

# The Constitutionality of the “Homosexual Advance Defence” in the Commonwealth Caribbean

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## Introduction

Defences to homicide have often been characterised as “concessions to human frailty”.<sup>2</sup> The challenge for legislators and judges has been to determine the breadth of the permissible concessions and the categories of human frailty that ought to be accommodated by the law. A series of appellate decisions in the Commonwealth Caribbean in cases concerning the killing of gay men have ignited debate about the nature and application of defences to homicide. The main defences accepted by the courts in these decisions were justifiable homicide (a complete defence to murder which results in acquittal on the ground that the homicide was done in service of the state) and provocation (a partial defence to murder which results in a conviction of manslaughter on the ground that the defendant was provoked to lose his or her self-control). In each case, the basis of the defence was founded on a “homosexual advance defence”, that is, an allegation that the defendant killed the victim in response to an unwanted same-sex sexual advance. The success of such homosexual advance defences sits uneasily with the requirements of Commonwealth Caribbean constitutions, which mandate that the constitutions are “supreme law” and that all other laws must be modified, invalidated or abolished if they fall short of constitutional standards.<sup>3</sup> At the centre of the debate over defences to homicides of gay men, particularly in the context of constitutional rights, is the question whether the human frailty accommodated by the law can, or ought, to include fear and stereotypes of same-sex sexuality.

This article presents a critical analysis of the homosexual advance defence in the Commonwealth Caribbean. It is argued, through a thematic presentation of the case law and comparative analysis, that the application of the defences of provocation and justifiable homicide in gay homicide cases is inconsistent with constitutional rights in Commonwealth

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2 *R v Kirkham* (1837) 8 C. & P. 115, p. 119; and Horder, J., *Provocation and Responsibility*, Oxford University Press, 1992.

3 See, for example, Constitution of Barbados, Section 1; Constitution of Jamaica, Section 2; Constitution of Trinidad and Tobago, Section 2; and Constitution of St Vincent and the Grenadines, Section 101.

Caribbean states. It is argued that continued reliance on a homosexual advance defence is inconsistent with the rights to life and equality in Commonwealth Caribbean constitutions. Section one of the article examines the gendered, heteronormative development of provocation and justifiable homicide. Section two analyses the right to equality in Commonwealth Caribbean constitutions and discusses the extent to which the homosexual advance defence under both provocation and justifiable homicide contravenes that right. In section three, it is argued that the application of justifiable homicide as a homosexual advance defence contravenes the right to life in Commonwealth Caribbean constitutions, as it excludes considerations of the reasonableness and proportionality of the use of lethal force in response to a non-lethal attack. Though different textual issues arise under the analysis of each right, at the core of the violation of both the right to life and the right to equality is the fact that the homosexual advance defence incorporates and perpetuates prejudices against gay men and provides insufficient respect for, and protection of, the lives of gay men. Thus, section four briefly suggests remedial steps for resolving the tension between the homosexual advance defence and Caribbean constitutional rights guarantees.

### 1. Heteronormative Development of Justifiable Homicide and Provocation

The historical development of justifiable homicide and provocation and their application in gay homicide cases is a manifestation of heteronormative conceptions of masculinity.<sup>4</sup> The defence of provocation rests on the limbs that “the defendant was provoked into losing his self-control” and second, that the provocation was such that it was capable of causing the “reasonable man” to do as the defendant did.<sup>5</sup> As it was originally constructed to address brawls and struggles between men, the defence has been criticised on the basis that it legitimises violence, and in particular, violence by men.<sup>6</sup> Jeremy Horder has persuasively argued that the historical development of the defence of provocation licensed rage in men and the violent manifestation of that rage as a matter of defence of honour.<sup>7</sup> Defence of honour had, and still has, implications in the realm of sexuality and relationships as is evident in the availability of the defence where there was a threat to traditional conceptions of masculinity through sexual infidelity or a homosexual advance.<sup>8</sup> For instance, in the formulation of the

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4 Heteronormativity is used to refer to the belief in prescribed roles for men and women and in the norm of heterosexuality. In this sense, it applies both to normative prescriptions for gender and sexuality. See discussion in Jackson, S., “Gender, sexuality and heterosexuality: the complexity (and limits) of heteronormativity” *Feminist Theory*, Vol. 7, 2006, p. 107.

5 *Holmes v DPP* [1946] 2 All ER 124, p. 128; and *Philbert v The State* (unreported, Eastern Caribbean CA, Dominica), 30 April 2012, Para 21.

6 Pei-Lin Chen, C., “Provocation’s Privileged Desire: the Provocation Doctrine, ‘Homosexual Panic’, and the Non-Violent Unwanted Sexual Advance Defense”, *Cornell Journal of Law and Public Policy*, Vol. 10, 2000–2001, p. 220; and Gray, A., “Provocation and the Homosexual Defence in Australia and the United States: Law out of Step with Community Values”, *The Crit*, Vol. 3, 2010, p. 55.

7 See above, note 2, Horder, pp. 23–42.

8 See above, note 6, Pei-Lin Chen.

modern doctrine of provocation, adultery by one's wife with another man was included in the categories of conduct for which the provocation defence was available.<sup>9</sup> Thus, in *R v Mawgridge*,<sup>10</sup> Holt CJ explained:

*[W]hen a man is taken in adultery with another man's wife, if the husband shall stab the adulterer, or knock out his brains, this is bare manslaughter: for jealousy is the rage of the man, and adultery is the highest invasion of property (...). If a thief comes to rob another, it is lawful to kill him. And if a man comes to rob a man's posterity and his family, yet to kill him is manslaughter.*<sup>11</sup>

This category of provocation has been endorsed in legislation, such as Section 120(c) of the Criminal Code of Belize which includes as one of the circumstances that may amount to provocation "an act of adultery committed with or by the wife or husband of the accused person".<sup>12</sup> The adultery basis of provocation has also received judicial endorsement in the Caribbean, with courts finding that the killing of one's wife in response to learning of her adultery could ground a provocation defence.<sup>13</sup> This basis of provocation was applied in the Trinidadian Court of Appeal decision in *Cox v The State*.<sup>14</sup> The Court of Appeal reduced Cox's conviction from murder to manslaughter, upon evidence that he killed his girlfriend after he discovered that she was having a sexual relationship with another woman.<sup>15</sup> The *Cox* case does demonstrate awareness of the need to display disapproval of such violence, the judges noting the "alarming upsurge of violence generally and in domestic violence in particular in this society".<sup>16</sup> Yet, the Court's disapproval only affected the sentence and not the conviction. The approach in *Cox* therefore remains wedded to traditional legitimisation of violence, an approach which is being dispensed with in other common law jurisdictions.<sup>17</sup> Thus, even before England and Wales replaced the provocation defence with the defence of loss of self-control in the Coroners and Justice Act 2009, there was evidence of judicial discomfort with the traditional application of provocation

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9 *R v Mawgridge* (1707) 84 ER 1107, p. 1115; Forell, C., "Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia", *American University Journal of Gender, Social Policy and the Law*, Vol. 14, p. 31; and above, note 2, Horder, pp. 24, 39.

10 *Ibid.*, *R v Mawgridge*.

11 *Ibid.*, p. 1115.

12 See also, Penal Code 1924 (Bahamas), Section 300(3); and Criminal Code 1987 (Grenada), Section 240(c).

13 See, for example, *Zetina v R* (unreported, CA, Belize), 19 June 2009.

14 *Cox v The State* (unreported, CA, Trinidad and Tobago), 13 March 2008.

15 *Ibid.*, Para 15.

16 *Ibid.*, Para 21.

17 Victorian Law Reform Commission, *Defences to Homicide: Final Report*, 2004.

in cases of sexual jealousy.<sup>18</sup> Moreover, the new loss of self-control defence is explicitly unavailable where the violent act was in response to sexual infidelity.<sup>19</sup>

Like the use of provocation to excuse violence caused by sexual jealousy, the use of the homosexual advance defence as part of provocation is not a new phenomenon. It was raised in *R v McCarthy*<sup>20</sup> in 1954, where ultimately the defence of provocation was unsuccessful because the Court held that the accused was intoxicated and therefore could not be considered a “reasonable man” at the time of the act.<sup>21</sup> However, Lord Chief Justice Goddard, who delivered the judgment of the Court, expressed support for the argument that violence on the part of the defendant would have been an excusable response to an advance by the deceased man. In the words of the Lord Chief Justice, “this provocation would, no doubt, have excused (...) a blow, perhaps more than one”.<sup>22</sup>

The specific requirements of the defence of provocation have long been criticised for manifesting a gender bias.<sup>23</sup> The requirement that the defendant must have experienced a “loss of self-control” is said to privilege men, particularly men in a position of relative power in relation to their victim. The defence applies in a “gendered reality” in which men customarily kill out of anger while women who rely on the defence kill in response to fear.<sup>24</sup> Thus, even where both men and women successfully rely on provocation, the application of the defence has created the spectre of treating killings in response to sexual jealousy as commensurate with homicide in response to fear of a violent aggressor.<sup>25</sup> The “loss of self-control requirement” has also been shown to privilege heteronormativity on the basis of the persistent notion in the current law of provocation that “a heterosexual man’s honour is insulted by a homosexual advance and he must retaliate accordingly to counter its effect.”<sup>26</sup> Accordingly, provocation

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18 See, for example, *R v Entwistle* [2010] EWCA Crim 2828, in which the Court of Appeal of England and Wales recognised that “sexual jealousy” was not an excuse for murder and did not constitute sufficient provocation. By contrast, despite the Trinidad and Tobago Court of Appeal’s criticism of the upsurge in violence, the Court nonetheless indicated at paragraph 15 that the sexual jealousy of the defendant on learning of the relationship between his wife and another woman would be “critical to any defence to a charge for murder” (and not merely relevant to sentencing).

19 Coroners and Justice Act 2009, Section 59(6).

20 *R v McCarthy* [1954] 2 All ER 262.

21 *Ibid.*, p. 265.

22 *Ibid.*, p. 263.

23 See above, note 9, Forell, p. 27.

24 *Ibid.*, pp. 33–34.

25 Bradfield, R., “The Treatment of Women Who Kill Their Male Partners Within the Australian Criminal Justice System”, Doctoral Thesis, University of Tasmania, 2002, available at: <http://eprints.utas.edu.au/1045/>, pp. 144–146.

26 Papanthasiou, P. and Estéal, P., “The ‘Ordinary Person’ in Provocation Law: Is the ‘Objective’ Standard Objective?”, *Current Issues in Criminal Justice*, Vol. 1, 1999, p. 55.

can operate to excuse a “defendant’s” lethal expression of outraged manhood against his gay male victim.<sup>27</sup>

The ancient common law defence of justifiable homicide was also developed with heteronormative undertones. The defence served to vindicate the following categories of homicide: (i) where an executioner executes a criminal in strict conformity with the sentence of death imposed by a court of law; (ii) where an officer of justice or another person acting in his aid kills a person who resists arrest, or kills an escaping felon; and (iii) where the homicide is committed in prevention of “a forcible and atrocious crime”.<sup>28</sup> These three categories of justifiable homicide were seen as being in service of the state, and were therefore condoned and vindicated; the defence was justificatory and not excusatory. Accordingly, in the words of Blackstone, the law perceives “no kind of fault whatsoever” and bestows on the killer “commendation rather than blame”.<sup>29</sup> The third category, defence of justifiable homicide in prevention of a “forcible and atrocious crime”, could be invoked by a husband who kills a man who attempts to rape his wife or daughter and by a man to whom a same-sex advance has been made (that is, the ancient crime of sodomy).<sup>30</sup> There is a strong historical link between honour and virtue,<sup>31</sup> and the defence of chastity or heterosexuality amounts to a defence of the honour and impenetrability of the male. Moreover, as justifiable homicide was viewed as an act in service of the state, the defence in general and the third category in particular, demonstrate a decidedly masculine representation of the state itself. The killing protects not only the defendant’s honour but also the masculinity, and therefore, the honour of the state itself.

Compounding the heteronormativity of provocation and justifiable homicide are the concepts of “reasonableness” and the “reasonable man”, often now judicially denoted the “ordinary man”, which feature in the formulation of both defences. The reasonable man test is activated under the objective limb of the provocation defence, which requires a determination of whether the provocation was sufficient to cause a reasonable man to act as the defendant did.<sup>32</sup> It is also relevant to the defence of justifiable homicide, which requires that the defend-

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27 Power, H. “Provocation and Culture”, *Criminal Law Review*, 2006, p. 877. There is much debate in the United States of America regarding whether provocation ought to be classified as a justificatory or excusatory defence. For a clear account of this debate, see Mison, R., “Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation”, *California Law Review*, Vol. 80, 1992, pp. 144–146. This article takes the position that it is a justificatory defence.

28 Smith, J.C. and Hogan, B., *Criminal Law*, Butterworths, 1965, pp. 230–232; and Fitzwalter Butler, T.R. and Garsia, M., *Archbold Pleading, Evidence and Practice in Criminal Cases*, Sweet & Maxwell, 1966, p. 2550. The defence has since been abolished in England and Wales.

29 *Blackstone’s Commentaries on the Laws of England*, Book 4, Routledge, 2001, Chapter 4, p. 182.

30 *Ibid*; and above, note 28, Smith and Hogan; and *R v Bartley* (1969) 14 WIR 407.

31 See above, note, Horder, pp. 26–27.

32 *Attorney General for Jersey v Holley* [2005] UKPC 23, Paras 6–10.

ant must honestly believe, on reasonable grounds, that he had to kill in order to prevent the commission of a forcible and atrocious crime.<sup>33</sup> The “reasonable” standard has been subject to blistering critique for decades, often on the grounds of feminist theory.<sup>34</sup> Fundamentally, the basis of the critique was that the standard of the reasonable man was shaped by the dominant and majority members of society, i.e. privileging men. Increasingly, however, there is more discourse on the interaction between the reasonable person standard and sexual orientation. Thus, the “ordinary man” is not only a man (as the name suggests) but also, heterosexual.<sup>35</sup> It has been argued that by maintaining this standard of “ordinariness”, the defences of provocation and justifiable homicide uphold a power structure that privileges male heterosexual power by viewing it as “ordinary”.<sup>36</sup> Moreover, the roots of the defences are steeped in an outlook which perceives the “reasonable” or “ordinary” person as male, and privilege the protection of the male body and masculine honour.<sup>37</sup> This hypermasculine construct of the law and the state has resonance today in Commonwealth Caribbean states. Caribbean feminist author, Jacqui Alexander, has explained the importance of this construct in the legitimisation of the state, arguing that “the archetypal source of state legitimation is anchored in the heterosexual family, the form of family crucial in the state’s view to the founding of the nation.”<sup>38</sup> In this framework, the gay man presents a threat which the state must quash in order to “continue to legitimate its existence.”<sup>39</sup>

Criticisms of the sexuality bias of the reasonable person test have highlighted that the standard of the reasonable person is so stripped of critical social assessment that “it excludes an understanding of the social reality encountered by homosexuals.”<sup>40</sup> The social reality of the prejudices faced by lesbian and gay persons in a heterosexual society certainly form a crucial part of understanding the use and application of provocation and justifiable homicide as homosexual advance defences. That social reality for sexual minorities within Caribbean society is most vividly reflected in the continued criminalisation of same-sex expression through colonial era sodomy laws that provide that it is an “abominable crime” to engage in anal intercourse. Section 76 of the Offences Against the Person Act of Jamaica, for instance, provides that:

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33 See *R v Bartley*, above note 30, p. 411.

34 Moran, M., *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard*, Oxford University Press, 2010, pp. 1–7.

35 See Pei-Lin Chen, above note 6, p. 209.

36 Johnston, P., “More Than Ordinary Men Gone Wrong: Can the Law Know the Gay Subject”, *Melbourne University Law Review*, Vol. 20, 1995–1996, pp. 1158–1160 and 1179.

37 See Horder, above note 2; and Forell, above note 9 p. 31.

38 Alexander, M.J., “Not Just (Any) Body Can Be a Citizen: The Politics of Law, Sexuality and Postcoloniality in Trinidad and Tobago and the Bahamas”, *Feminist Review*, Vol. 48, 1994, p. 14.

39 *Ibid.*

40 See above, note 26, p. 55.

*Whosoever shall be convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable to be imprisoned (...) for a term not exceeding ten years.*<sup>41</sup>

Societal animus towards same sex sexuality is also revealed in reports of violent attacks upon members of the LGBT community by private citizens,<sup>42</sup> the failure of the police force to protect LGBT victims of crime, and interference with LGBT persons' access to public services.<sup>43</sup> This presents a scenario in which the society and the state itself sanction continued discrimination and prejudice towards sexual minorities, particularly gay men. Ultimately, a reasonable person standard that epitomises the reasonable person in a society in which homophobia endures opens the door for prejudices against sexual minorities to influence the operation of defences to homicide.<sup>44</sup>

The implications of the heteronormativity of provocation and justifiable homicide defences, and of the anti-gay animus that is channelled through the application of both defences when homosexual advance defences are put forward, are borne out in three Commonwealth Caribbean appellate decisions. A homosexual advance defence was argued in a case of justifiable homicide in *Bartley v R*<sup>45</sup> and *Philbert v The State*<sup>46</sup> and as a defence of provocation in *Marcano v The State*.<sup>47</sup> The decision of the Jamaican Court of Appeal in *Bartley* in 1969 marked the modern re-emergence of justifiable homicide as a defence in the Commonwealth Caribbean. It was accepted by the Court that the homicide was the result of a fight that occurred when the deceased attacked Bartley after the deceased tried to have sexual relations with Bartley. At Bartley's homicide trial, the judge left the issues of provocation and self-defence to the jury but declined to put the issue of justifiable homicide to the jury. The jury convicted the appellant of manslaughter (having apparently accepted the provocation defence). However, the Court of Appeal acquitted Bartley, holding that the judge should have left the defence of justifiable homicide to jury. The Court of Appeal held that:

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41 See also Criminal Code 1981 (Belize), Section 53; Offences Against the Person Act 1873 (Dominica), Section 59; and Offences Against the Person Act 1925 (Trinidad and Tobago), Section 59. The crime technically applies to both heterosexual and gay anal intercourse but has a disparate impact on gay men.

42 See, for example, Human Rights Watch, "Jamaica: Shield Gays from Mob Attacks", 31 January 2008, available at: <https://www.hrw.org/news/2008/01/31/jamaica-shield-gays-mob-attacks>; and HuffPost Queer Voices, "Jamaican Anti-Gay Attack Allegedly Caught on Tape", *Huffington Post*, 2 November 2012, available at: [http://www.huffingtonpost.com/2012/11/02/jamaica-anti-gay-attack-video\\_n\\_2067114.html](http://www.huffingtonpost.com/2012/11/02/jamaica-anti-gay-attack-video_n_2067114.html).

43 Human Rights Watch, *Hated to Death: Homophobia, Violence, and Jamaica's HIV/Aids Epidemic*, 2004, pp. 18–21, 27–31.

44 See Mison, above note 27, p. 147. As in Mison's article, the term homophobia is used in this article to denote prejudice against and hatred of gay and lesbian persons, rather than fear of such persons.

45 See *R v Bartley*, above note 30.

46 See *Philbert v The State*, above note 5.

47 *Marcano v The State* (unreported, CA, Trinidad and Tobago), 26 July 2002.

*[A]n attempt to commit sodomy on the person of another is an attempt to commit a forcible and atrocious crime and, if accompanied by acts of violence which clearly manifest an intention to commit the offence, can justify the killing of the attacker.<sup>48</sup>*

In a 2012 judgment, *Philbert v The State*, the Eastern Caribbean Court of Appeal relied on *Bartley* to hold that, on a charge of murder, the defendant is entitled to be acquitted on the defence of justifiable homicide if there is evidence that he killed the deceased in order to repel “a sodomitical attack”.<sup>49</sup> It was alleged that the deceased St. Louis made several advances toward Philbert while they were sitting on St. Louis’s bed. Philbert claimed that St. Louis was trying to unbutton his (Philbert’s) pants, whereupon Philbert pushed St. Louis off the bed, kicked him repeatedly and stamped on his neck while he was on the floor. St. Louis was discovered dead on the floor of his room two days later.<sup>50</sup> Philbert was convicted of murder but the Court of Appeal quashed his conviction, finding that the trial judge failed to give adequate directions on justifiable homicide.<sup>51</sup> *Philbert* established two central principles for the use of justifiable homicide as a homosexual advance defence. First, a homosexual advance constitutes an attempt to commit “a forcible and atrocious crime”.<sup>52</sup> Second, the degree of force used is irrelevant once there is an honest belief based on reasonable grounds that killing is the only way to prevent the sexual act.<sup>53</sup>

Provocation on the basis of a homosexual advance was put forward as a defence in *Marcano v The State*, a Court of Appeal decision from Trinidad and Tobago.<sup>54</sup> The deceased, Christopher Lynch, was killed by the appellant Marcano and Marcano’s friend Nairoon. There was evidence that on the night of the homicide, the three men were socialising at Lynch’s home. It was alleged that Lynch made a sexual advance towards Nairoon, which Nairoon rejected. An argument developed and Marcano then held Lynch while Nairoon chopped Lynch to death. Marcano argued that his actions were in defence of his friend Nairoon.<sup>55</sup> At trial, the jury found Marcano guilty of murder. He appealed against his conviction, on the grounds that the trial judge did not leave the issue of provocation to the jury and gave inadequate directions on self-defence.<sup>56</sup> On the issue of provocation, the Court of Appeal held that the ordinary “right-thinking” person would have responded as Marcano did to a homosexual advance.<sup>57</sup>

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48 See *R v Bartley*, above note 30, p. 411.

49 See *Philbert v The State*, above note 5, Para 40.

50 *Ibid.*, Paras 7 and 14.

51 *Ibid.*, Paras 36–37.

52 *Ibid.*, Paras 23 and 31–32.

53 *Ibid.*, Para 33.

54 See *Marcano v The State*, above note 47.

55 *Ibid.*, pp. 6, 16–17.

56 *Ibid.*, pp. 2–3.

57 *Ibid.*, p. 20.

All three decisions present the ordinary person as a heterosexual offended by, and entitled to react violently to, overtures of same-sex sexuality. Thus, the killing of the gay man was held to be justifiable in *Bartley* and *Philbert*, resulting in acquittal; in *Marcano* the appellant was also freed as the Court of Appeal declined to order a retrial “having regard to all the circumstances” of the case.<sup>58</sup>

The use of the homosexual advance defence, both in cases of provocation and justifiable homicide, pose serious challenges for Caribbean constitutional rights. The following sections of the article analyse the inconsistency of the homosexual advance defence, as borne out in the three cases highlighted above, with the rights to equality and life. In this analysis, the three areas of conflict with constitutional rights are: first, the incorporation of homophobic prejudices in the application of the defences: second, the lack of a sufficient requirement for reasonableness and proportionality in the operation of the homosexual advance defence: and third, the failure to distinguish between a non-violent advance and a violent (and potentially lethal) attack.

## 2. The “Homosexual Advance Defence” and the Right to Equality

The departures of the homosexual advance defence from constitutional rights are demonstrative when seen through the lens of the right to equality. All Commonwealth Caribbean jurisdictions contain constitutional provisions that guarantee the right to equality and prohibit discrimination. The constitutional provisions take different forms but they all prohibit discriminatory laws and discrimination by institutions of the state. The centrality of equality provisions in identifying favoured and disfavoured groups within society contributes to a complex constitutional picture of the protection of equality for sexual minorities in the Caribbean region.<sup>59</sup> There are two general sets of Caribbean constitutional equality sections. The first set of provisions guarantees the right to “equality before the law.” Section 4(b) of the Constitution of Trinidad and Tobago takes this form, providing as follows:

*It is hereby recognised and declared that in Trinidad & 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.*

Section 13(3)(g) of the Constitution of Jamaica and Section 149D of the Constitution of the Co-operative Republic of Guyana also include a “right to equality before the law”.

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58 *Ibid.*, p. 23. Provocation typically reduces a charge from murder to manslaughter, but in this case, the Trinidadian Court of Appeal discharged the appellant.

59 Wheatle, S., “The Rights to Equality and Non-Discrimination and the Jamaican Charter of Fundamental Rights and Freedoms” *West Indian Law Journal*, 2012.

The second set of provisions uses the terminology of discrimination rather than equality and bars discriminatory laws as well as discriminatory treatment by public officials. For instance, Sections 15 (1) and (2) of the Constitution of Saint Christopher And Nevis provide that “no law shall make any provision that is discriminatory either or itself or in its effect” and that “a person shall not be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.”<sup>60</sup> The Constitutions of Dominica and St Lucia take a similar form but are broader in scope in that they prohibit discrimination against “any person or authority”.<sup>61</sup> The Constitutions of Jamaica and Guyana also include provisions barring discrimination on particular grounds.<sup>62</sup>

In states that provide for “equality before the law”, there is a particularly strong case for arguing that discrimination against sexual minorities is unconstitutional. The equality before the law provisions contain no limitation as to the classes of persons to which the right to equality applies. Consequently, equality before the law is not limited by the grounds of non-discrimination specified in other parts of the constitution. These sections are therefore broad enough to prohibit discrimination on the ground of sexual orientation. The Trinidadian Court of Appeal held in *LJ Williams v Smith*<sup>63</sup> that the right to equality before the law in Section 4(b) of the Constitution of Trinidad is not restricted by the bases of discrimination specified in the introductory clause to Section 4.<sup>64</sup> The corresponding sections in other jurisdictions should be interpreted similarly. For example, the equality before the law provision in the Jamaican Constitution should not be limited by the grounds of discrimination specified in section 13(3)(i) of the Jamaican Constitution.

With respect to provisions in the Constitutions of St Kitts and Nevis, Belize, Bahamas, Dominica and St Lucia, all of which bar discrimination on particular grounds, different considerations apply. Section 13(3) of the Constitution of Dominica is representative of the language of the non-discrimination sections. It provides that:

*[T]he expression “discriminatory” means 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.*

The reference to specified grounds of discrimination raises the question whether, on ordinary statutory interpretation principles, the Section presents a closed, finite list of grounds.

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60 Section 16 of the Constitution of Belize and Section 20 of the Constitution of Bahamas are drafted in similar terms.

61 Constitution of Dominica, Section 13(2); and Constitution of St Lucia, Section 13(2).

62 Constitution of the Co-operative Republic of Guyana, Section 149; Guyana; and Constitution of Jamaica, Section 13(3)(i).

63 *LJ Williams v Smith* (1980) 32 WIR 395.

64 *Ibid.*, pp. 424–427, per Kelsick JA.

There are several arguments that can be made to refute the position that the specified grounds are exhaustive. First, it may be argued that the “closed list” position rests on a general rule of statutory interpretation applicable to ordinary laws but which should be displaced in interpreting a constitution. The Privy Council, as the final appellate court for the vast majority of Commonwealth Caribbean states, has established that courts must treat:

*[A] constitutional instrument (...) as sui generis, calling for principles of interpretation of its own, suitable to its character (...) without necessary acceptance of all the presumptions that are relevant to legislation of private law.*<sup>65</sup>

This means that, in the words of Lord Wilberforce, bills of rights “call for a generous interpretation avoiding what has been called ‘the austerity of tabulated legalism’, suitable to give to individuals the full measure of (...) fundamental rights and freedoms”.<sup>66</sup> However, courts have also cautioned against applying the principle of generous interpretation in ways that distort the meaning of the text. Thus, the Privy Council counselled in *Matadeen v Pointu*<sup>67</sup> that, in applying a “generous interpretation” a court ought to be mindful of the fact that it is engaged in “interpretation”, not “divination”.<sup>68</sup> Nonetheless, allowing for an open list of protected classes of discrimination provides the generous interpretation that is suitable for constitutional rights’ protection without unduly stretching the meaning of the words used in the discrimination clauses.

The second argument in favour of the open list position is grounded in another celebrated principle of constitutional interpretation: that constitutions must be interpreted as living instruments. It is settled law that a constitution is a living instrument and its provisions must accordingly be “judicially adapted to changes in attitudes and society”.<sup>69</sup> However, it must be noted that the Privy Council has held that not all provisions are so susceptible to adaptation, and that provisions that are “expressed in general and abstract terms”, “in particular, the fundamental rights’ provisions”, require such adaptation while provisions that are drafted in more specific, concrete terms do not.<sup>70</sup> While Section 13(3) of the Constitution of Dominica, noted above, is a fundamental rights provision, it is debatable whether its list of prohibited grounds can be properly characterised as “general and abstract”. By way of comparison, the Privy Council has applied the living instrument principle to the term “cruel and unusual

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65 *Minister of Home Affairs v Fisher* [1980] AC 319, p. 329.

66 *Ibid.*, p. 328.

67 *Matadeen v Pointu* [1999] 1 AC 98.

68 *Ibid.*, p. 108. See also the decision of the Constitutional Court of South Africa in *National Coalition for Gay and Lesbian Equality v Minister of Justice* (1998) 6 BHR 127, Para 21.

69 *Boyce v R* [2004] UPKC 32, Para 29.

70 *Ibid.*, Paras 28 and 55.

punishment”,<sup>71</sup> which is arguably more abstract than the specified list of grounds in Section 13(3). Further, the living instrument principle is generally applied to the meaning of a term that has not been defined.<sup>72</sup> This raises the question whether it can be used to update the meaning of discrimination, as that term has been defined. So while the living instrument principle is a powerful tool, it is not clear how much it can contribute to an argument for the extension of the prohibited grounds of discrimination.

A third and potentially potent argument in favour of the open list claim is that judicial interpretation of a similar provision in the Commonwealth African state of Botswana provides support for an interpretation of the non-discrimination sections as providing an open list of grounds. In *Makuto v The State*,<sup>73</sup> the Court of Appeal of Botswana held that the prohibited grounds of discrimination in Section 15 of the Constitution of Botswana should be extended to include discrimination on the basis of HIV status.<sup>74</sup> Section 15 provides that:

*[T]he expression “discriminatory” means affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour or creed.*

The President of the Botswana Court of Appeal argued that the framers of the Constitution had no intention of limiting the categories of groups protected from discrimination to those specified in Section 15, but rather, the groups specified were by way of example of what the framers thought were the most likely areas of discrimination.<sup>75</sup> Guidance ought to be sought from this constitutional decision of the Botswana Court of Appeal due to the close similarity between Section 15 of the Constitution of Botswana and the Caribbean non-discrimination sections referred to above. The Botswanan Court’s interpretation of the corresponding section ought to be considered highly persuasive to Caribbean judges in those jurisdictions with similar non-discrimination provisions. Overall, in light of the above three considerations, there is a convincing argument to be made that the non-discrimination sections provide an open list of protected categories, so that the door is open for protection of gay and lesbian members of society.

If the open list position is accepted for the group of states with non-discrimination sections, a caveat must be entered with respect to Jamaica and Guyana. Legislative history suggests that the non-discrimination sections in those two states do not include discrimination on the grounds of sexuality. In both jurisdictions, the non-discrimination sections

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71 See *Boyce v R*, above note 69, Para 24.

72 See, eg, *Thomas v Baptiste* [2000] 2 AC 1, p. 24; and *Bell v Director of Public Prosecutions* [1985] AC 937, p. 948.

73 *Makuto v The State* [2000] 5 LRC 183.

74 *Ibid.*, pp. 187–189.

75 *Ibid.*, p. 189, citing *Dow v AG* [1992] LRC (Const) 623.

were the result of recent legislative action, 2003 in the case of Guyana, and 2010 in the case of Jamaica. In debates on the grounds of discrimination to be listed as prohibited grounds in the Constitution, the question of discrimination on the grounds of sexuality arose, and in both jurisdictions the terms were constructed to exclude discrimination on the grounds of sexuality. In Jamaica, the non-discrimination section bars discrimination on the ground of “being male or female”.<sup>76</sup> The unusual phraseology of “male or female” was preferred to the more common terms “sex” or “gender”. The term “gender” was rejected on the basis that it was too flexible and could be understood as any classification “roughly corresponding to the two sexes and sexlessness”.<sup>77</sup> The term “sex” was, in turn, rejected on the basis of fear that the word sex might be interpreted to include “sexual orientation”.<sup>78</sup> In Guyana, the original Act to amend the non-discrimination section did include sexual orientation as a prohibited ground, but in the face of opposition from religious groups, the President of Guyana refused to give assent to the Act.<sup>79</sup> Consequently, a new act which excluded sexual orientation was passed and given presidential assent.<sup>80</sup>

In summary, the constitutional right to equality before the law is clearly applicable to gay and lesbian persons in the “equality before the law” states (Jamaica, Guyana and Trinidad and Tobago). Despite the exclusion of protection for gay persons in the non-discrimination sections in Jamaica and Guyana, equality protection is also conferred in these two states by the equality before the law provision. In the states in which there are only non-discrimination sections, but no “equality before the law” provisions, the argument that gay persons are protected by a constitutional right to non-discrimination is a more difficult one, though it is persuasive. Accordingly, there is a strong argument to be made that, generally, sexual minorities in the Commonwealth Caribbean are entitled to the benefit of the constitutional rights to equality and non-discrimination. Using Henry Shue’s analysis of the duties flowing from basic rights, attendant upon the right to equality are duties on the state and state institutions, including parliament and the courts, to respect, protect and fulfil the right to equality.<sup>81</sup> Therefore, the content of criminal laws and their application by the institutions of the state must be examined to determine if the laws, and their application, are consistent with the equality obligations arising in the various constitutions.

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76 Constitution of Jamaica, Section 13(3)(i)(i).

77 Government of Jamaica, *Report of the Joint Select Committee on its Deliberations on the Bill Entitled An Act to Amend the Constitution of Jamaica to Provide for a Charter of Rights and For Connected Matters*, Houses of Parliament, available at: <http://jis.gov.jm/media/charter-of-rights1.pdf>.

78 *Ibid.*

79 Research Directorate, Immigration and Refugee Board, Canada, “Guyana: Treatment of gays and availability of state protection (Update to GUY40837.E of 26 February 2003)”, 29 January 2004.

80 Constitution (Amendment) (No. 2) Act 2003, Section 15.

81 Shue, H., *Basic Rights*, Princeton University Press, 1980, p. 51; and Fredman, S., *Human Rights Transformed: Positive Rights and Positive Duties*, Oxford University Press, 2009, p. 69.

Using Shue's framework, the defence of justifiable homicide violates the right to equality. The defence of justifiable homicide to prevent a "forcible and atrocious crime" in its modern embodiment in the Caribbean, is solely used to defend the killing of gay men. The only Caribbean appellate cases in which the defence of justifiable homicide was successful were those in which the deceased was a gay man.<sup>82</sup> Accordingly, though the defence is ostensibly neutral on the surface, it has a clear discriminatory impact on gay men. This is an instance of indirect discrimination, which has been held to constitute a violation of the equality provisions of Caribbean constitutions.<sup>83</sup> For example, the Belize Court of Appeal in *Wade v Roches*<sup>84</sup> held that the dismissal of the applicant from a Catholic public school because her unmarried pregnancy evinced a departure from Jesus' teachings on sex and marriage was unconstitutional sex discrimination.<sup>85</sup> This decision amounted to recognition of indirect discrimination as unconstitutional since the basis of the dismissal, though neutral on the face of the policy which was to live according to religious doctrine, operated with a discriminatory impact on women.<sup>86</sup> The discriminatory impact of the justifiable homicide defence in prevention of a forcible and atrocious crime is manifest in the exclusive use of the defence in cases of homicide against gay men. Further, the judgment in *Philbert* made it clear that it was the nature of the advance being a same-sex advance that rendered it an attempt to commit a forcible and atrocious crime; therefore, it was the sexual orientation of the deceased and the advance that was relevant, not the question whether the advance was made violently.

The law on provocation, as applied in homicide cases involving gay men, also results in unequal treatment, chiefly because the provocation defence is applied in a manner that treats gay victims differently from other victims. The problems lie in the use of a non-violent sexual advance as an acceptable basis for the defence of provocation and the analysis used in the cases which suggest that the success of the defence is due to the fact that the sexual advance was made to a member of the same sex. The indirect discrimination resulting from the discriminatory impact on gay men is well represented in the *Marcano* case. The Chief Justice in *Marcano* repeatedly stated that the defendants would have been repulsed by the deceased's "overtures", that "there could be nothing more reprehensible", and "[t]hat is the sort of thing that sends people crazy, in a frenzy".<sup>87</sup>

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82 No cases were able to found in which the defence was successful in other circumstances. See Wheatle, S., *Adjudication in Homicide Cases involving Lesbian, Gay, Bisexual and Transgendered Persons in the Commonwealth Caribbean*, Faculty of Law UWI Rights Advocacy Project, 2013.

83 An argument may also be made that, in many cases, public and judicial authorities are directly discriminating against gay men in their application and enforcement of the law relating to both justifiable homicide and provocation. However, this article is concerned with constitutionality of the laws themselves.

84 *Wade v Roches* (unreported, CA, Belize), 9 March 2005.

85 *Ibid.*, Paras 36–38.

86 See above, note 59, p. 132.

87 See *Marcano v The State*, above note 47, pp. 7–8 and 10.

Unequal treatment in homosexual advance cases is further perpetuated by the judgments' acceptance and legitimisation of prejudice against gay men. Thus, we see gay men being represented as inherent threats to masculinity and society, and as criminals. The Court of Appeal in the *Philbert* case referred to the deceased gay man as "the perpetrator",<sup>88</sup> hence casting the deceased, who would ordinarily be conceived as "the victim", in the role of "the criminal". In the use of a homosexual advance defence, the judgments reflect a perception of the gay man as dangerous and of same-sex sexuality as inherently abnormal and criminal. Accordingly, an advance by a gay man is perceived as an "attack" within the law of justifiable homicide as applied in the Caribbean. The gay man is cast in the role of perpetrator and attacker and the defendant is cast as "the [potential] victim of a homosexual act."<sup>89</sup>

Further, the analysis in *Marcano* was indicative of stereotypical perceptions of gay men. The deceased was repeatedly described as an "older man" and "a bigger man", while his killers were characterised as "boys who were not wise to the world", although they were actually aged 17 and 20.<sup>90</sup> These characterisations appear to project a stereotype of gay men as a corrupting influence on youth, and consequently, as a danger to the future of society and the state. Thus, the characterisations of gay men in these cases reflect perceptions of gay men that suggest that they are not to be treated as victims of crime. This again represents the lasting and pervasive impact of the heteronormative construction of the state and the "othering" of non-heterosexual masculine individuals within the criminal law.

The heteronormative implications also result in a perception of the "ordinary man" as one who reacts to overtures from a person of the same sex with repulsion and violence. During the Court of Appeal hearing in *Marcano*, Sharma CJ remarked that "it is well to remember that in this particular case (...) this incident started (...) with the rebuff or the repulsion of the overtures made by Lynch [the deceased] to these two young men."<sup>91</sup> In the course of delivering the Court of Appeal's judgment, Sharma CJ appealed again to the sentiment of repulsion against the "unnatural" practices of gay men and a perpetuation of the notion that the normal response of the ordinary man to invitations to engage in such "unnatural acts" is deadly violence. In the view of the Chief Justice, this was "a case where (...) the acts themselves were so unnatural" that any "right thinking person" could have reacted as the defendant and his friend did.<sup>92</sup>

An antidote to this heteronormative approach is to reject the conception of the ordinary person as one imbued with prejudices against sexual minorities. The Canadian Supreme Court has perhaps provided the clearest and boldest statement rejecting the homosexual advance

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88 See *Philbert v The State*, note 5, Para 33.

89 *Attorney General v Jones* BS 20120 CA 98.

90 See *Marcano v The State*, above note 47, pp. 6–7.

91 *Ibid.*, p. 10.

92 *Ibid.*, pp. 20–21.

defence in general<sup>93</sup> and the heterosexist notions of the ordinary person in particular. The Canadian Supreme Court held in *R v Tran* that:

*[T]he ordinary person standard must be informed by contemporary norms of behaviour, including fundamental values such as the commitment to equality provided for in the Canadian Charter of Rights and Freedoms. For example, it would be appropriate to ascribe to the ordinary person relevant racial characteristics if the accused were the recipient of a racial slur, but it would not be appropriate to ascribe to the ordinary person the characteristic of being homophobic if the accused were the recipient of a homosexual advance.*<sup>94</sup>

### 3. The Right to Life

Beyond the challenges presented to the right to equality by both provocation and justifiable homicide, justifiable homicide is more incongruous in a modern constitutional regime as it undermines the fundamental right to life of gay men. There are two general forms of right to life sections in Caribbean constitutions. In the first category are sections which comprise two elements, which may be described as a positive element and negative element. The positive element states that individuals are entitled to the right to life. The negative element states that individuals shall not be deprived of that right except in specified circumstances. For instance, Section 13(3)(a) of the Constitution of Jamaica provides for:

*[T]he right to life, liberty and security of the person and the right not to be deprived thereof except in the execution of the sentence of a court in respect of a criminal offence of which the person has been convicted.*<sup>95</sup>

Guidance on the interpretation of this first category can be obtained from the interpretation of the similarly drafted right to life in Article 2(1) of the European Convention on Human Rights (ECHR), which provides that:

*Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*

Indeed, the relevance of such an interpretation is reinforced by the use of Article 2(1) as a model in constitutional drafting in the Caribbean and by Caribbean appellate references to

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93 Lunny, A., "Provocation and "Homosexual" Advance: Masculinized Subjects as Threat, Masculinized Subjects under Threat", Vol. 12, *Social & Legal Studies*, 2003.

94 *R v Tran* [2011] 3 LRC 437, Para 34.

95 Section 4(a) of the Constitution of Trinidad and Tobago also includes positive and negative elements, recognising "the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law".

decisions of the European Court of Human Rights (ECtHR) in deciding constitutional cases.<sup>96</sup> In interpreting Article 2(1), the ECtHR has declared that the state has a duty to “secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person.”<sup>97</sup> There is accordingly, a duty on the institutions of state, including parliaments and the courts, to take steps to safeguard life and “to provide effective deterrence against threats to the right to life.”<sup>98</sup>

In the second set of sections found in other Commonwealth Caribbean constitutions, only the negative element appears. For example, Article 138(1) of the Constitution of the Co-Operative Republic of Guyana provides that “[n]o person shall be deprived of his life intentionally save in the execution of the sentence of a court in respect of an offence under the law of Guyana of which he has been convicted.”<sup>99</sup> However, the omission of the positive element does not exclude positive obligations. In a decision on the constitutionality of the Domestic Violence Act of St Lucia, Barrow J, sitting on the bench of the High Court of St Lucia, stated in *obiter dicta* that the state has a constitutional obligation to protect persons from domestic violence, arising from the rights of individuals to “life, liberty, security of the person, equality before the law and the protection of the law.”<sup>100</sup> Moreover, as celebrated Caribbean jurist Margaret Demerieux has argued with respect to this second category of right to life sections that do not expressly include the positive element:

*[A] right to life must, however formulated, go beyond an obligation on the state not to take life intentionally and to secure to citizens protection against the taking of life by private persons. Consequently, the minimum obligation of the right to life forbids the state from taking life and requires it as well to ensure a legal regime in which murder and seriously life threatening action is illegal.*<sup>101</sup>

The right to life in Commonwealth Caribbean jurisdictions is not constructed as an absolute right; accordingly in most Caribbean states, the right may be limited by the legally sanctioned

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96 Parkinson, C., *Bills of Rights and Decolonization the Emergence of Domestic Human Rights Instruments in Britain's Overseas Territories*, Oxford University Press, 2007, pp. 185-96; and *Reyes v the Queen* [2002] 2 AC 235, Para 42.

97 *Keenan v UK*, App. No. 27229/95, 3 April 2001, Para 89. See also *Osman v UK*, App. No. 87/1997, 28 October 1998.

98 *Oneryildiz v Turkey*, App. No. 48939/99, 30 November 2004, Para 89.

99 The following constitutions are in very similar terms: Constitution of Barbados, Section 12; Constitution of Antigua and Barbuda, Section 4; Constitution of St Christopher and Nevis, Section 4; Constitution of St Lucia, Section 2; Constitution of St Vincent and the Grenadines, Section 2; Constitution of Grenada, Section 2; Constitution of Dominica, Section 2; and Constitution of the Bahamas, Section 16.

100 *Francois v AG of St. Lucia* (unreported, HC, St. Lucia), 24 May 2001.

101 DeMerieux, M., *Fundamental Rights in Commonwealth Caribbean Constitutions*, University of the West Indies, 1992, p. 122.

use of force, which is “reasonably justifiable in the circumstances”.<sup>102</sup> Therefore, the requirement of a reasonable justification for using deadly force is a principle that must be respected by the criminal law of each jurisdiction. The criminal law, including defences to murder, must ensure that deadly force is only justified or excused where such force is reasonably justifiable. This implies reasonableness in the use of deadly force and proportion between the deadly violence and the trigger for such violence.

Assessing the defence of justifiable homicide in prevention of a “forcible and atrocious crime”, it is readily apparent that its application by the courts in homosexual advance cases fails to meet this constitutional standard. The Jamaican Court of Appeal held in *Bartley* that:

*[I]f the intent to commit the forcible and atrocious crime is clearly manifested and there is an honest belief based on reasonable grounds that the commission of the crime can only be prevented by killing the assailant, the degree of force used in repelling the attack is generally irrelevant.*<sup>103</sup>

Though there is reference to an honest belief on reasonable grounds that the crime can only be prevented by killing, the concept of reasonableness is negated by two further considerations. First, the Court unquestioningly accepted that it is justifiable to use deadly force in response to a non-lethal attack (a “sodomitical attack”).<sup>104</sup> Second, the court countered the reference to reasonableness by insisting that “the degree of force used (...) is irrelevant” once there was an honest belief based on reasonable grounds that killing was required to repel the commission of sodomy. This holding set the stage for the judgment in *Philbert*, which would emphasise the irrelevance of any critical assessment of the degree of force used.

In the course of delivering the judgment of the Court of Appeal acquitting the appellant Philbert, the Court expressly marginalised the reasonableness of use of force. Two passages of the judgment are crucial on this issue. In the first, it was stated that:

*The law is that (...) a person faced with a sodomitical attack may even pursue his assailant until he finds himself out of danger, but he must not strike blows except in self-defence. Neither does the relevant law require the degree of force used by the appellant in repelling the attack to be proportionate to the seriousness of the attack and the danger to the person attacked.*<sup>105</sup>

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102 See, for example, Constitution of Antigua and Barbuda, Section 4(2); and Constitution of Belize, Section 4(2).

103 See *R v Bartley*, above note 30, p. 411.

104 See *Philbert v The State*, above note 5, Para 30.

105 *Ibid.*, Para 32.

It is worth pinpointing that reasonableness and proportionality are excluded as requirements for the defence by the paradoxical idea that the defendant is entitled to “pursue his assailant until he finds himself out of danger” and by the statement that the law does not require the degree of force to be proportionate to the seriousness of the attack or the danger to the defendant.

The subsequent passage reads as follows:

*The law requires that the appellant should have had, at the material time, an honest belief based on reasonable grounds that the deceased's sodomitical attack could only be prevented by pushing the deceased as he did and kicking him whilst he was on the floor trying to get up. If the appellant, when faced with the deceased's buggery attempt on him, had that requisite honest belief, the degree of force that he used would be irrelevant. The appellant in such a case does not have to show that it was necessary for him to use force, even deadly force. Necessity for using deadly force against the perpetrator is presumed by the law in such circumstances. It would be the deceased's attempt to bugger him that justifies the appellant's use of force.*<sup>106</sup>

Though the court paid lip service to the idea that the defendant should have “an honest belief based on reasonable grounds” that it was necessary to act as he did, it then proceeded to hold that the necessity of using deadly force is “presumed by the law in such circumstances” and that the use of force is justified by the mere existence of the deceased’s “attempt” to have sexual relations with the defendant. This denial of a role for reasonableness in measuring the use of force led to the acquittal of *Philbert*, who repeatedly inflicted brutal and severe wounds on the deceased, even after the evidence suggests that the deceased had been disabled. The Court also concluded that since the degree of force was irrelevant, the jury should have been directed to “acquit the appellant without reference to the medical evidence as to the nature and extent of the injuries (...) and their opinion as to how these injuries were inflicted.”<sup>107</sup> This case highlights in stark terms the impact of removing the requirement of reasonableness and proportionality from the determination of whether the use of force resulting in death was justifiable. By failing to incorporate a requirement of reasonableness or proportionality, the use of justifiable homicide as a homosexual advance defence condones homicidal violence which cannot be considered “reasonably” or “demonstrably justified” as is required by the constitutional guarantees of the right to life.

The lack of reasonableness and proportionality in the application of the defence of justifiable homicide in the Caribbean is compounded by the failure to distinguish between what is termed a “homosexual advance” and a “homosexual attack”. In fact, the terms are used

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106 *Ibid.*, Para 33.

107 *Ibid.*, Para 35.

interchangeably. For instance, in *Philbert*, the Court of Appeal found that the “appellant was repelling a buggery attack on him by the deceased”,<sup>108</sup> while also referring to the deceased’s “buggery advances” and “sexual advances”.<sup>109</sup> This fails to create a distinction between an assault and an advance, and in turn, between a violent act and a non-violent act. The result is to create the impression that any advance by a gay man to a heterosexual man is *ipso facto* an assault and violent. It would also lead to the conclusion that hostility, violence, and homicide are appropriate responses to physical expressions of same-sex sexuality.<sup>110</sup>

By contrast with the modern Caribbean use of the defence, the ancient common law rules on justifiable homicide on the ground of prevention of a “forcible and atrocious crime” are no longer recognised in the common law states of Australia, Canada, or the UK. These jurisdictions have reformulated the defence and incorporated clearer requirements of reasonableness and proportionality in the use of force. In England and Wales, the ancient common law rules on justifiable homicide in the prevention of a crime were replaced decades ago by Section 3 of the Criminal Law Act 1967.<sup>111</sup> Under Section 3, the question whether killing in the course of preventing a crime is justified is to be determined by questioning whether the degree of force used was reasonable in the circumstances of the case.<sup>112</sup> The Section therefore rejects the notion that the degree of force used would be irrelevant, a notion adopted by the Caribbean cases on justifiable homicide as a response to a homosexual advance. The requirement of proportionality or reasonableness is also a requisite element of the lethal use of force in defence of oneself or another in Australia and Canada. Australian laws on the use of force in prevention of crime have “rules incorporating expressly or by implication some measure of proportion.”<sup>113</sup> In the Australian state of Victoria, for instance, Section 462A of the Crimes Act 1958 (Vic) permits the use of force which is not disproportionate for the purpose of preventing indictable offences. In Tasmania, Section 41 of the Criminal Code Act 1924 (Tas) only permits such force as is reasonably believed to be necessary to prevent crimes involving immediate and serious injury to person or property. With respect to the Commonwealth of Australia, Section 10.4 of the Criminal Code Act 1995 (Cth) permits such use of force in the prevention of crime which is a reasonable response to the circumstances as perceived by the person who uses such force. The concepts of reasona-

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108 *Ibid.*, Paras 26 and 28.

109 *Ibid.*, Paras 27 and 28.

110 Attorney-General’s Department (New South Wales), *Review of the “Homosexual Advance Defence”*, August 1996, p. 14, cited in Tomsen, S. and George, A., “The Criminal Justice Response to Gay Killings: Research Findings”, *Current Issues in Criminal Justice*, Vol. 9, 1997–1998.

111 The section reads as follows: “(1) A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large. (2) Subsection (1) above shall replace the rules of the common law on the question when force used for a purpose mentioned in the subsection is justified by that purpose.”

112 See above, note 28, Smith and Hogan, , pp. 229–230.

113 Lanham, D., Bartal, B., Evans, R. and Wood, D., *Criminal Laws in Australia*, Federation Press, 2006, p. 85.

bleness and proportionality also permeate the provisions on justifiable use of force in the Criminal Code of Canada.<sup>114</sup>

The most relevant comparative statement on the constitutional standing of the defence of justifiable homicide is the judgment of the South African Constitutional Court in *Re State v Walters*<sup>115</sup> on the constitutionality of Section 49(2) of the Criminal Procedure Act. Section 49(2) declared it to be justifiable homicide where a person reasonably suspected of a scheduled offence was killed in circumstances where he could not be arrested or prevented from fleeing. The Constitutional Court held that in authorising the use of lethal force even when (as is the case for some scheduled offences) there was no threat of any, or serious bodily harm, Section 49(2) was disproportionate.<sup>116</sup> The Court therefore declared the Section invalid for violation of the right to life and human dignity under Sections 10 and 11 of the Constitution of South Africa. In light of the persuasive weight Caribbean courts have placed on South African Constitutional Court's judgments,<sup>117</sup> the decision of the South African Constitutional Court on the constitutionality of justifiable homicide ought to have persuasive weight in Caribbean courts. The Constitutional Court's reasoning provides explicit constitutional examination of the lack of a requirement of reasonableness and proportionality in one category of justifiable homicide, reasoning which would undoubtedly be instructive in determining the constitutionality of justifiable homicide in prevention of "a forcible and atrocious crime".

Despite the fundamental judicial responsibility of subjecting all laws and institutions to the prescriptions of the constitution, the *Philbert* and *Bartley* judgments demonstrate no awareness on the part of the judges of the constitutional rights framework in which they must execute their functions. The judgments adopt a defence developed in centuries past and apply it in contemporary times without updating the defence to account for the contemporary constitutional context. Further, the potential impact of the two decisions is significant: they emanate from appellate courts in the region and therefore, provide a persuasive source of law for courts in other Commonwealth Caribbean jurisdictions.

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114 See, for example, Section 34 and 37 of the Criminal Code: "34 (2) Everyone who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if (a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and (b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm. 37. (1) Everyone is justified in using force to defend himself or anyone under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it. (...) (2) Nothing in this section shall be deemed to justify the wilful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force used was intended to prevent."

115 *Re State v Walters* [2003] 1 LRC 493.

116 *Ibid.*, Paras 44–46.

117 See, for example, *Maurice Tomlinson v Television Jamaica Ltd* (unreported, SC, Jamaica), 15 November 2013, Paras 50–54 and 168–190.

#### 4. The Way Forward

The constitutional departures of the homosexual advance defence from both the right to life and the right to equality are unsustainable. Under both provocation and justifiable homicide, invocations of non-violent homosexual advances as bases for a defence to murder must be rejected. This would follow a compelling trend in other Commonwealth jurisdictions in which there is increasing recognition of the modern incongruity of homosexual advance defences. As noted above, Canadian appellate courts have rejected such pleas. Further, reviews of case law and statute in Australian states and territories have led to reform of the relevant laws<sup>118</sup> and the Australian Capital Territory and the Northern Territory have enacted legislative provisions excluding non-violent sexual advances from the defence of provocation.<sup>119</sup>

A clear judicial route for resolving the inconsistency posed by the use of the homosexual advance defence as a basis of provocation would be to reject such a claim as a triggering factor for the purposes of provocation. This would resolve the inequality posed by this application of provocation while leaving the more general complaints and broader issues facing the provocation defence to be resolved by the respective legislatures. Regarding justifiable homicide in the prevention of a forcible and atrocious crime, both the very core of the defence and its application are unconstitutional as it not only violates the right to life by justifying unreasonable degrees of force, but is also blatantly discriminatory in its exclusive application to homosexual advances. This category of justifiable homicide is therefore irredeemable and must be resigned by the courts under their constitutional obligation to enforce the supremacy of the constitution or abolished by Caribbean legislatures.

#### Conclusion

A persistent human frailty that each society must confront is the tendency to prejudice, which often manifests itself in fear of, and discrimination against, that which we perceive as “the other”. This presents a challenge to legislators and jurists in crafting and applying criminal law and constitutional law. If the criminal law is to reflect the rights and obligations emanating from the Caribbean Constitution, it must resolve issues concerning excusatory and justificatory defences to charges for murder in a manner that respects the life and equal worth of all individuals in the state. This requires state institutions to be cognisant that the human frailty of prejudice, manifested in a fear of same-sex sexuality, is one that must not be excused or justified by the state when it results in the killing of sexual minorities. Yet, the application of justifiable homicide and provocation in gay homicide cases does sanction such violence and signifies state perpetuation of prejudicial attitudes towards gay men.

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118 See, for example, Law Reform Commission of Western Australia, *Final Report: Review of the Law of Homicide*, September 2007; and Queensland Law Reform Commission, *A review of the excuse of accident and the defence of provocation*, Report No 64, September 2008.

119 Crimes Act 1900 (ACT), Section 13(3); and Criminal Code Act 1983 (NT), Section 158(5).

This article maintains that the danger of justifiable homicide to the constitutional rights fabric of the state is more acute in the sense that it infringes on the rights to life and equality, while the use of a homosexual advance defence as the basis of provocation undermines the equal protection afforded to gay men and lesbians under the law. The use of a homosexual advance defence reflects a perception of the gay man as dangerous and of same-sex sexuality as inherently abnormal and criminal. Accordingly, a same-sex advance by a gay man is perceived as an “attack” and gay men are cast in the role of perpetrators. Used as a homosexual advance defence, both provocation and justifiable homicide embody unconstitutional state sanction of lethal violence against sexual minorities, which rather than alleviating the impact of the prejudice against sexual minorities in society, perpetuates this prejudice and effectively targets sexual minorities as worthy of not only opprobrium, but also death.