

The Poverty of Equality Jurisprudence in the Commonwealth Caribbean

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1. Introduction

A recent exchange at a United Nations' Human Rights Day event involving a US Supreme Court judge makes it clear just how universal the difficulties in interpreting and applying equality principles are. The setting was a lecture held at Princeton University on 10 December 2012. At one point, a freshman asked Justice Antonin Scalia whether he had any regret for the "extraordinarily offensive" comparisons he made in his dissents in two landmark gay rights cases,² where Scalia likened homosexuality to murder and bestiality. The characteristically pugnacious judge expressed no remorse or shame. He explained: "I don't apologize for the things I raised. I'm not comparing homosexuality to murder. I'm comparing the principle that a society may not adopt moral sanctions, moral views, against certain conduct. I'm comparing that with respect to murder and that with respect to homosexuality."³

These opaque protestations notwithstanding, Scalia's reasoning in both cases was eminently about making comparisons – or more particularly, identifying categories or classes of people whom it would be permissible to treat differently and (to use Scalia's word) with animus. Whether or not he chose to acknowledge it, the effect of his approach was to compare homosexual acts with murder and bestiality as examples of conduct

which could justifiably be denied equal protection under the fourteenth amendment to the US constitution. Yet Scalia expressed surprise that his intrepid interrogator was not persuaded.

The one value of this fruitless exchange is that it typifies the complexity of equality as a normative principle. Since identical treatment of all persons is neither feasible in practice nor even necessary in theory, the challenge it poses as a justiciable right is identifying the circumstances or reasons for which it would be legitimate to create distinctions among people in order to treat them differently. This may sound simple enough as articulated, but it imposes a prerequisite that has long confounded both theorists and practitioners. Judges sometimes purport to resolve the tensions by seeking a balance between the rights of the individual and the interests of society, but what that sanguine exercise conceals is that neither concept is self-evident or objectively discoverable.⁴ At best, what it does is to re-frame the debate whilst still leaving undetermined what counts as enforceable "rights" and overriding "interests".

These challenges have proved to be particularly acute for countries of the Commonwealth Caribbean. Given the region's bloody origins and colonialism's legacy of

factional racial and social cleavages, one might have expected to encounter a robust body of equality law and practice. But aside from perfunctory acknowledgement of the past in the preambles to some constitutions, the documents themselves are surprisingly reticent on the subject of equality, which has been matched in turn by a crippling judicial conservatism in the interpretation and enforcement of equality claims.

In this article I examine these deficiencies in greater detail. I commence in section two with a discussion of the actual text of the constitutions so as to identify exactly what is guaranteed under the law. In the three sections following I explore the judicial treatment of specific aspects of the right, namely sex discrimination in relation to women, sexual minorities and gender non-conformists, as well as on the interpretation of the more general equality right where this appears either in addition to or instead of the more common non-discrimination guarantee. This discussion reveals that despite the potential offered by constitutional bills of rights across the region, the excessive restraint that characterises judicial treatment of their equality-related provisions has resulted not just in an underdeveloped jurisprudence, but in one that is often backward-looking.

2. The Protected Characteristics

Almost all the constitutions of countries making up the Commonwealth Caribbean⁵ commence with some introductory commitment to the principle of equality, even if only by implication. The preamble to the Constitution of Antigua and Barbuda, for example, captures this ideal through its acknowledgement of respect for “the dignity and worth of the human person” and the entitlement of “all persons” to fundamental rights and free-

doms. It then goes on to espouse the commitment that “there should be opportunity for advancement on the basis of recognition of merit, ability and integrity”. These or similar aspirations are echoed in the preambles of all of the other constitutions, with some even expressing respect for equality in more direct and forceful language. The “newer” constitutions of Belize and Guyana are the best examples of this directness, with robust declarations in their preambles that speak to “equal and inalienable rights”, the “elimination of economic and social privilege”, and policies which ensure gender equality.

It is when one turns to the substantive, enacting provisions, however, that the dearth of references to equality is most noticeable.⁶ All but one of the five earliest independence constitutions contain no general right to equality, and guarantee instead protection against discrimination on certain specified grounds. The “newer” models tentatively changed this, but even these confined any mention of the term “equality” to their preambles. Like the “older” model of constitutions, what was actually guaranteed in the bills of rights was simply protection against discrimination on certain specified grounds. Thus of all the territories, it was initially only in the unconventional Trinidad and Tobago bill of rights that a general guarantee of equality was included within the substantive provisions – this being the right of the individual to equality before the law and “equality of treatment from any public authority”.⁷ Since then, however, more general guarantees of equality have been included in the constitutions of Belize,⁸ Guyana⁹ and Jamaica.¹⁰ The significance of this feature is that in the majority of Caribbean constitutions, equal treatment is only guaranteed in the negative (as in protection from discrimination) and then only on very restricted bases. This was an inadequate way

of legislating for equality, and is a key reason for the impoverished jurisprudence which has resulted.

Compounding the problem of the restrictive approach of negative protection against discrimination is that the actual grounds on which distinctions are prohibited are very limited. The “older” model of Bills of Rights specified only five, namely “race, place of origin, political opinions, colour or creed”. Conspicuously absent from that list is any mention of categories such as sex, gender, social class, age, religion or disability, each of which (save for social class) embodies immutable personal characteristics or at least attributes which are deeply embedded in a person’s psyche and which cannot be easily changed. More importantly, several of the ignored attributes have proved to be grounds on which different treatment frequently occurs, and given the potential for abuse they are standard categories in the equality or anti-discrimination provisions of constitutions in other parts of the world for which unjustified differentiation is forbidden.¹¹ Because of this, the omission of these grounds from the bills of rights of the early Caribbean constitutions is difficult to explain or rationalise.

This legislative caution was moderated slightly in the post-1973 constitutions, all of which included “sex” as a prohibited ground of discrimination. However, that addition simply brought the list of protected characteristics to six. The Antigua and Barbuda Constitution mentions one additional ground, namely birth out of wedlock, while the recently enacted Charter of Fundamental Rights and Freedoms in the Jamaican Constitution adds two – social class and, pointedly eschewing any reference to sex or gender, that of “being male or female”.¹² The only exception to this trend is to be found in the bill of rights

in the reformed Guyana Constitution, which in addition to listing a staggering eighteen prohibited grounds of discrimination, also includes a general equality right.¹³ The text of Caribbean anti-discrimination provisions is therefore, on the whole, marked by strict economy, which has obvious negative implications for the scope of equality protection in the region.

This textual circumspection is aggravated by how the right has been interpreted. Judges consistently hold that any anti-discrimination analysis must be conducted by reference to one of the grounds listed within the text,¹⁴ and that the list itself is a closed one. The first aspect of this position is defensible, for it would be nonsensical to require identical treatment of all persons irrespective of differentiating circumstances, but the problem is with the second part, namely that the list of grounds specified in anti-discrimination provision must be interpreted as a closed one. This stance was firmly articulated in *Nielsen v Barker*, where the Guyana Court of Appeal rejected a sex discrimination claim on the basis that sex was not one of the grounds listed in the anti-discrimination section. Describing article 149(2) as prescribing “tight, definitive compartments”,¹⁵ Massiah JA rationalised that:

“[A] judge does not possess, in the area of constitutional adjudication with reference to the protection of fundamental rights and freedoms, the wide, ambulatory and ecumenical powers that he otherwise enjoys (...) A person’s fundamental rights and freedoms are set out in [articles 138 to 151], and there can, of course, be no proper judicial expansion of those constitutional provisions to embrace other rights not specifically contained therein, for courts are not super-legislatures permitted to sub-

stitute their own judgment for that of the elected representatives of the people.”¹⁶

This result (and reasoning) was followed by the Privy Council in *Matadeen v Pointu*,¹⁷ and although this was an appeal from the Supreme Court of Mauritius, the decision is binding on all those countries of the Commonwealth Caribbean where the constitutional provisions are similar and for whom the Privy Council remains the final appellate court. Under consideration in *Matadeen* was the decision of the Ministry of Education to introduce a fifth, optional paper in Oriental languages at the primary education examination. The respondents alleged that since the decision was taken only eight months before the examination was to be held, it was discriminatory because it gave students already studying Oriental languages an unfair advantage. The Privy Council disagreed, holding that since the inequality of treatment complained of fell outside of the grounds enumerated in the non-discrimination section of the Constitution, no constitutional breach was established.

Writing for the Board, Lord Hoffman reasoned that there was no general principle of equality in the Mauritius Constitution, and treating the “protection of the law” clause in the opening section as such would render the anti-discrimination section with its carefully enumerated grounds superfluous.¹⁸ Further, while Lord Hoffman agreed that equality of treatment is a general principle of rational behaviour, this did not mean it should necessarily be a justiciable one. In his view, it was perfectly acceptable to take the approach whereby a limited number of grounds are specified in the anti-discrimination section, while the possibility of any addition is left to Parliament. The reason for this lay in what he perceived as the judiciary’s inherent un-

suitability to decide issues of social policy. In Lord Hoffman’s words:

“The reasons for treating people uniformly often involve (...) questions of social policy on which views may differ. These are questions which the elected representatives of the people have some claim to decide for themselves.”¹⁹

The problem with this interpretation is that it ignores the reality that the methodology of the common law is one whereby judges have no choice but to engage in policy-making. In 1991 when the House of Lords decided that a man could be convicted of the rape or attempted rape of his wife where she withdrew her consent to sexual intercourse,²⁰ this represented the judicial reversal of a rule that had existed for more than two centuries and was a seminal shift in sexual inequality. In so doing, the House of Lords relied on nothing but considerations of social policy, pointing to the changed status of marriage in modern times (as a partnership of equals) and the requirement of a “live system of law” to have regard to contemporary social conditions.²¹ To take a Caribbean example, the Privy Council over the period of a decade succeeded in dismantling the mandatory death penalty across the entire Commonwealth Caribbean, despite its populist appeal and the reluctance of domestic parliamentary majorities to initiate legislative reform.²² It was therefore somewhat disingenuous of the Board to pretend that parliament has a monopoly on deciding questions of social policy, when they themselves frequently indulge in such matters.

Aside from its historical inaccuracy, Lord Hoffman’s approach is also problematic because it concedes too much to parliamentary majorities, particularly in local settings

which are fiercely partisan²³ and lack a culture of robust members of parliament voting independently of the party line. Moreover, leaving decisions of social policy entirely to the popular vote ignores the fact that class distinctions frequently affect members of minority groups, whom majorities may be less inclined to protect. By contrast, a far more principled approach to this dilemma was articulated by the Chief Justice of Zimbabwe, who asserted in *Banana v The State* – albeit dissenting – that the “courts could not be dictated to by public opinion”, which “cannot replace in them the duty to interpret the Constitution and to enforce its mandates”.²⁴ The issue in *Banana* was whether the common law crime of sodomy was inconsistent with the constitutional guarantee of non-discrimination on the basis of gender. Gubbay’s principled dissent was in stark contrast to the position of the majority, which was that it was not the function of an “undemocratically appointed” court “to seek to modernise the social mores of the state or of society at large”.²⁵ What *Banana* demonstrates clearly is that automatic deference to the popular will may operate to shield (and even perpetuate) prejudice, which is why the dictates of constitutionality can on occasion legitimately entitle the judiciary to be influenced by considerations of social policy. Indeed, as Stephen Wheatley has pointed out, modern democracies are not populist but constitutional.²⁶ Thus by declining to interrogate legislative distinctions on the basis that the list of prohibited grounds is closed courts may be failing in their constitutional role.

Finally, it is worth noting that even from a purely technical or doctrinal point of view, the *Nielsen/Matadeen* approach is weak. The austerity of treating the list of prohibited grounds as closed is not necessarily justified by the text, which is not free from ambiguity.

For example, while the “older” constitutions omitted “sex” from the list of prohibited grounds in the actual non-discrimination section, those very constitutions repudiated sex discrimination elsewhere – such as in the opening section to the bills of rights.²⁷ Elsewhere, it has been acknowledged that the grounds themselves are not necessarily rigid, which means that excluded groups have sought (and succeeded) in being characterised under existing categories.²⁸ In this way, the UN Human Rights Committee has interpreted “sex” as including “sexual orientation”,²⁹ and the European Court of Justice has held that discrimination against transsexuals constitutes sex discrimination.³⁰ Most boldly of all, the High Court of Delhi has fashioned out of a seemingly closed list, protection on the basis of grounds analogous to those actually specified.³¹ In *Naz Foundation v Government of NCT of Delhi*, the issue was whether section 377 of the 1860 Indian Penal Code violated the right to equality, insofar as the provision criminalised consensual sexual acts between adults in private. In finding a breach, the High Court concluded that sexual orientation is a ground analogous to sex, and that discrimination on the basis of sexual orientation is not permitted by art 15 of the Indian Constitution.³² This was a remarkable conclusion given the specific terms of article 15(1), which prohibits discrimination “on grounds *only* of religion, race, caste, sex, place of birth or any of them”. Anchoring the court’s decision in part was the effect it gave to the value promoted by the non-discrimination right, which it identified as the personal autonomy of the individual.³³

Treating the list of prohibited grounds of discrimination as creating “tight, definitive compartments” is an extremely restrictive approach to constitutional interpretation, and evidently one that is not justified by text,

theory or tradition. The continued judicial adherence to this approach thus severely limits the scope of equality protection in the Commonwealth Caribbean.

3. Sex Discrimination

Compounding the stilted language of the constitutional non-discrimination guarantees is a conservative approach that characterises much of the litigation brought on the basis of these provisions. This conservatism has been most pronounced in two substantive areas: rulings on claims of sex discrimination, and the interpretation of the broad equality right that appears in a handful of the region's constitutions. To a lesser extent, a degree of restraint is also evident in the principles that courts have invoked to guide their interpretation of the equality guarantee in question. The effect of such moderation in relation to both procedural and substantive issues has been to diminish the potential of the right, as evidenced in the discussion below.

(i) Women

One of the earliest cases in this area to have engaged the attention of a Caribbean court was *Nielsen v Barker*, where a Danish fugitive in Guyana, resisting deportation to serve a sentence for rape and murder in Denmark, sought the protection of marriage to a female Guyanese citizen in order to claim the status of "belonging" to Guyana and thus outside the scope of prohibited immigrants.³⁴ Under the relevant legislation, "belonger" status was conferred on both citizens and their dependants, but "dependant" was narrowly defined using the gendered term "wife". The applicant argued that pursuant to the power to modify legislation to ensure its conformity with the Constitution,³⁵ "wife" should be read as "spouse", since article 29(1) of the Constitution provided unambiguously that:

"[w]omen and men have equal rights and the same legal status in all spheres of political, economic and social life."

The Court of Appeal rejected this argument and, by way of justification, Massiah JA posited that central to article 29 was "the desire to achieve equality of the sexes; it has nothing to do with the elevation of the man".³⁶ Allowing a female citizen to confer the same benefits on her spouse as a male citizen could do in a comparable situation seems to be squarely about achieving equality of the sexes, so what the learned judge meant by this explanation is a mystery. Indeed, the applicant developed this point directly, arguing unsuccessfully that the effect of the Immigration Act was that a Guyanese man could enjoy the "comfort and pleasure of his alien wife's society", a benefit denied to a Guyanese woman.

Massiah JA buttressed his conclusion by construing dependency in a purely financial sense, pointing out that while a husband is legally obliged to maintain his wife, there is no corresponding obligation on a wife to maintain her husband, so to interpret the provisions in the manner urged would amount to a "sweeping, radical exercise".³⁷ However, this sexist notion of dependency is belied by modern legislation under which a man can claim a share of his wife's property on divorce,³⁸ so even if dependency had historically been constructed around financial responsibilities, there was no good reason for clinging to such prejudices. Indeed, the connection between dependency and financial obligation is not a logical imperative of the section, and given the sweeping language of article 29(1), the judge's resistance to the more generous interpretation indicates the deeply rooted prejudices in this area.

An even clearer instance of unrestrained chauvinism within the judiciary is provided by a case from St. Lucia in 1986, which concerned a challenge to a law providing for the dismissal of unmarried female teachers who became pregnant.³⁹ The applicants were both dismissed after each became pregnant for the second time. They challenged their dismissal as constituting discrimination on the ground of sex, invoking section 13 of the St. Lucia Constitution which prohibits discriminatory laws and treatment. Under this provision, “discriminatory” is defined as “affording different treatment to different persons attributable wholly or mainly to their respective descriptions by sex, race, place of origin, political opinions, colour or creed”.⁴⁰ The trial judge upheld the law in question on the basis that he had heard nothing from the plaintiffs to shift the presumption of constitutionality. In so doing, the trial judge was applying an old approach to constitutional challenges, whereby a statute is presumed to be constitutional and the burden lies on the litigant to lead evidence establishing unconstitutionality.⁴¹ This represented a complete abdication of the court’s role, given that it was self-evident that the provision impacted disproportionately on unwed mothers. To ask the victim of a law which *prima facie* limits a constitutional right to prove that the law in question is unjustifiable seems counter-intuitive, since information as to a law’s purpose will not be readily accessible to ordinary citizens. Thus a presumption of constitutionality which inverts the burden of proof will routinely result in limiting laws being upheld. The injustice of this approach has since been recognised, and the presumption of constitutionality is now viewed as a canon of construction to be applied where legislation is ambiguous, rather than as imposing a burden of proof on an applicant.⁴²

Even worse, having faulted the plaintiffs for their failure to lead evidence the trial judge then relaxed his standards for the defendants, finding in the alternative that *even if* the provision in question was discriminatory, it was reasonably justifiable and so fell within either or all of the permitted exceptions,⁴³ rendering it constitutional. Remarkably, the defendants did not specify which exception applied, but the court was not deterred by their omission. The defendants had simply argued that the impugned law was “in the public interest”, and the court accepted this justification in the absence of any elaboration or discussion as to what that interest was or any evidence in support.⁴⁴ This ruling is the epitome of judicial deference to the state, even in the face of a profoundly discriminatory law with obviously detrimental consequences – not just for single women and their children, but also for society at large.

It is not clear that either of these cases would be followed by another court today – in fact, in 2005 the Belizean Court of Appeal came to the opposite conclusion to *Girard* on similar facts.⁴⁵ But these cases are nonetheless important for several reasons. They are a clear illustration of the historical attitudes towards women, which persisted up until relatively recent times. They embody a resolute outlook against interpreting the non-discrimination guarantee meaningfully, and one of the most restrictive aspects of *Nielsen* – that the listed grounds are exhaustive – has been repeatedly reaffirmed by subsequent courts.⁴⁶ Ultimately, it is entirely a matter of speculation whether these cases represent current judicial attitudes, simply because of the dearth of litigation on the subject. Indeed, the latter fact has itself been held out as possibly underscoring the lack of importance accorded to gender equality issues in the Caribbean.⁴⁷

(ii) *Sexual Minorities*

If the position in *Nielsen* or *Girard* typified a restrictive attitude in relation to women, it should come as no surprise to discover that sexual minorities have fared even worse. In Trinidad and Tobago, equal opportunities legislation was enacted in 2000 to prohibit discrimination in both the private and public spheres and to promote equality between persons of different statuses.⁴⁸ The Equal Opportunities Act (EOA) specified “status” as constituted by a variety of personal characteristics including “sex, race, ethnicity, religion and disability”,⁴⁹ with “sex” explicitly defined as not including sexual preference or orientation.⁵⁰ A challenge to this provision was unanimously upheld by the Trinidad and Tobago Court of Appeal, which found the exclusion to be unjustified and unconstitutional for violating the fundamental rights of persons on a basis analogous to that of “sex”.⁵¹ Buttressing his reasoning, Archie JA made an explicit connection between fundamental rights and the inherent dignity and value of human beings, describing the statutory exclusion as particularly “invidious”.⁵²

However, not only did the Privy Council overturn this progressive result, they did so summarily and with contemptuous disregard for the gravity of the issue at stake. Writing for the majority, Baroness Hale cursorily invoked a standard limitations analysis in relation to broadly stated rights, under which a limiting statute may be constitutional if it “pursues a legitimate aim and is proportionate to it”.⁵³ This enabled the imperious conclusion that “there can be little doubt that the balance which Parliament has struck in the EOA is justifiable and consistent with the Constitution”.⁵⁴ Baroness Hale did not explain why this balance was constitutionally sound; in fact, she did

not even bother to reveal that her statement applied to the challenge to the sexual orientation exclusion. The only clue in the entire judgment that this challenge was overruled comes from a passing reference in the dissenting opinion of Lord Bingham, who stated tersely that he “would not understand ‘sex’ in section 4 of the Constitution to embrace sexual preference or orientation”.⁵⁵

Baroness Hale’s position was particularly perplexing, for only two years earlier she came to the opposite conclusion in an English case. In *Pearce v Mayfield School* she agreed that discriminating on the basis of sexual orientation was one species of sex discrimination, pointing out that those “who treat homosexuals of either sex less favourably than they treat heterosexuals do so because of their sex: not because they love men (or women) but because they are men who love men (or women who love women). It is their own sex, rather than the sex of their partners, which is the problem.”⁵⁶ Hale’s abrupt volte-face in *Suratt* thus demanded, at a minimum, some explanation.

Whether “sex” includes “sexual orientation” is, admittedly, a highly contested notion. The United Nations Human Rights Committee was one of the earliest bodies to make this connection,⁵⁷ but since they too provided no analysis or explanation in so deciding, the case in question is not a reliable authority. In arriving at the opposite conclusion, the Privy Council in *Suratt* was at least being consistent with the position taken by the House of Lords in its earlier decision of *Macdonald v Advocate General for Scotland*, where it held that the dismissal of a serving member of the Royal Air Force because he revealed his homosexuality did not constitute direct sex discrimination under the Sex Discrimination Act 1975.⁵⁸ In *Macdonald*, all five judges rea-

soned that the discrimination was plainly as a result of sexual orientation, not sex. In ascertaining the appropriate comparator they held that like had to be compared with like, which meant that all relevant characteristics – of which sexual orientation was one – had to remain the same. Since homosexual men were liable to be dismissed, as were lesbians, the policy was not discriminatory on the ground of sex.⁵⁹

Given these sharply divided opinions on whether sex discrimination covers sexual orientation discrimination, the scant treatment accorded by the Privy Council to this issue in *Suratt* was wholly inadequate. Moreover, *Macdonald* is not a model of clarity, nor does it embody the most persuasive stance on the issue. Notably, Robert Wintemute has argued that when making comparisons in a discrimination analysis, it is impermissible to change any of the factors since that would disguise the operative discrimination.⁶⁰ Thus in assessing whether discrimination exists where a man complains of being treated differently because of having a male partner, Wintemute states that only the sex of the comparator must be changed and not the sex of the comparator's partner.⁶¹ Thus the comparator of a male complainant is someone of the opposite sex (since the claim is sex discrimination); however, so as not to disguise the sex discrimination, the sex of the partners (both complainant's and comparator's) must be kept constant. The mistake of the *Macdonald* approach, Wintemute explains, lies in ignoring that sexual orientation is eminently a "sex-based criterion",⁶² which is hidden when a gay man is compared with a gay woman.

While the House of Lords agreed in principle with the approach of comparing like with like, they disagreed that the sex of the

comparator's partner is not to be changed. In their view, sexual orientation is a relevant characteristic, which meant that a homosexual man had to be compared to a lesbian and not a heterosexual woman. But the problem with this is precisely, as identified by Wintemute, that treating sexual orientation as a relevant characteristic (and therefore changing the sex of the comparator's partner as well) disguises the sex discrimination at work. As Baroness Hale herself had recognised in *Pearce*, a person's sexual orientation *cannot* be determined without knowledge of and reference to his or her sex. At its most essential core, sexual orientation is intimately connected to sex, and logically it must be a species of sex discrimination.

Ultimately, whatever the merits of these various positions, the debate itself was largely irrelevant to Trinidad and Tobago. In *Macdonald*, the House was determining the meaning of "sex" as contained in an English statute, which does not list "sexual orientation" as a protected characteristic. The Constitution of Trinidad and Tobago, by contrast, does not protect against discrimination on the basis of any specified ground or grounds, but instead provides an expansive guarantee to "equality before the law". It has long been settled that the introductory clause⁶³ to the Trinidadian bill of rights is *not* an independent non-discrimination clause, and courts⁶⁴ as well as commentators⁶⁵ have accepted that the grounds enumerated therein do not constitute a list – exhaustive or otherwise – of prohibited bases of discrimination. Astonishingly, the Privy Council itself has recognised and approved of this position, with none other than Baroness Hale herself articulating it in clear terms.⁶⁶ This rendered any debate as to whether "sex" includes sexual orientation wholly otiose, and Lord Bingham's conclusion to this effect was of no relevance.

The better approach in *Suratt* was that taken by the Court of Appeal, which found sexual orientation to be analogous to “sex” as listed in the introductory section.⁶⁷ By so doing the Court of Appeal recognised that the Constitution does not provide a *closed* list of grounds, so there was no need to embark on a discussion of whether or not sexual orientation was covered by “sex”. In this way, sexual orientation was viewed as a ground in its own right, applicable because of its relation to existing enumerated grounds (an argument by analogy).⁶⁸ Given their familiarity with this most basic aspect of the Trinidadian bill of rights, demonstrated elsewhere, there is no kind way to explain this aspect of the Privy Council’s decision in *Suratt*.

(iii) Dress Codes

In a case from St. Kitts and Nevis, Kaleel Jones, a four year old boy, was prevented from attending school because of his long hair.⁶⁹ The school rules provided a comprehensive code on appearance, stipulating in part that neither boys nor girls could have stylish hairstyles, which meant no “hairdos” for girls or long hair for boys. Kaleel’s parents refused to cut his hair, alleging that doing so would cause him psychological trauma. Because both sides refused to budge, the parents were eventually forced to enrol Kaleel in another school which did not have the same restriction on hair length. Kaleel sued, alleging that the school’s decision to refuse him admission until his hair was cut short was discriminatory on the grounds of sex, given that the rule applied to boys and not girls. The Court of Appeal disagreed, holding that the essence of discrimination is different and less favourable treatment to one person as compared with another, and since the rules in question merely differentiated *between* the sexes in enforcing a common approach regulating appearance, they were not dis-

criminatory. Writing for the majority, Barrow JA reasoned that the school rule concerning hair length could not be read in isolation, for it was part of a larger code regulating appearance. He continued saying that the rules sought to enforce a *conventional* appearance on the part of both boys and girls by prohibiting “stylish” haircuts. The rules were therefore even-handed in their application to both sexes and not unconstitutional.

There are several problematic aspects of Barrow’s reasoning, two of which stand out. The first is that the Court of Appeal was only able to come to this conclusion by reading the dress code as a whole – an approach that is not obviously warranted or justifiable. As Robert Wintemute has pointed out, non-discrimination is concerned with individual treatment, not group rights, so there is no rationale for lumping different choices together and examining their net effect. Instead, in keeping with the nature of the right, what must be considered is a specific rule’s effect on the ability of individuals to make each specific choice.⁷⁰ Further, even if the rules are to be lumped together, this does not suspend the standard requirement of any non-discrimination analysis that like must be compared with like – which, it is clear, the court abysmally failed to do. By treating the rule regulating the length of boys’ hair as similar to that regulating girls’ hairdos and preventing hair extensions,⁷¹ what the court did was to compare a biological feature (hair length) with artifice (hair style). Under one rule a girl could wear her (long) hair ordinarily at school while remaining free to style it at home, whereas under the rule that applied to boys, the requirement of only short hair in school would necessarily dictate hair length everywhere else. In other words, the rules were not comparable, so there was even less justification for lumping them together.

The second and even more troubling feature of the court's decision was its conclusion that in regulating the appearance of its students, the school was entitled to require a "conventional appearance".⁷² In so finding the court apparently overlooked that "convention" is often barely disguised prejudice, which acquires legitimacy through familiarity or tradition. This connection was clearly made by the South African Constitutional Court in 2008 in *MEC for Education v Pillay*, a case that essentially raised the same issue. In *Pillay*, a student challenged a school rule which prohibited her from wearing a nose stud to school.⁷³ Although this was a part of South Indian cultural tradition, at first instance the school rule was held to promote "acceptable convention" and thus no unfair discrimination was found. Overturning this ruling, Langa CJ pointed out that:

"[T]he norm embodied by the Code is not neutral, but enforces mainstream and historically privileged forms of adornment, such as ear studs which also involve the piercing of a body part, at the expense of minority and historically excluded forms. It thus places a burden on learners who are unable to express themselves fully and must attend school in an environment that does not completely accept them."⁷⁴

Religion and culture which feature in *Pillay* are no more important than issues related to sex and gender. *Pillay* reminds us that conventions can be exclusionary, majoritarian and therefore just as harmful to minorities as other rules – so reliance on them should not automatically legitimise a current rule or practice. By not accommodating these nuances in relation to Kaleel's situation, the Court of Appeal displayed no appreciation of how decisions like its own help to reinforce stereotypes around masculinity.⁷⁵ There is a wealth of sociological literature

and ethnographic studies in the Caribbean describing a culture of rampant masculinity and linking this to profound gender inequalities, acute levels of violence against women, homophobic violence (which is not necessarily directed only at homosexuals) and under-performance by boys and men in education.⁷⁶ According to Tracy Robinson, violence against women "remains in the Caribbean a pervasive and debilitating condition of women's lives and the concept of gender is indispensable to understanding why and to whom it happens".⁷⁷ The point here is that social constructions of gender and masculinity, or mainstream expectations of how boys and men should behave, have resulted in negative consequences, and thus should not be reflexively perpetuated.

In this case, the hair length rule was not wholly neutral, for there was testimony to the effect that Kaleel would suffer psychological harm if his hair was cut. One wonders what prejudice would result from allowing a child's individuality to flourish, especially when traditional social constructions of masculinity have been known to be attended by, even if only tangentially, negative consequences. In this context, the court's dogged insistence on enforcing convention betrayed a deeply unreflective attitude.

4. Multiple Equality Guarantees: Belize, Guyana and Jamaica

As mentioned above, three Caribbean constitutions – those of Belize, Guyana and most recently Jamaica – contain general equality rights in addition to a specific non-discrimination guarantee. Given that the amendments in the constitutions of Guyana and Jamaica are the most recent, not much of substance has been generated in these countries regarding the meaning and inter-relationship of these multiple guarantees.

Nonetheless, what is common to the little jurisprudence that does exist is the marked absence of a principled approach guiding the interpretation of the sections.

In the Belize Constitution, there are two provisions relating to equality: section 6(1), which provides that “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law”, and, section 16(1), which is the standard non-discrimination right providing protection against discriminatory laws and treatment on certain listed grounds.⁷⁸ Section 6(1) is unique for a Caribbean constitution not only because it is an addition to the more common non-discrimination right, but also because it is immediately followed in section 6(2) by a long list of procedural protections for the criminally accused, rights that are normally characterised as “due process” or “protection of the law”. However, this placement has proved to be inauspicious, for its proximity to due process rights has cut down the provision’s scope as a general equality right.

The main case to have considered the meaning of these multiple guarantees is *Fort Street Tourism Village v AG*, where the claimants complained of discriminatory treatment in relation to their ability to access the patronage of tourists coming off of cruise ships.⁷⁹ The absence of a deep water harbour in the area surrounding Belize City means that cruise ships have to moor at sea, and passengers are then ferried to a boardwalk where they complete the immigration process. The problem arose from the fact that the government designated a private company, Fort Street Tourism Village, as the sole port of entry and exit, whereupon the company erected concrete barriers on the boardwalk. The effect of these structures was to prevent easy access for the tourists to the claimants’ businesses, all of which were lo-

cated alongside the boardwalk. The claimants sued, alleging, among others, breaches of sections 6(1) and 16.

The most comprehensive treatment of the equality arguments was given at first instance by the Chief Justice. He held that section 6(1) was merely a procedural guarantee⁸⁰ – that is, a “guarantee of due process to everyone”.⁸¹ According to his interpretation, the section requires that any unfairness of treatment alleged had to be measured by reference to section 16, that is, the detailed anti-discrimination section.⁸² Thus unless the reason for the different treatment corresponded to one of the specific grounds listed in section 16, there could be no violation of section 6(1).⁸³ In this case, because the treatment complained of did not fall within one of those categories, there was no breach of either section.

On appeal, this interpretation was unanimously upheld. The Court of Appeal judges were particularly fixated on the absence of an element of state action, holding that, for this reason, the constitutional right was not applicable in the first place.⁸⁴ But each went on to find that, in any event, there was no discrimination that would fall within the terms of section 16(1).⁸⁵ Morrison JA pointedly added that the Chief Justice was “plainly right” in his interpretation of section 6(1).

The most glaring problem with this approach to section 6(1) is that it turns the guarantee into mere surplusage. If a claim alleging a breach of either equality before the law or the equal protection of the law can only succeed where the ground of differentiation is one of those listed in section 16(3), there is nothing to gain by invoking 6(1) and a litigant need only rely on section 16. However, since it is presumed that parliament does not legislate in vain, section 6(1) must have been included

for some reason. One can derive some assistance in discerning that reason by referring to other bills of rights. The most helpful in this regard is the South African one, which also contains a multi-faceted equality right.⁸⁶ Under this model there is both a general declaration of equality in section 9(1), as well as specific provision against discrimination on certain listed grounds in section 9(3).

The Constitutional Court of South Africa has established three stages of inquiry to assess a claim of discrimination under section 9, the key result being that the scope of the general equality right in subsection (1) is not fenced in by the subsequent list of prohibited grounds of discrimination in subsection (3).⁸⁷ At the first stage, the court scrutinises statutory classifications, and a law can fail at this stage if any differentiation is found not to have a rational connection to a legitimate government purpose. If any differentiation is found to bear a rational connection to a legitimate aim, then the second stage of analysis arises to ascertain whether it might nevertheless amount to discrimination.

At the second stage, the court must ascertain whether the identified differentiation is unfair. This involves two inquiries: first, determining the motivation, and second, the impact, of the different treatment. If the motivation or reason for the differentiation is based on a ground specified in section 9(3), then unfairness is presumed and discrimination is established. This presumption can be rebutted. Alternatively, if the motivation is not based on a specified ground, it may still be unfair (though not presumptively so) if the reason for the differentiation is based on “attributes or characteristics” that have the potential to impair human dignity or affect persons adversely. In other words, the list of grounds specified in section 9(3) is not treated as exhaustive. Next, if the consideration of

certain factors leads to a conclusion that the differentiation is not unfair, then there is no violation of 9(3), but if the differentiation is found to be unfair, then the final stage of enquiry arises.

At the third stage, which arises if unfair discrimination is established and only in relation to laws of general application,⁸⁸ the court has to examine whether the proved discrimination can be justified under the limitations provision. In undertaking this analysis, the court adopts a proportionality test, balancing the object of the provision against the extent of its infringement of equality.

As is evident from this carefully designed approach, the broad equality right in section 9(1) is not treated as parasitic on 9(3), and each guarantee serves a distinct purpose. Specifically, there are two key consequences to the itemisation of grounds in 9(3): first, treatment motivated by or classifications based on any of the listed factors is *presumed* to constitute unfair discrimination, and second, the express identification of protected characteristics imposes a higher standard on the state where it seeks to justify unfair discrimination on those bases. But if a ground is not listed in 9(3) this does not mean that a litigant cannot establish inequality of treatment under section 9(1) – all it does is impose a different burden and standard of proof.

Another relevant fact to consider is that both expressions incorporated in Belize’s section 6(1) – equality “before the law” and “equal protection of the law” – are terms laden with meaning. Given their rich antecedents, it asks too much to view their inclusion in the bill of rights as mere coincidence or empty rhetoric. In *Matadeen*,⁸⁹ for instance, where the applicants argued that the guarantee of “protection of the law” in section 3 of the Con-

stitution of Mauritius expressed a general principle of equality, one of the reasons given by the Privy Council for rejecting their argument was the absence of the word “equal” before “protection”. Lord Hoffman attached great significance to this omission, pointing out that section 3

“[I]n fact contains no reference at all to equality. In this respect it is to be distinguished from the Fourteenth Amendment to the Constitution of the United States of America and article 14 of the Indian Constitution.”⁹⁰

By referencing the Fourteenth Amendment to the US Constitution, which prohibits States from denying to any person “the equal protection of the laws”, Lord Hoffman was invoking one of the best known constitutional guarantees of equality. This clause has been invoked to invalidate legislative classifications for more than 100 years,⁹¹ and over time it has evolved into a substantive equality guarantee, not confined to a narrow guarantee of protection against unequal treatment.⁹²

American jurisprudence has proved to be hugely influential and nowhere more so than in Canada, where similar language in their bill of rights⁹³ was interpreted – not as mere *procedural* protection – but as a substantive guarantee of equality in the content of laws. In what has become one of the best known explanations of this phrase, Canadian Supreme Court Justice Ritchie J has stated:

“[S.] 1(b) means at least that no individual or group of individuals is to be treated more harshly than another under the law, and I am therefore of the opinion that an individual is denied equality before the law if it is made an offence punishable under the law (...) for him to do something which his fellow Canadians are free to do without having commit-

ted any offence or having been made subject to any penalty”.⁹⁴

Thus by their summary treatment of the general equality right in section 6(1), the Belizean courts have eviscerated the clause of any meaningful content. Their interpretation is inconsistent with the plain meaning of the provision, and it runs counter to a substantial and influential body of learning from other common law jurisdictions regarding the meaning and scope of what are really *terms of art*.

In Guyana and Jamaica there has not been any substantial treatment of these multiple rights as yet, so it is unclear whether the narrow approach adopted in Belize will prevail. In *Vieira Communications v AG of Guyana*⁹⁵ the general equality right was invoked, but since the court found a breach of the right without any analysis, the case provides no guidance on how these multiple rights should be interpreted. Moreover, the little said by the court is not promising. In that case, the applicant company, which operated a television network in Guyana, applied in March 1993 for a broadcast radio licence from the relevant regulatory agency. Not receiving any decision on its application for more than eight years, the company brought a successful constitutional claim, in which it invoked its expression and equality rights (among others). In the Court of Appeal, the latter claim was raised and determined in two sentences:

“[The appellant company] submits that the NFMU has discriminated against it by failing to grant it a radio broadcast licence while it granted licences for the operation of three government controlled radio stations, in contravention of its fundamental rights guaranteed by arts 149D(1) and (2). The respondents have not directly addressed this argument and we have experienced no diffi-

culty in coming to agreement with the appellant on this submission.”⁹⁶

While this outcome cannot be faulted, the lack of analysis by the court leaves us no closer to the development of a body of principles to guide the interpretation of the Guyana Constitution’s multiple equality provisions. The court clearly identified comparators, which were the three government-controlled radio stations, but this alone is insufficient. It cannot be assumed that if the state obtains a radio broadcast licence every other applicant is automatically entitled to one as well – equality, after all, does not require identical treatment. Thus in addition to identifying a comparator, proof that the differential treatment was motivated by a prohibited ground is also required. Given that the appellant company relied on the general equality right this meant that it was not restricted to invoking one of the grounds listed in the specific non-discrimination right, but that did not absolve it from identifying an impermissible motivation altogether.

Moreover, also missing from the court’s decision was any guidance on how to construe the several rights related to non-discrimination in Guyana’s Constitution: is it entirely the choice of a potential litigant which of these clauses is applicable? If so, what is the relation (if any) between the specific non-discrimination right in 149 and the more general equality right in 149D? Where the general right is invoked (as in this case), does any differentiation result in a finding of breach, or is there a preliminary burden on either party to demonstrate the reason for the differentiation? If so, what is the standard by which any proved differentiation must be assessed and possibly justified? As seen from South African jurisprudence, these are all issues that have been carefully worked out in a series of cases. Given that a breach of ar-

ticle 149D cannot be established merely by proof of different treatment, the same must be done by Guyanese courts too.

5. General Equality Rights: Trinidad and Tobago

Alone amongst all the bills of rights in the Commonwealth Caribbean, the one in Trinidad and Tobago’s Constitution contains a general right to equality without a separate provision prohibiting specific grounds of non-discrimination.⁹⁷ Since this constitution is the second oldest of the independence constitutions in the Caribbean there has been enough time to articulate appropriate principles to guide the interpretation of the relevant clauses, but remarkably such guidance has not yet materialised. On the contrary, the interpretation of the two equality clauses in section 4 has consistently bedevilled the judiciary.

One of the earliest cases under section 4(d) was a successful claim brought against the Chief Immigration Officer for his refusal to consider applications for work permits by the applicant company, while doing so for at least one other company.⁹⁸ While the Court of Appeal of Trinidad and Tobago held correctly that in order to establish a breach of this right it is not necessary to show that the breach fell within the introductory words of section 4, it appears that the applicant succeeded in this case without establishing *any* reason at all for the different treatment. This, like the Guyanese case discussed above, suggests that the mere fact of differentiation is unlawful – an unsustainable position since the law cannot guarantee identical treatment to all. *LJ Williams* was followed by another case where the court simply looked for a similarly circumstanced person, and finding none concluded there was no discrimination.⁹⁹

What is continually misunderstood by these cases (including the Guyanese one) is that merely identifying an appropriate comparator cannot be enough, and a litigant should also be required to establish that the difference in treatment proceeded from some improper motivation. Describing the two Trinidadian cases as “total conceptual disasters”,¹⁰⁰ Margaret DeMerieux, the doyenne of Caribbean human rights law, writes:

“[*LJ Williams*] makes of section 4(d) something quite different from discriminatory treatment in the other West Indian sections and indeed discriminatory treatment as generally understood in law. This is the conferral of benefits or burdens, or the making of decisions on the basis of unlawful distinctions and criteria of differentiation, which constitute specific wrongful *motives* for the governmental decision or action.”¹⁰¹

Explaining this approach, she continues:

“It is quite inconceivable that section 4(d) could have been designed as a guarantee for the actual equal treatment of persons in Trinidad and Tobago, similarly circumstanced or not, especially where the similar circumstance depends on judicial choice or formulation, not determined by any observable principle, and as so often said here, not determined by the discovery of the basis for different treatment. It could hardly be the case, that all persons who could possibly apply for certain licences (in some cases the class could be the whole population), should be able to get one, once any other person has received one.”¹⁰²

Another conceptual misstep by Trinidadian courts, again stemming from these two early cases, has been the requirement of *mala fides* in establishing a breach of either equality right.¹⁰³

One of the most notable instances of its application occurred in a claim by a female Muslim student that the decision of the school in question to refuse to allow her to wear a modified version of the uniform to accommodate the hijab constituted, among other breaches, a violation of her right to equality of treatment under section 4(d).¹⁰⁴ The trial judge held that in the absence of bad faith or hostile intention on the part of the headmistress and the school board, there was no unequal treatment. This is, of course, plainly incorrect. A finding of discrimination does not depend on bad faith, and there is no shortage of authority to this effect.¹⁰⁵ Yet the Privy Council, despite recognising the error, has declined to address it,¹⁰⁶ making only the limited concession that *mala fides* cannot be in issue where a legislative classification is in issue.¹⁰⁷ This concession was long overdue but still insufficient, for it does not cover all possible instances of unequal treatment under section 4(d).

Although more than two decades have elapsed since DeMerieux identified the errors in the prevailing approach to the equality provisions, the most recent cases in Trinidad and Tobago in the area continue to repeat them. In *Paponette v AG*,¹⁰⁸ a dispute arose between the maxi-taxi association and the state concerning the removal of taxis plying two routes (Nos. 2 and 3) to “City Gate”, a taxi docking area located on land controlled by the Public Transport Service Corporation (PTSC). The association was assured that the management of City Gate would be entrusted to them, but when this failed to materialise they sued. One of the grounds of action invoked section 4(d), the claim being that the owners and operators of routes 2 and 3 were treated differently from the owners and operators of other routes, since they alone were under the control of PTSC and required to pay a fee for docking.

In the Court of Appeal the equality claim was dismissed on the ground that the identified comparators – the operators of other routes – were not similarly circumstanced because they did not operate in Port of Spain. While the ultimate finding may have been correct, the court’s reasoning was flawed. That error was, once again, failing to appreciate that it is not enough to identify a similarly circumstanced person or group, for what is also required is an examination of the bases of the different treatment of the two groups. It is only if the complaining group is treated differently from another for an impermissible reason that the constitutional right is breached.

Although the Privy Council decided the matter on the basis of the property right, they also adverted to the equality claim. Overruling the Court of Appeal, they decided that since the state had led no evidence regarding the reasons for the different treatment, the court was forced to speculate and so found a breach of section 4(d).¹⁰⁹ While the Privy Council may have been nearer to the mark than the Court of Appeal, another case decided by them originating from Trinidad and Tobago only one month before indicates that doctrinal confusion still persists. In that case, *Public Service Appeal Board v Maraj*,¹¹⁰ at issue were regulations which laid down different procedures for dealing with disciplinary matters related to public officers. The Privy Council found in favour of the respondent on the basis (once again) that the state had failed to advance any justification for the difference in procedures, curtly stating: “Legislation frequently has to draw distinctions between different classes of people. Such distinctions may well be justified. Some distinctions are easier to justify than others. But at the very least they must serve a legitimate aim and be rationally connected to that aim.”¹¹¹

The weakness of both decisions is that they appear to conflate distinct stages of inquiry, which makes a muddle of what must be proved, when, and by whom. The effect of both *Paponette* and *Maraj* is to approach all differences, in law and treatment, as presumptively suspect and requiring justification by the state. This imposes an onerous burden on the state, given that legislation routinely classifies between classes of people for legitimate reasons. Early on in its jurisprudence the South African Constitutional Court demonstrated an awareness of this, and in one case they cautioned that:

“If each and every differentiation made in terms of the law amounted to unequal treatment that had to be justified by means of resort to s33, or else constituted discrimination which had to be shown not to be unfair, the Courts could be called upon to review the justifiability or fairness of just about the whole legislative programme and almost all executive conduct (...). The Courts would be compelled to review the reasonableness or the fairness of every classification of rights, duties, privileges, immunities, benefits or disadvantages flowing from any law. Accordingly, it is necessary to identify the criteria that separate legitimate differentiation from differentiation that has crossed the border of constitutional impermissibility and is unequal or discriminatory ‘in the constitutional sense.’”¹¹²

No doubt, this is why in South Africa equality claims are approached in stages, and proof of mere differentiation does not instantly require justification. At the outset, mere differentiation is only unconstitutional if it does not bear a rational connection to a legitimate government purpose. At this stage the court employs a lower level of scrutiny than when it is assessing the justification for the limita-

tion of a right.¹¹³ It is only if *discrimination* (as distinct from mere differentiation) is found to exist that the state is then required to justify the law or action.

None of this analysis occurred in *Paponette* or *Maraj*, where, on a finding of different treatment, both applicants succeeded because the state did not lead evidence in justification. In *Paponette* at least, there was an obvious and compelling reason for the relocation of the taxi stands in Port of Spain, which was to ease the notorious traffic congestion that plagues the city. To have simply found in this case (as in *Maraj*) that there was an unjustifiable breach of equality, the Privy Council elided over several distinct stages which require preliminary determinations of rationality and identification of the motivation for differential treatment, with each being attended by differing levels of proof.

6. Conclusion

Caribbean bills of rights include provisions which are capable of generating protection to minorities and marginalised groups, however guarded the language of such guarantees may be. The larger problem has been a conservative approach to the right, characterised by strict literalism and an inability to situate claims within their larger social context. This conservatism has been compounded by confusion on certain key issues, particularly in relation to the

general equality right where the relevant courts, including the Privy Council, have failed to work out answers to some of the most basic questions. For example: where the actual provision does not specify protected characteristics, what constitutes impermissible bases of differentiation? On whom does the burden lie to establish unlawful discrimination? At what stage must proved differentiation be justified, and if so, by what standard? In fact, is proving motivation required at all, given that many of the cases consistently have suggested that merely establishing different treatment of similarly circumstanced persons is sufficient to establish discrimination?

Some of these questions touch on deeply contested issues, such as the nature of discrimination and on whom the responsibility lies for establishing its boundaries. They involve difficult but not abstract inquiries. Central to the need for protection is that equality is linked to human dignity; that it aims to discount irrelevant personal characteristics from influencing certain essential decisions; that it seeks to redress the historical marginalisation of certain minorities; and, that majorities may sometimes be unable (or even unwilling) to provide protection. Unless courts of the Commonwealth Caribbean demonstrate an appreciation of these imperatives, they will continue to be unable to fashion a coherent and meaningful jurisprudence on equality.

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2 *Romer v Evans* 517 US 620 (1996) and *Lawrence v Texas* 539 US 558 (2003).

3 Davidson, A., "The Animus of Antonin Scalia", *New Yorker*, 12 December 2012, available at: <http://www.newyorker.com/online/blogs/comment/2012/12/the-moral-feelings-of-antonin-scalia.html>.

4 Wheatley, S., "Minorities under the ECHR and the Construction of a Democratic Society", *Public Law*, 2007, pp. 783-784.

5 Based on similarities in content, the original constitutional bills of rights of the twelve independent countries which make up the Commonwealth Caribbean can be loosely grouped into two categories: the "older" model, comprising those of the first five countries (except Trinidad and Tobago) to gain independence, namely Jamaica (1962), Guyana (1966), Barbados (1966) and the Bahamas (1973), and the "newer" model, comprising all the rest, namely Grenada (1974), Dominica (1978), St. Lucia (1979), St. Vincent and the Grenadines (1979), Antigua and Barbuda (1981), Belize (1981), and St. Christopher & Nevis (1983). The Trinidadian bill of rights diverged significantly as it was patterned after the Canadian bill of rights of 1969 and not the European Convention on Human Rights like the others. Since independence, Guyana's version was extensively amended in 1980 and again between 2001 and 2003, and Jamaica's bill of rights was repealed and replaced in 2011, with the substituted version now bearing a greater resemblance to the Trinidadian model.

6 Tracy Robinson, *Commonwealth Caribbean Human Rights Law, Course Materials – Equality*, University of the West Indies, 2012, p. 2. This omission was most pronounced in the original Independence Constitution of Jamaica, wherein the word 'equal', including its derivatives, did not appear at any place in the bill of rights.

7 Section 4 of the Trinidad and Tobago Constitution provides: "It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely- (b) the right of the individual to equality before the law and the protection of the law; and (d) the right of the individual to equality of treatment from any public authority in the exercise of any functions...".

8 Constitution of Belize 1981, s. 6(1).

9 Constitution of Guyana 1980, Article 149D.

10 Charter of Fundamental Rights and Freedoms 2011, sections 13(3)(g) and (h).

11 See, for example, Constitution of South Africa, s. 9(3) or Constitution of India, s. 15.

12 See above, note 10, s. 13(3)(i).

13 In addition to the previous five, the grounds added are "age, disability, marital status, sex, gender, language, birth, social class, pregnancy, religion, conscience and belief or culture".

14 *Nielsen v Barker* (1982) 32 WIR 254.

15 *Ibid.*, p. 282.

16 *Ibid.*, p. 280.

17 [1999] AC 198.

18 *Ibid.*, Para 16.

19 *Ibid.*, Para 9.

20 *Regina v R* [1991] 3 WLR 767.

21 *Ibid.*, pp. 770-772.

22 For an overview of the main cases of this period see: Burnham, M., "Indigenous Constitutionalism and the Death Penalty", *ICon*, Vol. 3.4, 2005, p. 582.

23 La Guerre, J., "Consensus and Conflict in the Commonwealth Caribbean", in La Guerre, J. (ed.), *Issues in the Government and Politics of the West Indies*, University of the West Indies, 2001, pp. 75, 80-83; Professor Carnegie describes this as the "effectiveness of party discipline": Carnegie, A.R., "On Comparing American and West Indian Constitutional Law", Paper presented at the Chief Justices' Conference, Boscobel, Jamaica, 7 August 1987, p. 9 (on file with the author).

24 [2004] 4 LRC 621.

25 *Ibid.*, p. 646.

- 26 See above, note 4.
- 27 See, for example, Constitution of Barbados, s. 11.
- 28 Fredman, S., *Discrimination Law*, OUP, 2011, pp. 113-118.
- 29 *Toonen v Australia*, Communication No. 488/1992, UN Doc CCPR/C/50/D/488/1992.
- 30 *P v S and Cornwall CC* [1996] All ER (EC) 397.
- 31 *Naz Foundation v Government of NCT of Delhi*, WP(C) No. 7455/2001, 2 July 2009.
- 32 *Ibid.*, Para. 104. Note that this was a decision of the High Court of Delhi, not the Indian Supreme Court.
- 33 *Ibid.*, Para. 112.
- 34 See above, note 14.
- 35 Under section 7 of the Constitution of the Co-operative Republic of Guyana Act 1980, existing laws are required to be construed with “such modifications, adaptations, qualifications and exceptions” so as to ensure their conformity with the Constitution.
- 36 See above, note 14, p. 290.
- 37 *Ibid.*, p. 290-291.
- 38 Married Persons (Property) Act, Chapter 45:04, Laws of Guyana.
- 39 *Girard and Pierre v AG*, LC 1986 HC 24 (HC, St. Lucia) 17 December 1986.
- 40 Constitution of St. Lucia 1979, s. 13(3).
- 41 *Hinds v R.* [1976] 1 All ER 353 (PC, Jamaica).
- 42 *AG of the Gambia v Momodou Jobe* [1984] AC 689 at p. 702; *de Freitas v Permanent Secretary* (1998) 58 WIR 131.
- 43 Section 13 of the St. Lucia Constitution provides a wide array of exceptions to the non-discrimination guarantee. Matthew J relied on “either or all” of sub-sections (4), (5) and (6), which exclude this guarantee from applying to laws made in relation to taxation and non-citizens, as well as treatment under the law in relation to adoption, marriage, divorce, burial, succession, and standards relating to employment.
- 44 Compare with the approach of the South African Constitutional Court: *Moise v Transitional Local Council* (CCT 54/00) 2001 (4) SA 491, Para 19.
- 45 *Wade v Roches* BZ 2005 CA 5 (Court of Appeal, Belize).
- 46 *Spencer v AG* (1998) 2 CHRLD 184 (Court of Appeal, Antigua & Barbuda) and *SVG Green Party v AG* VC 2005 HC 30 (High Court, St. Vincent).
- 47 Robinson, T., “Gender, Nation and the Common Law Constitution”, *Oxford Journal of Legal Studies*, Vol. 28, 2008, pp. 753-62, at p. 735.
- 48 Equal Opportunities Act, No. 69 of 2000.
- 49 *Ibid.*, s. 3.
- 50 *Ibid.*
- 51 *Suratt and Others v AG*, Civil Appeal No. 64 of 2004, 26 January 2006, Paras 40-45.
- 52 *Ibid.*, Paras 43-44.
- 53 *Suratt and Others v AG* [2007] UKPC 55, Para 58.
- 54 *Ibid.*
- 55 *Ibid.*, Para 35.
- 56 *Pearce v Mayfield School* [2001] EWCA Civ 1347, Para 7.
- 57 See above, note 29.
- 58 *Macdonald v Advocate General for Scotland* [2003] UKHL 34.
- 59 *Ibid.*, per Lord Nicholls, Paras 5-7; Lord Hope, Paras 70-71 and 73; and Lord Rodger, Paras 153-158.

- 60 Wintemute, R., "Recognising New Kinds of Direct Sex Discrimination: Transsexualism, Sexual Orientation and Dress Codes", *Modern Law Review*, Vol. 60, 1997, p. 334.
- 61 *Ibid.*, p. 347.
- 62 *Ibid.*, p. 346.
- 63 See above, note 7.
- 64 *LJ Williams v Smith and the AG* (1980) 32 WIR 395.
- 65 DeMerieux, M., *Fundamental Rights in Commonwealth Caribbean Constitutions*, Faculty of Law Library, UWI 1992, p. 437.
- 66 In *Public Service Appeal Board v Maraj* (2010) 78 WIR 461, she stated (at Para. 27) that "the rights laid down in s 4 are free-standing rights, which exist irrespective of any discrimination on the enumerated grounds".
- 67 See above, note 51, Para 43.
- 68 *Vriend v Alberta* (1998) 3 LRC 483.
- 69 *AG v Jones* KN 2008 CA 3, 2 June 2008.
- 70 See above, note 60, p. 355.
- 71 See above, note 69, Para 25.
- 72 *Ibid.*, Para 27.
- 73 *MEC for Education v Pillay* (CCT 51/06) 2008 (1) SA 474.
- 74 *Ibid.*, Para 44.
- 75 Cook, R., "Structures of Discrimination", *Macalester International Journal*, Vol. 28, 2011, p. 33.
- 76 Chevannes, B., "The Role of Men in Families in the Caribbean: A Historical Perspective", in Bannon, I. and Correia, M. (eds.), *The Other Half of Gender*, The World Bank, 2006, pp. 87-91, at p. 73; Chevannes, B., "What We Sow and What We Reap: Problems in the Cultivation of Male Identity in Jamaica", The Grace Kennedy Foundation Lecture, Kingston, Jamaica, March 1999; and Parry, O., "Boys will be Boys: Why Caribbean Males Underachieve", Conference Paper presented at the conference "The Construction of Caribbean Masculinity", St. Augustine, Trinidad & Tobago, 12 January 1996.
- 77 Robinson, T., "An Analysis of Legal Change: Law and Gender-Based Violence in the Caribbean", Caribbean Judicial Colloquium, Nassau, The Bahamas, 17-19 May 2004, available at: <http://www.sdn.org/16days/files/Judicial%20Colloquium.pdf>.
- 78 The specified grounds are sex, race, place of origin, political opinions, colour or creed.
- 79 (2008) 74 WIR 133.
- 80 *Ibid.*, Para 44.
- 81 *Ibid.*, Para 49.
- 82 *Ibid.*, Para 52.
- 83 This is the standard approach to the non-discrimination right made popular by *Nielsen v Barker*, see text accompanying notes 14 to 16 above.
- 84 See above, note 79, per Mottley JA at Para 66 and Carey JA at Para 77.
- 85 *Ibid.*
- 86 Section 9 of the South African Constitution provides:
- "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

87 Notably, *Harksen v Lane* NO 1998 (1) SA 300 (CC) and *Hoffman v South African Airways* 2001 (1) SA 1 (CC).

88 *Hoffman*, above note 87, Para 24.

89 See above, note 17.

90 *Ibid.*, Para 16.

91 Gewirtz, P, "Race and Equal Protection of Laws: *Strauder v West Virginia*", in Marshall, B. (ed.), *The Supreme Court and Human Rights*, Forum Series, 1982, p. 111.

92 *Ibid.*, p. 119.

93 Section 1(b) of the Canadian bill of rights guaranteed "the right of the individual to equality before the law and the protection of the law".

94 *R v Drybones* [1970] S.C.R. 282 at 297.

95 (2009) 76 WIR 279.

96 *Ibid.*, p. 295.

97 See above, note 7.

98 See above, note 64.

99 *AG v KC Confectionary Ltd* (1985) 34 WIR 387.

100 See above, note 65, p. 434.

101 *Ibid.*, p. 432 (emphasis in original).

102 *Ibid.*, pp. 434-435.

103 See, for example, *KC Confectionary*, above note 99, p. 415.

104 *Mohammed v Moraine* (1994) 49 WIR 371.

105 *James v Eastleigh Borough Council* [1990] 2 AC 751.

106 In *Bhagwandeem v AG* (2004) 64 WIR 402, the court declined to rule on this point without detailed argument, maintaining this stance in *Central Broadcasting Services v AG* (2006) 68 WIR 459.

107 See above, note 66, at p. 471.

108 *Paponette v AG* (2010) 78 WIR 474.

109 *Ibid.*, p. 493.

110 See above, note 66.

111 *Ibid.*, pp. 472-473.

112 *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), Para 17.

113 De Waal, J., Currie, I. and Erasmus, G., *The Bill of Rights Handbook*, Juta, 1999, p. 198.