loves homosexuals, rejects homophobia as an irrational fear and hatred of homosexuals, and expresses regret for harm caused to gays and lesbians by the church's past actions.

The BEA also states, however, that heterosexual marriage is the only form of relationship *approved by God* for sexual relations, that it opposes any sexual relations outside a monogamous marriage, and expresses belief that habitual homoerotic practice without repentance is inconsistent with faithful church membership. Based on these beliefs, the BEA encourages sexually active homosexuals to celibacy, urges gentleness with homosexuals in their process of coming to change and renounce their lifestyle for one that is aligned with these beliefs, and commends organizations that help homosexuals lead a celibate life.

The BEA also declared that it opposes churches that endorse gay relationships as a legitimate form of Christian relationships, opposes ordaining sexually active gays and lesbians into the ministry, and affirms that they do not view homosexuality as a basic human right.<sup>134</sup> All

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<sup>133</sup> Barbados Evangelical Association, *Faith, Hope, Love, and Human Sexuality*, <http://www.caribevangelical.org/pdfs/fhlhs.pdf>.

<sup>134</sup> *Id.* at 1.

of these beliefs are based on the BEA's understanding of the biblical text, essentially claiming that these mandates are not their own, but *God's* will.<sup>135</sup>

Looking at the comments above, it is clear that behavior aligned with the BEA's teachings—presented as God's will, is rewarded through recognition of the compliance. For example, it “commends” organizations that help homosexuals live in celibacy. It is also clear that sanctions will be applied where the norms are broken. For example, the BEA states that there will be “a case for more stringent disciplinary action” (social sanctions) for promoting homoerotic sexual practices within a congregation. Not only does this establish sanctions for that particular behavior, but it also implies there will be less stringent disciplinary action (social sanctions) for breaking other norms promoted by the BEA.<sup>136</sup> Furthermore, they oppose churches that support gay relationships amongst Christians, essentially sanctioning the behavior of churches opposing their views. Therefore, it can be concluded that following the BEA's norms leads to reward, while abandonment of the norms leads to varying levels of sanctions.

Religious norms, such as those of the BEA, are often more powerful than other types of norms. One scholar, who studied the conformity curve of social norms, noted that religious norms are particularly powerful because they are often stated in absolute *nevers* and *always*.<sup>137</sup> Thus, while degrees of non-conformity are possible, over-conformity is impossible because of the nature of the regulating norm.<sup>138</sup> However, if the rule of the religious body is an all or

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<sup>135</sup> See generally *id.*

<sup>136</sup> *Id.*

<sup>137</sup> Jessie Bernard, *Normative Collective Behavior: A Classification of Societal Norms*, 47 AM. J. SOC. 24, 25 (1941) (“must *never* lie, steal, kill” and “must *always* observe the Sabbath, honour our parents,” etc.).

<sup>138</sup> *Id.* at 25-26.

nothing type of rule, then non-conformity also becomes impossible<sup>139</sup> to the degree that it is impermissible.

Where non-conformity is not allowed and conformity is absolute, social sanctions within that group are likely be at their greatest in order to ensure conformity. One can easily imagine that a demand for such absolute adherence to what is framed as a “moral norm,” or the “will of God” even, would promote swifter complete internalization of that norm. In the words of Posner, there is no longer choice—“the choice has been made for him, by his [church, God].”<sup>140</sup> The sanctions of the social group for breaking an absolute norm act to reinforce the internalization process. Thus, the person struggling with non-conformance of an absolute norm has to deal with guilt and shame for breaking a norm that did not allow non-conformity because the choice was made for them (in the case of religion, the choice is made by the church, as the voice of God, or by God). And, the person also has to contend with the possibility of social sanctions that could be as severe as being ostracized from that group.

I posit that it is at a juncture such as this that the legislature and judiciary have the greatest duty not to reflect the social norm within the law too quickly. Whereas the social norms of the majority opposing homosexuality in Barbados are so absolute (being planted in religious dogma as the will of God) that they are likely fully internalized, the legislature and judiciary owe even more careful consideration to whether the law should reflect or displace the social norms of the majority.

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<sup>139</sup> *Id.*

<sup>140</sup> Richard A. Posner, *Social Norms and the Law: An Economic Approach*, 87 AMER. ECON. REV. 365, 367 (1997).

## V. Conclusion

In sum, were the draft marriage reforms to be adopted, changes would have to be effected in the criminal code that would allow the free sexual expression of consenting same-sex couples, without risk of criminal liability for their sexual acts, in the same manner that heterosexual may freely express their sexuality without incurring criminal liability. While there are no constitutional impediments to the implied exclusion of same-sex marriage in Barbados, neither would there be a constitutional impediment to its legalization. In a twist of irony, however, the change in the core definition of marriage would remove the Act from the protection of the Savings Clause. Thus, the new definition of marriage (including same-sex couples) would be open to constitutional challenge.

There are currently no international obligations that would impose on Barbados an affirmative duty to extend marriage to same-sex couples. However, the HRC has already interpreted the penumbra of the word “sex” as inclusive of “sexual orientation” as a protected class. Similarly, it is not inconceivable that marriage could come to be interpreted as being included within the penumbra of the right to privacy, freedom of association, freedom of expression, or freedom of conscience. Were this to occur, a valid challenge to the current exclusion of same-sex couples from marriage would become possible under the ICCPR, since the exclusion of same-sex couples could then be interpreted as violating Barbados’ obligations under the ICCPR.

The religious majority in Barbados has been the strongest opposition to homosexuality related issues. In spite of such opposition, however, telltale signs of an underlying current of change in the social views towards homosexuality may be seen amongst clergy, a minority of the populace whose focus is on human rights, and through the cultural voice—such as in calypso.

This change is occurring simultaneously with ongoing change in the international community, which has resulted in five countries granting marriage rights to same-sex couples.

While I do not see Barbados as allowing same-sex marriage within the very near future, it would not be too bold to say, in light of current events—namely, the ever brewing decriminalization of homosexuality issue, the domestic climate toward gays evolving towards greater inclusiveness, and the similar changes in the international climate—that marriage in Barbados is more likely to be inclusive of same-sex couples sooner rather than later.

It is possible that Barbados joining the CCJ may have an impact on the issue of marriage being extended to same-sex couples sooner rather than later. The exact impact is somewhat unpredictable, however, since the CCJ is a young body and lacks a jurisprudence extensive enough to make jurisprudential analysis and predictions on the outcome of certain issues.

On the one hand, the Commonwealth Caribbean, overall, tends to be more conservative in its approach to gay issues than England—where the JCPC is located. This can be seen in the fact the British Privy Council forced five of their Caribbean territories to decriminalize homosexual sex after they had refused to do so themselves.<sup>141</sup> On the other hand, the CCJ is a court of law and will not necessarily reflect the cultural views of the populace when ruling. Since this court is fairly recently birthed, whether it will adapt a progressive or conservative jurisprudence in regards to fundamental rights issues (such as the inclusion of same-sex couples in marriage) remains to be seen.

However, there is one case the CCJ has already heard which indicates that the CCJ may have more of a leaning towards international law than the JCPC may have had. In *Attorney General v. Boyce*, the JCPC had refused to stay the defendant's execution pending a challenge

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<sup>141</sup> See *supra* note 7 and accompanying text.

filed with the Inter-American Commission on Human Rights that his death sentence placed Barbados in violation of its duties under the American Convention on Human Rights treaty, to which Barbados is party, and that it should be commuted.<sup>142</sup> Evidencing its potential as a progressive court, the CCJ ruled contrary to the JCPC, holding that the defendant has a right to exhaust remedies “international processes” before the Barbados Privy Council can condemn him to death.<sup>143</sup> I find this to be an unexpected result since the JCPC’ history had seemed more progressive than the jurisprudence in the Caribbean and, obviously, the CCJ is a Caribbean body. We can see, through this case, how the progressive potential of the CCJ could affect the state of marriage in Barbados, if its exclusion of same-sex couples was challenged through the eyes of treaty obligations.

Should same-sex marriage be challenged in Barbados, based on the probability that the majority opposition voice would oppose it based on absolute religious dogma, I would advocate that the courts have a great responsibility to not simply reflect the majority’s norms in the law, but to consider if displacement of the social norm would be warranted in order to protect the minority interest under the law.

Similarly, the legislature would also carry the responsibility not to continue reflecting the majority social norm against same-sex marriage in weighing whether or not to extend marriage to same-sex couples. Rather, the legislature should weigh the issue in terms of the evolution of Bajan culture and the international arena on the issue, as balanced with its constitutional duty to effect laws that promote “the peace, order and good government of Barbados.”<sup>144</sup>

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<sup>142</sup> Attorney General v. Boyce, CCJ Appeal No CV 2 of 2005, at 3 [5], *available at* [http://www.caribbeancourtsofjustice.org/judgments/cv2\\_2005/judgment/3.%20Judgment\\_%20President\\_Hon\\_Justice\\_Saunders.pdf](http://www.caribbeancourtsofjustice.org/judgments/cv2_2005/judgment/3.%20Judgment_%20President_Hon_Justice_Saunders.pdf) (last visited February 16, 2007).

<sup>143</sup> *Id.* at 65 [143].

<sup>144</sup> BARBADOS CONST. Ch. V, § 48.1 and 48.2.