DEMOCRACY IN DISGUISE: ASSESSING THE REFORMS TO THE FUNDAMENTAL RIGHTS PROVISIONS IN GUYANA

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After more than a two-year delay, and amid much controversy that polarized an otherwise apathetic population, the Constitution (Amendment) (No. 2) Bill 2003 (hereinafter Act 10) was presented for the second time to Parliament in July 2003. This time, all references to non-discrimination on the ground of sexual orientation were excised from its provisions, a move that guaranteed straight passage through Parliament. With the offending clause out of the way, the president assented to the bill, and it became law on August 12, 2003.¹ This ought to have been cause for celebration, even in the absence of the controversial amendment to the non-discrimination clause. After all, this bill represented the culmination of the work of the Constitution Reform Commission, whose remit included making recommendations to strengthen the fundamental rights provisions of the controversial 1980 Constitution. In keeping with its mandate, the explanatory memorandum to the bill grandly promised the “elevation” of certain principles in the Constitution to the status of fundamental rights, as well as the creation of “new” fundamental rights and human rights.²

Rhetoric notwithstanding, the actual substance of the bill turned out to be gravely disappointing, falling far short of the expectations raised by the costly reform process. In all fairness, Act 10 does address some of the shortcomings of the 1980 Constitution, and takes some tentative steps in the right direction. To a regrettably large degree, however, the reforms do not go far enough, and the equivocation surrounding the non-discrimination clause is but one example. Other reforms, such as the incorporation of international human rights standards, have been so butchered in their implementation that their impact on Guyana’s regime of human rights and fundamental freedoms is likely to be negligible. Most surprising of all is the fact that many provisions are ill-conceived, and reveal a limited understanding of human rights

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¹ Constitution (Amendment) (No. 2) Act, No. 10 (2003) (Guy.).
² Legal Supplement, OFFICIAL GAZETTE (Guy.), July 4, 2003.
jurisprudence. Before embarking on this analysis, however, it might be useful to outline briefly the political background that preceded Act 10.

I. BACKGROUND TO CONSTITUTIONAL REFORM

Following the December 1997 general elections, Georgetown was once again wracked by internal strife and dissension. The now familiar pattern of street protests, bomb threats and paralyzing ethnic tensions replayed itself before a dismayed public, and it took the intervention of the previously indifferent Caribbean Community (CARICOM) to achieve a truce between the ruling party and the opposition, and with that, a temporary halt to the disturbances. The resulting agreement, referred to as the Herdmanston Accord, required constitutional reform among its menu of measures, with the ultimate objective being the improvement of race relations.3

As it turned out, it took another year for a Constitution Reform Commission (CRC) to be established. With this delay, and because of the timeline previously agreed on, the CRC was left with a mere six months to conduct public consultations and deliver its report. The CRC was mandated to address, during its review of the Constitution, “the full protection of the fundamental rights and freedoms of all Guyanese under the law and the CARICOM Charter of Civil Society.”4 Other matters to be considered included the functioning of the various branches of government, electoral reform and the rights of certain vulnerable groups. Eventually, on July 17, 1999, the CRC presented its report to Parliament. The report included detailed recommendations on the Bill of Rights as well as on the presidency, the Cabinet, the judiciary, Parliament, local government, elections, national security, the service commissions, and even the economy.5 The majority of these were implemented in piecemeal fashion throughout 2000 and 2001 by approximately ten statutes amending the Constitution. The last was Act 10, which contained the bulk of the changes to the fundamental rights provisions approved by the Parliamentary Oversight Committee. Initially tabled in Parliament in late 2000, Act 10 was unanimously passed. However, by the time it was presented to the president for his assent, several Christian fundamentalist groups belatedly discovered its

5 REPORT OF THE CONSTITUTIONAL REFORM COMMISSION TO THE NATIONAL ASSEMBLY OF GUYANA on July 17, 1992 [hereinafter CONSTITUTIONAL REFORM COMMISSION REPORT].
existence and mounted a frenzied public campaign against it on account of its inclusion of sexual orientation as a forbidden ground of discrimination. The result, as they say, is history. The president ignored the unanimous vote of the legislators and refused to give his assent. Shortly thereafter, Parliament was dissolved for accelerated general elections slated for March 2001, and Act 10, not having been signed into law, expired.

It was this history that delayed the implementation of the recommendations of the CRC regarding fundamental rights, and led to the re-introduction of the bill in Parliament in 2003. This time around, however, the government took the politically expedient route and presented Act 10 to Parliament purged of all references to sexual orientation. This sanitized version, though becoming law and purporting to enact the recommendations of the CRC, is lacking not only on account of its omission of the sexual orientation clause, but also with respect to the actual changes implemented. This Article proposes to examine Act 10 in three sections: Part II will be devoted to the amendments to the various fundamental rights guarantees; Part III will analyse the so-called new rights created; and Part IV will comment on various issues ignored by Act 10, in particular the abandoned sexual orientation non-discrimination guarantee.

II. AMENDMENTS TO EXISTING GUARANTEES

A. Article 40(1)

Leading the suite of constitutional amendments is the drastic alteration of article 40(1), a provision that precedes the substantive fundamental rights guarantees of the Constitution. In its original form, as in the constitutions of all the Commonwealth Caribbean countries except that of Trinidad and Tobago, this article provided:

Every person in Guyana is entitled to the basic right to a happy, creative and productive life, free from hunger, disease, ignorance and want. That right includes the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely—

(a) life, liberty, security of the person and the protection of the law
(b) freedom of conscience, of expression and of assembly and association, and
(c) protection for the privacy of his home and other property and from deprivation of property without compensation.\(^6\)

The specific guarantees relating to life, liberty, protection of the law and other rights, adverted to in the three sub-articles, also are outlined in Title 1 of the Constitution, commonly referred to as the Bill of Rights.\(^7\)

Jurists had long considered article 40 as merely introductory and not conferring any justiciable rights, and no less an authority than the venerated Chancellor J.O.F. Haynes propounded this view in *Ameerally v. Attorney General*.\(^8\) In this case, the appellants were charged with attempting to commit an indictable offence, specifically an attempt to defraud the intending purchaser by falsely inflating the worth of a commodity being sold. The Court of Appeal agreed with the appellants that no offence was disclosed, as false pretences cannot be grounded on a statement of opinion or representation of quality. The Court held that “protection of the law” in section 3 of the 1966 Constitution (the predecessor to article 40 in the 1980 Constitution), relied on by the appellants, was not meant to confer enforceable rights and therefore did not prevent the State from proceeding with the charge.\(^9\)

On this view, article 40 serves no purpose and ought to be dispensable without adverse consequences. That appears to have been the reasoning of the drafters, for Act 10 has repealed the whole of paragraph (1) of article 40 and replaced it with the terse statement: “Every person in Guyana is entitled to the basic right to a happy, creative and productive life, free from hunger, ignorance and want. That right includes the fundamental rights and freedoms of the individual.” The tragedy of this amendment, however, is that it ignores developments in the law, and extinguishes in one fell swoop the nascent growth of jurisprudence both in Guyana and the rest of the Caribbean that had begun to accord to article 40(1), and in particular its “protection of the law” clause, a more dynamic and vibrant role.

*Kent Garment Factory v. Attorney General of Guyana*\(^10\) was one of the earliest cases to depart from *Ameerally*. By then, the 1966 Constitution had

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\(^{6}\) GUY. CONST. art. 40(1); available at http://www.georgetown.edu/pdba/Constitutions/Guyana/guyana96.html.

\(^{7}\) GUY. CONST. tit. 1.

\(^{8}\) [1978] 25 W.I.R. 272 (Guy.).

\(^{9}\) *Id.*

\(^{10}\) [1991] 46 W.I.R. 177 (Guy.).
been replaced, and its section 3 provision was slightly modified in article 40 of the new 1980 Constitution by the deletion of the word "whereas." The Court of Appeal found this change to be significant, and extrapolated that article 40 conferred enforceable rights. In the words of Chancellor George:

[A]rticle 3 of the earlier Constitutions has been replaced by article 40 and in my view any controversy as to whether or not the replaced article is also preambulatory has been set at rest because of the definitive words used in the new article. The substituted article is a mix of idealism, and aspirations, of statements of principle and of entitlements. And among those entitlements is the right to the protection of the law.11

As to the strength of this right, Chancellor George ventured:

In my opinion the concept of 'protection of the law' is premised on the existence of a court system to which all would have access in order to vindicate any perceived wrong or to defend against any allegation of wrongdoing, and which after a fair hearing would render an impartial judgment which would be binding and enforceable.12

The tide had now turned and judges began to approach article 40 much more expansively. In Abrams v. Attorney General of Guyana,13 the applicants, who were charged indictably with trafficking in a controlled drug, successfully relied on article 40's protection of the law (among other constitutional provisions) to strike down a committal order against them. On its review of the depositions, the Court found that there was no evidence to support the offences, and accordingly nullified the committals.14 Again, "protection of the law" was held to incorporate the right of access to court and a fair hearing followed by an impartial judgment.

Most dramatically of all was the impact of this provision in Lewis v. Attorney General of Jamaica.15 In this case, the appellants, a number of men

11 Id. at 188 (emphasis added).
12 Id. at 191.
14 Id.
convicted of murder, had not been allowed to make representations to the Mercy Committee, and the Jamaican government issued death warrants upon the conclusion of that Committee's deliberations even though the men had applications pending before international human rights bodies. According to Her Majesty's Privy Council, these were irregularities that contravened the rules of natural justice and deprived the appellants of the protection of the law to which they were entitled under section 13 of the Jamaican Constitution (the Jamaican equivalent to article 40). Accordingly, the death sentences were set aside and commuted to life imprisonment.

Article 40 has thus evolved over the years into an extremely useful provision, its potential limited only by the ingenuity of the judges tasked with its enforcement. The substituted article, however, with its terse and barren formulation, lacks similar potential, and is now without doubt merely preambulatory in nature.

There is another, even more damaging consequence to Act 10's wholesale repeal of article 40(1). This repeal has meant the removal of the sole reference to privacy in the Guyana Constitution. It is evidently a little-known fact that in the Commonwealth Caribbean, only Belize and Trinidad and Tobago have a specific right to privacy in their constitutions. In Guyana, privacy is only mentioned in article 40(1)(c). Although this seems to be merely a passing reference, in light of the continually expanding scope given to article 40, the possibility loomed large that even this minimal formulation could be utilised by an imaginative court in order to confer a constitutional protection of privacy. With its drastic repeal, however, any such approach is completely lost, and one is left to wonder whether this was the deliberate intention of the drafters or whether it was simply a manifestation of their unfamiliarity with the specifics of the Guyana Bill of Rights. Whatever the cause, Act 10 leaves the Bill of Rights completely devoid of any reference to privacy, and combined with the deletion of article 40's protection of the law clause, leaves it considerably weaker than it was at the start of the reform process.

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16 Id.
17 MARGARET DEMERIEUX, FUNDAMENTAL RIGHTS IN COMMONWEALTH CARIBBEAN CONSTITUTIONS 296 (1992). Professor DeMerieux adds that only Belize and Trinidad confer specifically "litigable" rights to privacy. Given subsequent developments, however, this author must respectfully disagree with that statement.
B. The Right to Life

By the addition of paragraph 1A to article 138, Act 10 provides that no person can be executed for a crime committed when he or she was under the age of eighteen years. This enshrines as a constitutional right a provision that has long existed (and operated) in Guyana's law. Section 164 of the Criminal Law (Procedure) Act, which provides for the implementation of the death sentence, contains the following proviso: "[S]entence of death shall not be pronounced on or recorded against a person convicted of an offence if it appears to the Court that at the time when the offence was committed he was under the age of eighteen years . . ." While there may be some benefit to elevating the section 164 provision to fundamental right status, one has to search for it given the other, more severe defects in the right to life enshrined in article 138.

As a preliminary, it is important to mention the social context in which article 138 operates. Accepting the interdependent relationship of laws and social mores, the prevalence of extra judicial executions in Guyana should have in turn prompted careful scrutiny of the constitutional framework as it relates to the protection of life. In a study spanning two decades, the Guyana Human Rights Association (GHRA) has documented that an average of fifteen persons were shot to death annually by the police between 1980 and 1985, which rose to an average of sixteen persons per year between 1996 and 2001. These numbers soared to twenty-eight persons per year in 2002 and thirty-nine in 2003. In a sobering revelation, the GHRA disclosed that the Guyana Police Force attracted as many allegations of excessive use of force in 1996 and 1997 as the New York Police Department, an incomparably larger body, attracted for a period three times as long between 1989 and 1996. The sheer scale of the problem is best exemplified by comparison to the Toronto Metropolitan Police, where less than twenty-five fatalities from police shootings occurred over a twenty-year period. In this context, the CRC ought to have been more sensitive to the severe failings of article 138.

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21 GHRA, supra note 19, at 30.
22 Id.
To begin with, the paltry language of article 138 sets the stage for very minimalist protection. While the Guyana Bill of Rights is loosely modelled on the European Convention on Human Rights (ECHR), article 138 substitutes a negative protection in place of the ECHR's positive right. Whereas article 2 of the ECHR trumpets that "[e]veryone's right to life shall be protected by law," article 138(1) merely protects against intentional deprivation of life otherwise than by operation of law. This has led one Caribbean academic to comment wryly, "In literal terms, the West Indian clauses confer an entitlement not to be killed with no positive declaration of the protection of life."

This is not a matter of mere syntax, as the negative formulation of article 138(1) leaves uncertain whether the State has any duty beyond the minimum one of ensuring effective criminal sanctions for violations of the right to life. By way of comparison, the positive language of article 2 of the ECHR has permitted the European Court of Human Rights to interpret their guarantee as including "in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual." While the European Court refused to apply its own exemplary standard to the facts of that case, it still acknowledged the expansive reach of the article, a potential that Guyana's negative formulation lacks.

Another troubling feature of article 138 is its denial of the right to life to persons convicted of "an offence under the law of Guyana." Unlike some Caribbean constitutions which specify that the death penalty may only be prescribed for the offences of treason and murder, the generality of Guyana's formulation presents no similar boundaries. This is not idle academic speculation, for already twice since this present Constitution came into effect has the State extended the reach of the death penalty. In 1989, the Narcotic Drugs and Psychotropic Substances (Control) Act was amended to provide the death penalty for the offence of supplying or otherwise administering a narcotic to a child or young person who dies as a result of consuming the

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24 Article 138(1) reads, "No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of an offence under the law of Guyana of which he has been convicted." GUY. CONST. art. 138(1).

25 DEMERIEUX, supra note 17, at 122.


27 See, e.g., ANT. & BARB. CONST. ch. II, § 4(1).
drug. An appalling feature of this offence is that it is applicable even where the trafficker does not intend to cause death or even realises that death is likely to result. Then, again in 2002, the government made the commission of a "terrorist act" which results in the death of any person also punishable by death. Astonishingly, "terrorist act" was undefined, so that it is capable of capturing acts aimed at the destruction of property, and even worse, it is committed once the act in question results in death, irrespective of an intention to kill or to cause grievous bodily harm. Whereas the ultimate penalty of death had heretofore been reserved for offences such as murder, where the principal possessed a specific intention to kill or to cause serious bodily harm, these new offences extend its application to offences approximating manslaughter or unintentional killings.

In the civilised world, the trend has been, if not to abolish the death penalty altogether, then at the least to limit its reach to the most heinous cases. Certainly, it is unthinkable that it should apply to acts where the actor has no intention to kill, and where, as in the case of the 2002 offence, there may well exist a political dimension to the prohibited act in question. One man's terrorist act is, after all, another man's act of political resistance. This kind of intemperate legislation can be manipulated with disastrous social and political consequences, and was only possible in the first place because of the loose language of article 138(1). It is thus supremely disappointing that the CRC, with all its expertise and the peculiar history that gave rise to it, overlooked this issue.

Finally, article 138 is most seriously compromised because of its permitted exceptions—those situations in which the use of lethal force is exempted from its operation. The force used need only be "reasonably justifiable," a weaker standard than that espoused by article 2(2) of the ECHR where the force must be "no more than is absolutely necessary." Moreover, the situations that fall outside of any constitutional protection are unnecessarily wide, and include "the defence of property," effecting "a lawful arrest" or preventing "the escape of a person lawfully detained" and preventing "the commission . . . of

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28 Narcotic Drugs and Psychotropic Substances (Control) Act, § 6(1), LAWS OF GUY. ch. 35:11 (2003).
29 Criminal Law (Offences) (Amendment) Act 2002 (inserting section 309A into LAWS OF GUY. ch. 8:01 (2003)).
32 Id. art. 138(2)(b).
a criminal offence." While the use of reasonably justifiable force is a familiar test at common law, the excepted situations themselves are broadly drawn and arguably represent extensions of the common law. Article 138(2)(d), for example, apparently sanctions the use of reasonable force to prevent the commission of any criminal offence, while under article 138(2)(b) a person may be fatally shot even if he poses no threat to the apprehending officer. These exceptions relate to factual realities that are not uncommon to Guyanese society, and combined with Guyana's troubled socio-political history, ought to have ensured reform of the scope of the protection of life guarantee in the Bill of Rights. It is amazing that the Commissioners and drafters chose to focus instead on an obscure and meaningless technicality.

C. The Right to Personal Liberty

A major feature of article 139, which confers the right to personal liberty, is the protection conferred on criminal suspects and detainees in their interactions with the police. Among the protections is the injunction in article 139(4), whereby any person who is arrested and detained "shall be brought before a court as soon as is reasonably practicable." While this is a useful provision in that it directs attention to the undesirability of suspects remaining in police custody, it is simultaneously self-defeating because of its failure to specify a clearly defined time limit. Instead, the amorphous standard prescribed (that is, "reasonably practicable") cloaks law enforcement with enormous powers, which they have not recoiled from using and even abusing.

The inadequacy of this provision has not gone unnoticed. It came up for consideration in Khan v. State, an appeal from four murder convictions. Involving the murders of four young schoolboys, this case traumatised the rural community where the murders had occurred. As the worst cases invariably do, however, it highlights graphically the value of constitutional protections. In their commendable zeal to solve the brutal murders, the police arrested dozens of suspects, including the four appellants and their families. The four in question were held without charge and without access to counsel for varying periods ranging from four to twelve days, and in the end, they were only charged and taken to court after they gave confession statements. Although each appellant testified to a catalogue of violent acts inflicted against them,

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33 Id. art. 138(2)(d).
34 Id. art. 139(4).
35 No. 10-13 (Guy. C.A. 1987).
and in spite of other questionable circumstances, the trial judge rejected all allegations of police brutality and admitted each of the confessions into evidence. The appellants were all convicted and sentenced to death, though two of them were subsequently freed on appeal. In spite of vigorous arguments by defence counsel based on article 139(4), the Court of Appeal strenuously resisted laying down any time limit which could have the effect of circumscribing unrestricted police discretion to detain suspects in custody.36 Commenting on the admission into evidence of the confession given by the third appellant, Justice of Appeal Kennard would only concede that: "incarceration of this appellant for a period of four days without a charge being laid is a practice which must be discouraged and must be frowned upon"—empty words for the two appellants who were subsequently executed.

In partial recognition of this defect, Act 10 stipulates that suspects may be detained no longer than seventy-two hours after arrest or detention, although this period may be extended by the High Court upon application by the police. While this amendment is clearly overdue, it is nonetheless inadequate and betrays a troubling reluctance to demand uncompromising standards of police officers. The State possesses extremely coercive powers against which the average citizen is almost powerless in a practical setting. Within certain parameters, a person can be arrested, detained, searched and taken into custody, even if he or she has not committed an offence, but simply upon reasonable suspicion of so doing. For someone who is innocent, these are monstrous intrusions upon privacy and liberty, which are nonetheless tolerated for the greater good. The role of the Constitution is to regulate this asymmetrical relationship between the State and the individual, but it is not entirely convincing that seventy-two hours in police custody achieves a fair balance.

The early phase of a criminal investigation is a critical period for both suspects and investigators. Present always is the danger of improper and illegal pressure being applied against the powerless suspect as a means to obtain information, and this is why it is important for suspects—if they must be detained pending trial—to be kept in the custody of the more neutral prison setting and away from the officers conducting the actual investigation. The alternative raises the possibility of a host of abuses—from the psychological pressure of being kept incommunicado to the physical dangers of unlawful violence. History is replete with miscarriages of justice resulting from turning

36 Id.
37 Id. at 12.
a blind eye to improper police practices, and for proof one need look no further
than British "justice" vis-à-vis Northern Ireland militants.38

Almost as troubling is the provision of Act 10 that allows extension of
custodial detention upon application to the High Court. The procedure could
constitute a genuine review of the circumstances of the existing detention or
simply amount to a routine endorsement of a police application, but the record
of the local judiciary supports the latter possibility.

Establishing constitutional safeguards is not a weak, 'human rights'
approach to law enforcement. Rather, it forces police officers to adhere to the
laws they are sworn to enforce, and minimises the risks of forced confessions
and false convictions. These are unquestionably desirable goals, and highlight
why the amendment is arguably inadequate. Seventy-two hours is still too long
a period to be in police custody without charge, for it gives investigating
officers considerable time with a suspect. In Guyana’s context, where there
is a high degree of illiteracy and unfamiliarity with rights generally, protracted
police detention alone can inspire fear and impel self-incrimination. For these
reasons, it is regrettable that Act 10 did not champion a more vigorous
approach.

D. Protection of Property and Freedom of Assembly and Association

In two specific instances, Act 10 has effected overdue reforms of the Bill
of Rights. First, the property guarantee has been amended yet again, this time
to include the requirement of prompt payment of adequate compensation for
the compulsory acquisition of property. Curiously, however, Act 10 removed
an earlier 1990 amendment to article 142 mandating that the written law
providing for compulsory acquisition itself guarantee a right of access to court
no doubt on the premise that it was otiose, as any acquisition could always be
challenged under article 142 itself.

More significantly, article 147, the protection of the freedom of assembly
and association, has been materially amended. It now includes a right to
"demonstrate peacefully," a courageous political step on the part of the
government, given the turbulence that has accompanied each of its accessions
into office. Article 147(2) now expressly protects the right to strike, and
article 147(3) enshrines the right of both employers and trade unions to enter
into collective agreements.

The two reforms are both welcome. The guarantee of the right to strike obliterates the infamous decision of Collymore v. Attorney General of Trinidad and Tobago,\textsuperscript{39} whereby the right to assembly and association was held by both the local courts and the Privy Council not to include the freedom to strike, while the right to enter into collective agreements removes the effect of Alli v. Attorney General of Guyana.\textsuperscript{40} By these amendments, Act 10 has finally reversed years of retardation of the Bill of Rights by common law judges.

III. THE "NEW" RIGHTS

In addition to the specific changes to existing provisions of the Bill of Rights, Act 10 includes several new rights, both procedural and substantive. These are examined in turn.

A. Protection of Human Rights

The newly inserted article 154A purports to incorporate certain international human rights treaties into domestic law—lock, stock and barrel. This innovation was inspired by a similar provision in the new South African Constitution,\textsuperscript{41} and was a result of the CRC stipulation that "[A]ll Courts in Guyana are enjoined to pay due regard to international law and to international Conventions and Charters to which Guyana has acceded when dealing with matters involving alleged violations of the Fundamental Rights enshrined in the Constitution."\textsuperscript{42} Article 154A(1) accordingly provides:

Subject to paragraphs (3) and (6), every person, as contemplated by the respective international treaties set out in the Fourth Schedule to which Guyana has acceded is entitled to the human rights enshrined in the said international treaties, and such rights shall be respected and upheld by the executive, legislature, judiciary and all organs and agencies of Government and, where applicable to them, by all natural and legal persons and shall be enforceable in the manner hereinafter prescribed.\textsuperscript{43}

\textsuperscript{40} [1987] 41 W.I.R. 176.
\textsuperscript{41} S. AFR. CONST. ch. 2, art. 39(1).
\textsuperscript{42} CONSTITUTIONAL REFORM COMMISSION REPORT, supra note 5, para. 9.2.3.1.
Both the CRC recommendation and its manner of implementation by article 154A are highly unusual. With its imperious language of “enjoining” the judiciary to pay due regard to international treaties, the CRC betrayed its doubt regarding the capacity of the courts to faithfully dispense justice, not to mention a lack of faith in local jurisprudence. Worse still, the indolent manner in which this recommendation was effected has all the potential of being counter-productive. International treaties have no force unless they are implemented in domestic law, but normally States tend to enact them on an individual basis. Such an approach is advisable as treaties are often the result of careful diplomatic compromises, and since they may well espouse contradictory standards and obligations, wholesale adoption of more than one is potentially chaotic and could provide little guidance to a local court. These concerns, however, are wholly premature, for article 154A is a masterpiece of legal obfuscation, and an analysis of its provisions in their entirety will reveal how minimal its impact is likely to be.

Superficially at least, paragraph (1) has enormous potential to foster dynamism in the interpretation and enforcement of human rights. It provides boldly that every person is “entitled” to the rights in the named treaties, which “shall be respected and upheld” by all branches of government. Moreover, as these rights are enforceable against “all natural and legal persons” it thus is not only the State that is enjoined to observe the human rights and fundamental freedoms of others. As simple as that may seem, it represents a momentous extension of Commonwealth Caribbean human rights jurisprudence that generally limits the applicability of respective Bills of Rights to State bodies.44


44 Even though the constitutional provisions are generally silent on this issue, and only address the State apparatus directly in some provisions, the accepted authority for this limitation is the dicta of Lord Diplock in Maharaj v. Attorney General of Trinidad and Tobago, [1979] A.C. 385, 386G-H:

Read in the light of the recognition that each of the highly diversified rights and freedoms of the individual described in section 1 already existed, it is in their Lordships’ view clear that the protection afforded was against contraven-
It is surely desirable to hold all citizens to the standards espoused in the various international treaties, but given the whole of article 154A, there is little need to debate the merits of this extension, for the impact of paragraph (1) is effectively neutralised by the remainder of the article. Thus, while paragraph (1) specifies that all persons are "entitled" to the human rights enshrined in the named treaties, paragraph (2) qualifies that the "rights referred to in paragraph (1) do not include any fundamental right under this Constitution." One can only assume that the drafter meant that, where conflicts occur between an international treaty and the Constitution, then the latter is to prevail, but the actual provision is carelessly drafted and virtually nullifies the impact of paragraph (1).

Guyana's Bill of Rights came shortly after the movement at the end of World War II that saw the adoption of many major human rights instruments; predictably many of these documents cover similar areas and norms relating to fundamental human rights. Accordingly, the peremptory limitation of the rights in paragraph (1) to those not covered by the Constitution will have the practical effect of excluding many of the treaties in the Fourth Schedule altogether! In addition, the drafters enacted a further escape clause. Paragraph (6) provides, "The State may divest itself or otherwise limit the extent of its obligation under any of the treaties listed in the Fourth Schedule, provided that two-thirds of the elected members of the National Assembly have voted in favour of such divestment or limitation." In other words, having given with one hand, the State is always free to take away with the other.

The defects do not end there. Paragraph (3) of article 154A provides: "The State shall, having regard to the socio-cultural level of the society, take reasonable legislative and other measures within its available resources to achieve the progressive realization of the rights provided for in paragraph (1)." Measures are only required given "available resources"; more importantly, since the reasonableness of any measure is to be judged by the "socio-cultural level of the society," there is enough maneuverability to justify any position, including inaction. This paragraph imposes no clear or enforceable obligation on the State and demonstrates graphically the lukewarm commitment to international standards espoused by article 154A.

\[\text{tion of those rights or freedoms by the State or by some other public authority endowed by law with coercive powers. The Chapter is concerned with public law, not private law.}\]

\[\text{45 In spite of this, regard to international treaties would have served the purpose of keeping Guyana abreast with evolving standards.}\]

\[\text{46 The terms "National Assembly" and "Parliament" are interchangeable.}\]
Article 154A also contains a separate enforcement clause, and its supporting mechanism best demonstrates the feebleness of the entire process. Paragraph (4) provides that, for a breach or threatened breach of any of the paragraph (1) rights, a person may apply to the Human Rights Commission (HRC) "for redress." What redress, then, is the HRC empowered to dispense?

The HRC was itself the fruit of the CRC process, and was established in 2001. Both structurally and substantively, however, the HRC is weak, and recourse to it is hardly likely to confer any material advantage. An indication of the operating uncertainties can be gleaned from a quick look at the mandate, composition and powers of the HRC. For instance, one of the functions of the HRC is to monitor the observance of the treaties acceded to by the government, including those specified in the Fourth Schedule.\textsuperscript{47} However, this seems limited by the overall mandate of the HRC, which is narrowly addressed to monitoring compliance with laws "relating to equality of opportunity and treatment."\textsuperscript{48}

This multifaceted, or some might say schizophrenic body, is tasked simultaneously with investigative, research, policy-making, educational, monitoring and arbitral functions, and as if that were not enough, it is itself empowered to institute legal action on behalf of complainants "for redress."\textsuperscript{49} Yet, its composition does not indicate that it can effectively perform these wide-ranging functions. In addition to a chairperson, the HRC consists of four other members, chairpersons of the other constitutional commissions (the Ethnic Relations, Women and Gender Equality, Indigenous Peoples' and Rights of the Child Commissions). The truly astonishing feature of the HRC then is that, aside from its chairperson, none of its membership is devoted exclusively to human rights concerns, and by extension therefore, none need have or is likely to have any training or expertise in human rights issues. A practical but no less valid consideration is—given the fact that the entire membership comprises the chairpersons of other commissions—when are they expected to focus on the work of the HRC?

Most perplexing of all, even though article 154A(4) provides that aggrieved persons may apply to the HRC for "redress," upon a careful scrutiny of the provisions establishing the HRC, it does not appear that this body \textit{can} in fact grant any redress. The HRC is mandated to investigate complaints,\textsuperscript{50} but it has

\textsuperscript{47} \textsc{Guy. Const.} art. 212O(1)(a).
\textsuperscript{48} \textit{Id.} art. 212N(1).
\textsuperscript{49} \textit{Id.} art. 212O(2).
\textsuperscript{50} \textit{Id.} art. 212O(1)(g).
no powers of subpoena or search and no powers to question witnesses or to compel the production of documentary or other information. The HRC is empowered to "resolve disputes," but it has no power to issue binding orders or to otherwise compel adherence to its decisions. Recourse to this severely compromised Commission thus promises to be an exercise in futility. Despite its uniqueness, therefore, article 154A as enacted is unlikely to enhance the domestic enforcement of human rights.

B. Substantive Rights

The new substantive rights cover the following areas: the right to work, the right to pension and gratuity, the right to participate in decision-making processes of the state, equality of persons before the law, equality of birth status, equality for women, indigenous peoples' rights, the right to free education, the right to establish private schools, and finally the right to a harm-free environment. At first blush, all this seems rather impressive, representing a substantial improvement on Guyana's regime of human rights protection. Au contraire, many of these new rights have the potential to bedevil constitutional interpretation and enforcement. At best, these provisions are redundant; at worst, they are poorly conceptualised and executed.

1. The Right to Pension and Indigenous Peoples' Rights

At the outset, it should be stated that not all of the new rights are without value, and in this category fall articles 149B and 149G. Article 149B guarantees to "every public officer . . . an absolute and enforceable right to any pension or gratuity granted to him or her under the provision of any law or collective agreement of any kind whatsoever." Prior to this amendment, only constitutional public officers enjoyed an enforceable right to pension. Indeed, for a long time, the mistaken view was peddled that all public officers enjoyed pension only by way of "bounty or act of grace," but this view was mercifully buried by the Court of Appeal most recently in Baird v. Private Sector Comm'n. Delivering the judgment of the Court, Justice of Appeal 

51 Id. art. 212O(1)(h).
52 Id. arts. 149A-149J.
53 Id. at arts. 213-15.
55 [2003] 3 LRC 41.
Chang held that article 214 superseded the Pensions Act, so that constitutional public officers enjoy a “provisional or presumptive” right to pension. This, however, still excludes from constitutional protection other categories of public servants who are not covered by one of the service commissions, including employees of state corporations and other autonomous bodies such as the Guyana Revenue Authority. The latter would be vulnerable to the operation of the Pensions Act, section 4(1) of which provides, “No officer shall have an absolute right to compensation for past services or to pension, gratuity or other allowance under this Act, nor shall anything herein or in such regulations contained limit the right of the State to dismiss any officer without compensation.” Article 149B removes this lacuna, so that all public sector employees now enjoy an “absolute and enforceable” right to pension.

Equally welcome, though more guarded, is article 149G, which provides, “Indigenous peoples shall have the right to the protection, preservation and promulgation of their languages, cultural heritage and way of life.” This guarantee is long overdue given historical injustices and present realities faced by Guyana’s indigenous peoples. Amerindians, though the original inhabitants of this land, were displaced in the post-Columbian era, and today probably constitute the most impoverished ethnic group in Guyana. Even so, conspicuously absent from this provision is any reference to land—to which the well-being, way of life and heritage of indigenous peoples are intimately bound. Given the settled anthropological view of the special relationship between indigenous peoples and their land, recognised and enshrined in several treaties, it remains to be seen whether the consistent failure of successive

56 Id. at 49.
57 Pensions Act, LAWS OF GUY. ch. 27:02 (2003).
58 Anthropologist Rodolfo Gruenbaum, testifying before the Inter-American Court of Human Rights in Awas Tingni v. Nicaragua, put it this way:
All anthropological, ethnographic studies, all documents which the indigenous people themselves have presented in recent years, demonstrate that the relationship between indigenous people and the land is an essential tie which provides and maintains the cultural identity of those peoples. One must understand that the land is not a mere instrument of agricultural production, but part of a geographic and social, symbolic and religious space, with which the history and current dynamics of those peoples are linked.
governments to implement the recommendations of the Amerindian Lands Commission regarding Amerindian lands can be addressed via this truncated fundamental right.

2. The Rights to Work and to Participate

Aside from articles 149B and 149G described above, one must struggle to find any value in the remaining 'new' rights inserted by Act 10. Two of them, in fact, seem downright meaningless. Article 149A, guaranteeing the right to work, and article 149C, the right to participate in the decision-making processes of the state, are reproduced from Chapter 2 of the Constitution, which deals with "Principles and Bases of the Political, Economic and Social System." These were products of Guyana's socialist flirtations, lifted from the constitutions of countries such as North Korea and China, as well as the former Republics of East Germany, Yugoslavia and the USSR. As laudable as these goals may then have been, one is forced to question their current value and relevance.

Article 149A, for instance, somewhat inscrutably provides, "No person shall be hindered in the enjoyment of his or her right to work, that is to say, the right to free choice of employment." The 'hindrance' contemplated seems related to some unjustified interference, probably based on a personal characteristic. This interpretation only highlights the superfluity of the provision, however, as the non-discrimination guarantee already forbids acting on the basis of personal characteristics—yet any other construction would simply lead to absurd results. Employment is not a one-sided affair, and is necessarily governed by the ability to work. A disgruntled employee's 'hindrance' could well be the employer's justification for unsuitability. Given these complexities, this vague, almost vacuous provision seems to be nothing more than window dressing destined for the obscurity enjoyed by its predecessor.


The recommendation of the Amerindian Lands Commission in 1969 to grant some 128 indigenous communities title to approximately 24,000 square miles of land, together with mineral rights to a depth of fifty feet, has yet to be fully implemented.

3. Public and Private Schools

Article 149H is another effete, useless provision. It guarantees a right to free primary and secondary education—partially replicating article 27 of the Constitution that had already provided not only free primary and secondary education, but free tertiary education and vocational training as well. More puzzling is article 149I, which enshrines a right to establish private schools. That there was a perceived necessity for this to be enshrined as a fundamental right, over and above the immediate concerns of the state-funded schools (waves of emigrating teachers, low salaries, antiquated curricula and materials) would have been unremarkable if it did not betray an alarming ineptitude at the highest levels to address these problems.

4. Harm-free Environment

Into the category of uselessness must surely fall article 149J, which confers a right on all persons to “an environment that is not harmful to his or her well-being.” The article further imposes a duty on the state to protect the environment through measures aimed at preventing pollution and ecological degradation, promoting conservation and securing the sustainable use of natural resources.

Just a few years previously in 1996, the Environmental Protection Act was enacted—a comprehensive framework statute aimed at the “management, conservation, protection and improvement of the environment, the prevention or control of pollution, the assessment of the impact of economic development on the environment, the sustainable use of natural resources . . .” and related matters.62 This act established the Environmental Protection Agency, which enjoys a wide mandate, overarching authority over other regulatory bodies, and considerable powers, including the power to conduct investigations and inspections and the power to issue licences and permits.63 The act also created a regime for dealing with pollution64 and monitoring works and projects,65 and it provides stiff penalties for the breach of its provisions.66

62 Environmental Protection Act, pmbl. LAWS OF GUY. ch. 20:05 (2003).
63 Id. § 4(2).
64 Id. §§ 19-29.
65 See generally id. §§ 10-18 (requiring an environmental permit).
66 Id. at Fifth Schedule.
Since then, the promise of this act has yet to materialise. Having changed a number of executive directors, one of them under very cloudy circumstances, the Agency has failed to impose emission standards for pollution, regulate the burgeoning wildlife trade, or address the gargantuan problem of illegal Brazilian garimpeiros brazenly engaged in the extraction of Guyana’s natural resources. These are only some of the challenges facing Guyana, albeit no different than those of all developing countries with abundant natural resources and a weak infrastructure. Given that a detailed and comprehensive act already exists, what is clearly needed for Guyana’s explosive situation is not more legislation, however classified, but rather the effective implementation and enforcement of extant laws.

5. The Equality Rights

Act 10 piles on three ‘new’ equality rights, relating to status, women and equality generally. Article 149E provides for equality of status of illegitimate children, previously guaranteed by article 30 of the Constitution in practically the same, if not stronger, terms. Legislation enacted shortly after the 1980 Constitution came into effect sought to implement article 30 and preclude any arguments against its unenforceability. All that article 149E does, therefore, is to convert this provision into a fundamental right, but other than the change in classification, this amendment is unlikely to have any significant practical effect.

The same can also be said for article 149F, which guarantees equality for women. Similarly, this right corresponds to article 29 of the Constitution, which provided for the equality of women and men. Moreover, the Equal Rights Act was enacted in 1990 with the specific aim of enforcing “the principles enshrined in article 29 of the Constitution so as to secure equality for women and for matters connected therewith.” The 1990 Act contains provisions to secure equality in the workplace as well as equality of opportunity overall in political, economic and social life. Combined with the original article 40, which introduced the fundamental rights and freedoms to be enjoyed irrespective of sex, it is difficult to see how, prior to Act 10, women could have been constitutionally subject to any form of discrimination.

Curiously, Act 10 itself has substantially amended article 149, the non-discrimination guarantee, by expanding the forbidden grounds of discrimination to include birth, marital status, sex and gender. Add the original articles 29 and 30, as well as the specific acts dealing with illegitimate children and equal rights, and the result is a formidable body of both constitutional dictates and ordinary legislation enshrining equality of status for women and illegitimate children. In this context, the insertion of two further articles devoted to these groups was undoubtedly repetitive and unnecessary.

The last and most problematic of the new rights is article 149D, paragraph (1) of which provides, “The State shall not deny to any person equality before the law or equal protection and benefit of the law.” Given the multiplicity of constitutional provisions and other enactments dealing with equality and non-discrimination, many of which have been alluded to above, the central issue is what, if anything, this ‘new’ right adds.

Some guidance may be had from the Singapore Constitution, article 12(1) of which similarly provides, “All persons are equal before the law and entitled to the equal protection of the law.” This provision came up for interpretation in Ong Ah Chuan v. Public Prosecutor, a decision of the Privy Council on appeal from Singapore, where their Lordships described article 12(1) as an “anti-discriminatory provision.”

Significantly, article 149D’s “protection of the law” is qualified by the word “equal,” so this possibly covers a different concept from that relating to access to court as espoused in Kent Garment Factory and related cases, capturing instead the specific notion of procedural equality. As for the clause “equal . . . benefit of the law,” this seems to import the concept of substantive equality, that is, requiring equality in the content of laws. Bearing in mind these meanings, one is forced to question the purpose of article 149D, given that the unamended Constitution already prohibited both procedural and substantive discrimination and contained provisions to secure due process.

The issue raised is not merely redundancy. With the inclusion of multiple equality and non-discrimination provisions in the reformed Bill of Rights, the

70 Children Born Out of Wedlock (Removal of Discrimination) Act, No. 12 (1983) (Guy.).
71 Equal Rights Act, LAWS OF GUY. ch. 38:01 (2003).
72 SINGAPORE CONST., art. 12(1).
74 Id. at 670.
75 See supra notes 10-17 and accompanying text.
76 GUY. CONST. art. 149.
77 GUY. CONST. art. 144.
drafters have unleashed the danger of inconsistent standards and confusion in the application and enforcement of the various guarantees. Is article 149D meant to go beyond article 149, which already prohibits discrimination on certain clearly specified grounds? Put another way, does it make all legislative classifications illegal, and not simply those painstakingly enumerated in article 149(2)? If the answer to this question is no, then article 149D serves no apparent purpose; if yes, then some test has to be fashioned to address equality claims under the provision.

An indication of the complexity of the latter exercise can be gleaned from Ong Ah Chuan. In this case, the appellant was found in possession of a prohibited drug in such quantities as to raise the statutory presumption of trafficking. He was convicted of trafficking in narcotics and sentenced to death. In the Privy Council, he raised the argument that the mandatory death sentence for trafficking in or over the stipulated amount violated the principle of equality before the law under article 12(1) of the Constitution. At issue, therefore, was the validity of the distinction made on the basis of the quantity of the drug possessed. In considering this submission, their Lordships held that equality requires that like should be treated alike. Delivering the judgment of the Board, Lord Diplock explained, "What article 12(1) of the Constitution assures to the individual is the right to equal treatment with other individuals in similar circumstances." What difference in circumstances would justify differential treatment? Lord Diplock's tortuous answer was:

The questions whether this dissimilarity in circumstances justifies any differentiation in the punishments imposed upon individuals who fall within one class and those who fall within the other, and, if so, what are the appropriate punishments for each class, are questions of social policy. Under the Constitution, which is based on the separation of powers, these are questions which it is the function of the legislature to decide, not that of the judiciary. Provided that the factor which the legislature adopts as constituting the dissimilarity in circumstances is not purely arbitrary but bears a reasonable relation to the social object of the law, there is no inconsistency with article 12(1) of the Constitution.79

79 Id. at 673-74.
This is hardly a satisfactory approach, for it creates more questions than answers. Two points may be noted. First, Lord Diplock pretends to subscribe to the doctrine of separation of powers, but still subjects the reasonableness of the differentiating factor to judicial scrutiny. This is not necessarily a bad thing, but Lord Diplock does not take this to its logical conclusion. Instead, the "social object of the law" seems to be accepted as a given, so that absent arbitrariness in the differentiating factor, there can be no finding of unconstitutional treatment. With respect, this seems to make the provision a rather toothless weapon.80

These are all issues of great subtlety that admit of no easy answer. Article 149D is nothing short of disastrous, and carries with it the seeds of chaos in the interpretation and application of the plethora of non-discrimination and equality provisions in Guyana’s reformed Bill of Rights.

IV. THE OMISSIONS

A. General

Act 10 purports to address some aspects of the fundamental rights regime in the Constitution but inexplicably ignores others. For example, as discussed above, the act fails to address the anomalies in the right to life provision that seriously undermine the level of protection accorded by this right. Other areas can be briefly mentioned. Article 139, which guarantees the right to personal liberty, is flawed in several respects, such as the wide scope of its authorised exceptions that include preventive detention for periods of up to three months, and which exempt a person from protection if he is "reasonably suspected to be of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community."81 The interpretation of the right to counsel, a protection that is pivotal to a suspect’s defence, has confounded the courts and ought to have been clarified along with other rights pertaining to the treatment of suspects.82

Another area that demands urgent legislative intervention relates to the prohibition against inhumane and degrading punishment. Article 141 of the

80 See DEMERIEUX, supra note 17, at 413-52 (providing a detailed discussion of these issues).
81 GUY. CONST. art. 139(1)(k), (h).
Constitution contains a specific savings clause that authorises punishments existing at the entry into force of the Constitution. While this operates to save the death penalty, the implementation of the penalty is an entirely different matter and Guyanese jurisprudence diverges significantly from that of its Commonwealth Caribbean neighbours. Although the interpretation of article 141 is, to an extent, settled law in Guyana, the executive has been clearly reluctant to enforce capital punishment, and in the interim, dozens of convicted men who have exhausted their appeals remain trapped in a Kafkaesque nightmare awaiting execution. This was another opportunity squandered by the CRC.

By far the most significant omission of Act 10, however, concerns the non-discrimination guarantee, the source of all the initial controversy. The CRC being so clearly preoccupied by equality issues, it is regrettable that its most original recommendation did not come to fruition. These issues are examined in greater detail below.

B. Protection from Discrimination

As it appears in the current 1980 Constitution, the non-discrimination provision takes the standard form that obtains in constitutions around the Commonwealth Caribbean, barring, significantly, that of Trinidad and Tobago. In Article 149, both discriminatory laws and discriminatory treatment by the state and by public officers are prohibited, subject to certain exceptions relating to non-citizens, Amerindians and various matters relating to personal law. The essence of discrimination, however—as certain academics and judges have been at pains to point out—is not merely different treatment, but different treatment motivated by some impermissible ground or factor. Consequently, what is of central importance in assessing the scope of the guarantee are those very prohibited grounds or factors. Clearly, the wider or more flexible they are, the more tolerant the society is likely to be.

In Guyana, those prohibited grounds were listed in the unamended article 149(2) somewhat narrowly as "race, place of origin, political opinions, colour

83 In the Commonwealth Caribbean, by virtue of Pratt v. Attorney General of Jamaica, [1993] 3 W.L.R. 995 (Privy Council), a delay of more than five years in the execution of a capital sentence renders that sentence cruel and unusual and therefore unconstitutional, but this time period was expressly rejected by the Guyana Court of Appeal in Yaseen v. Attorney General of Guyana, No. 19-20 (Guy. C.A. 1996).

or creed." Clearly influenced by the reformed South African Constitution, in its report the CRC recommended amending article 149(2) to widen the prohibited grounds of discrimination to include sexual orientation in addition to the usual ones of race, religion, gender and so on. This recommendation was faithfully incorporated into the initial draft, only to be later abandoned in the face of vociferous, sectarian opposition.

Sadly, this capitulation by the government is not as trivial as some might think. Respect for civil liberties, as history has repeatedly demonstrated, cannot operate selectively. The moment that governments pick and choose who is entitled to protection, all minorities become vulnerable, and in order to appreciate the force of this proposition, one need only reflect on the fact that Hitler's intolerance was not reserved for Jews but that thousands of homosexuals were subject to unspeakable abuses and also exterminated in the Third Reich. A less dramatic, though no less real, consequence of tolerating disrespect for rights and due process is the corrupting influence that such an attitude can spawn, as we have vividly witnessed in Guyana in recent times. The "Phantom Force," initially tolerated, even celebrated in some quarters, did not confine itself solely to dispensing vigilante justice, and inevitably graduated from "liberators" to mercenaries for hire. At higher levels, the disregard displayed towards gays and lesbians by the rejection of the constitutional amendment is not an isolated manifestation of the government's political caution, but is in fact symptomatic of its ambivalent approach to the protection and enforcement of fundamental rights. The People's Progressive Party (PPP's) term has witnessed draconian legislation entailing significant incursions into civil liberties, such as statutes extending the death penalty and restricting the liberty of citizens forcibly repatriated for overseas convictions, and currently a Broadcasting Bill is pending in Parliament that has enormous potential for censorship and the curtailing of media freedom and free speech. Legislative illiberalism has been paralleled by executive inaction on problems concerning extrajudicial executions and the implementation of the death

85 S. Afr. Const. ch. 2, art. 9.
86 K. Peper, Triangles and Community Pride, NETWORK, June 1994, at 50.
87 In 2002 a vicious crime wave erupted across Georgetown and certain rural areas, in which Indo-Guyanese were specifically targeted. In the face of inaction by the authorities, a "Phantom Force" funded by besieged businessmen and tacitly encouraged by the government came into being, with its members carrying out private assassinations of known or suspected criminals. See Body of Evidence on Death Squad, Sunday Stabroek, Mar. 7, 2004, at 16.
penalty, leading to the conclusion that even though there was a so-called ‘return to democracy’ in 1992, democracy must have some measure of autochthony, as opposed to being imposed by foreign creditors, in order to flourish.

It would be apposite to make two observations at this point. First, the existence of homosexuality (and, by extension, the necessity for homosexual equality) is not a foreign or Western phenomenon unrelated to local realities. The pervasiveness of homosexuality has been observed across cultures, egalitarian to hierarchical, across species, from human beings to fruit flies, and across time, from Ancient Greek and pre-Columbian indigenous civilizations to modern societies.90 Second, the lack of prominence of homosexual issues in Guyana’s society does not minimize the importance or necessity for reform. Discrimination exists in all spheres—from laws that criminalize consensual sexual activities between males91 to civil laws that discriminate in all the usual areas relating to property and family law. In the remaining two sections, this Article outlines briefly some of the innovative juridical developments across the world that have advanced the cause of homosexual equality, before finally examining the arguments that apparently persuaded the president to drop the sexual orientation clause from article 149.

1. Juridical Developments

As an indication of the marginalisation of homosexuals, none of the international or major regional human rights instruments enshrine sexual orientation as a prohibited ground of discrimination. Nonetheless, this silence has not succeeded in retarding the articulation of homosexual rights in many parts of the world, as even the most cursory survey would demonstrate.

Most notable must be the interpretation given to article 26 of the International Covenant on Civil and Political Rights (ICCPR) by the United Nations Human Rights Committee (UNHRC) as forbidding discrimination on the ground of sexual orientation, on the basis that “sex” includes sexual orientation.92 Additionally, the UNHRC found that the anti-sodomy laws of Tasmania

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91 Criminal Law (Offences) Act, LAWS OF GUY. ch. 8:01 (2003).
violated the right to privacy enshrined in article 17 of the ICCPR. As pointed out by Justice Michael Kirby of the Australian High Court, the importance of this decision, coming as it does from a “high body of the United Nations,” extends far beyond Tasmania and “speaks to the whole world.”

Ironically, not only has Guyana acceded to the ICCPR, but Act 10 itself has incorporated it into Guyana’s domestic law in its entirety.

In the European Union, a progressive approach to these issues was embraced long before 1992. In *Dudgeon v. United Kingdom*, at issue were the laws of Northern Ireland that criminalized homosexual acts between consenting adult men in private. In an earlier drug raid, the police had seized the personal papers of the applicant, thereby discovering private accounts of his homosexual activities. As a result, he was arrested and suffered the indignity of over four hours of questioning about his sex life, and though no charges were ultimately laid, he eventually instituted an action. In ruling for the applicant, the European Court found that the anti-sodomy laws constituted an interference with the applicant’s right to respect for his private life under article 8 of the ECHR. The court’s enlightened attitude towards homosexuality, and its robust rejection of private morality as a justification for differential treatment of homosexuals, was very much evident in its judgment. According to the majority, “the moral attitudes towards male homosexuality in Northern Ireland and the concern that any relaxation in the law would tend to erode existing moral standards cannot, without more, warrant interfering with the applicant’s private life to such an extent.” Since then, various member states within the European Union have granted equal rights to same-sex couples in a host of areas, ranging from property and social security to even marriage and immigration.

93 *Id.*
95 GUY. CONST. art. 154A.
97 *See also* Norris v. Ireland, 13 Eur. Ct. H.R. at para. 61.
99 *See* Danish Registered Partnership Act, 1989, D/341-H-ML Act 372 (June 1, 1989). Further, the Netherlands is one of the few countries worldwide where homosexuals may legally marry, while out of a dozen countries that recognise same-sex relationships for immigration purposes, eight are European. Michael Kirby, Sexuality and Australian Law, Address Before the International Bar Association Conference (Oct. 18, 2000), at http://www.lawfoundation.net.au/resources/kirby/papers/20001018_sexuality.html (last visited May 1, 2004).
A jurisdiction that has blazed the trail for homosexual equality over the past decade is South Africa. Their 1996 Constitution was the first in the world to include sexual orientation as a prohibited ground of discrimination, and this precipitated dramatic legal reforms. One of the earliest cases concerned a successful challenge by the National Coalition for Gay and Lesbian Equality against the common law offence of sodomy as well as various statutory offences penalising sodomy and sexual relations between men. The Constitutional Court held that these laws violated the constitutional guarantees of both equality and privacy. The court reasoned that since the various provisions penalised conduct that caused no harm to anyone else, and since their only purpose was to criminalize conduct that failed to conform to the moral and religious views of a section of society, they were presumptively unfair and a breach of the equality guarantee.

According to Ju Sachs, "the violation of equality by the anti-sodomy laws is all the more egregious because it touches the deep, invisible and intimate side of people's lives, while the discriminatory manner in which groups are targeted by invasions of privacy will destroy any possibility of justification for such invasions."

More recent reforms in South Africa have spanned the areas of immigration, social security and even the contentious area of adoption. In Du Toit v. Minister for Welfare and Population Dev., it was held that the relevant provisions of the law that excluded same-sex life partners from the right to adopt jointly discriminated unfairly against the appellants, a lesbian couple, on the ground of their sexual orientation, and was accordingly unconstitutional.

Canadian equality jurisprudence has equalled, and in some instances even surpassed, developments elsewhere regarding the rights of sexual minorities. Section 15(1) of the Canadian Charter of Rights and Freedoms, in its prohibition of discriminatory laws and treatment, makes no mention of sexual

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100 S. Afr. Const. ch. 2, art. 9(3).
102 Id.
103 Id.
104 Id.
105 In Nat'l Coalition for Gay & Lesbian Equality v. Minister of Home Affairs, [2000] 3 C.H.R.L.D. 39, it was held that the refusal of immigration permits to same-sex life partners of residents was unconstitutional.
orientation, but in *Egan v. Canada*,109 the Canadian Supreme Court held that sexual orientation is nonetheless an "analogous ground," meaning that discrimination on this basis is also forbidden. An interesting application of *Egan* occurred in *Vriend v. Alberta*,110 which concerned a constitutional challenge to the 1980 Individual Rights Protection Act of Alberta. In this case, the appellant was dismissed from his employment at a private Christian college in Alberta after he disclosed his homosexuality. His application to the Alberta Human Rights Commission under the 1980 Act was refused on the simple ground that the act did not include sexual orientation as a prohibited ground of discrimination. The Supreme Court of Canada, ruling in the applicant's favour, found that the act violated section 15(1) of the Charter by failing to include sexual orientation as a prohibited ground of discrimination.111 The reasoning of the majority was that the Alberta statute denied gays and lesbians the equal protection of the law simply on the basis of a personal characteristic regarded as analogous to the grounds enumerated in section 15(1).112 Given that there was no rational connection between the goal of protecting persons from discrimination and the exclusion of homosexuals from the impugned provisions of the Act, there was no justification for the rights violation. According to Cory, writing for the majority, the exclusion of sexual orientation from the Act's protection sends a "strong and sinister message" that "discrimination on the ground of sexual orientation is not as serious, or as deserving of condemnation, as other forms of discrimination. It could well be said that it is tantamount to condoning or even encouraging discrimination against lesbians and gay men."113

Other areas of reform in Canada range over diverse matters from spousal security114 to educational issues. In *Chamberlain v. Surrey School Board*115 a ban on three kindergarten books depicting same-sex relationships was held to be unconstitutional. The ruling stemmed from the religious motivations for the ban; the Supreme Court emphasized that the public school system had to be run on a strictly secular basis, but the emphasis does not undermine the

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111 *Id.*
112 *Id.*
113 *Id.*
114 In *Attorney General of Ontario v. M.*, [1999] 2 S.C.R. 3, the exclusion of same-sex couples from maintenance provisions on the dissolution of a union was held to violate section 15(1) and therefore unconstitutional.
ruling’s implications for homosexual equality. According to McLachlin, “[p]arental views, however important, cannot override the imperatives placed upon the British Columbia public schools to mirror the diversity of the community and teach tolerance and understanding of difference.”\(^{116}\) No single development, however, has been more symbolic or revolutionary than *Halpern v. Attorney General of Canada*,\(^ {117}\) where the Ontario Court of Appeal held that the common law definition of marriage as “the voluntary union for life of one man and one woman to the exclusion of all others” excluded same-sex marriages and thereby violated section 15(1). In arriving at this conclusion, the Court reasoned that this exclusion could not be justified solely for the purposes of procreation or companionship, and since it also demeaned the dignity of same-sex couples, the objective of the law was not pressing and substantial and therefore could not be justified in a free and democratic society. Accordingly, the common law definition of marriage would be reformulated as “the voluntary union for life of two persons to the exclusion of all others.”\(^ {118}\)

Other jurisdictions have not lagged far behind. In Australia, for example, the *Toonen* ruling of the UNHRC led to the amendment of the Criminal Code in Tasmania repealing the offence of sodomy as committed by males, the last state in the Commonwealth of Australia that espoused such discriminatory laws. Like the European experience, this foreshadowed changes to other areas of the law. For example, in New South Wales, Australia’s most populous state, a comprehensive statute in 1999 extended rights to homosexual couples, previously enjoyed only by heterosexual couples, including both property rights in the areas of succession, taxation, insurance and family provision, as well as symbolic non-property rights granting the power to make decisions regarding medical treatment, guardianship and even mental health.\(^ {119}\) This statute was followed in other states such as Queensland, and similar bills are under consideration elsewhere. Same-sex relationships have been given equal prominence at the federal level, and since 1984 amendments to the immigration laws have given non-Australian partners of Australian citizens expanded rights of entry into the country.\(^ {120}\)

\(^{116}\) *Id.*

\(^{117}\) [2003] 3 L.R.C. 558.

\(^{118}\) *Id.*

\(^{119}\) Property (Relationships) Legislation Amendment Act 1999 (N.S.W. Stat.) (Austl.).

\(^{120}\) Kirby, *supra* note 99.
In the United States, a watershed decision of their Supreme Court in 2003 struck down discriminatory legislation in Texas targeting homosexuals, paving the way for the dismantling of similar laws across the country. In *Lawrence v. Texas*, the U.S. Supreme Court declared unconstitutional a Texas statute which criminalized sodomy between two persons of the same sex. Interestingly, the majority, minus Justice O'Connor, did not rest its decision solely on the equal protection clause, pointing out that if so the prohibition could be validated if restructured to prohibit homosexual as well as heterosexual participants. Instead, they found broadly that the criminalisation of private, consensual sexual activity that caused no harm violated the liberty of the individual as protected by the due process clause. The petitioners—two adult men who were discovered engaged in sexual activity in their own home by the police whilst investigating another, unrelated report—were held to be entitled to respect for their private lives. The majority said, "The State cannot demean their existence or control their destiny by making private sexual conduct a crime."

At the state level, even more momentous developments have taken place in the United States post-*Lawrence*. In November 2003, the Massachusetts Supreme Court ruled that a ban on same-sex marriages offended individual liberty and equality under the Massachusetts Constitution, and ordered the legislature to reform the relevant laws accordingly. The state legislature in turn enacted a law granting same-sex couples the right to enter into 'civil unions' with all the benefits, rights and responsibilities of marriage, though it stopped short of calling such this union a 'marriage.' This took care of the discrimination against same-sex partnerships seeking equal benefits with their heterosexual counterparts, or so the legislature thought—after all, a rose by any other name smells as sweet. Not so, responded the Massachusetts Supreme Court. In an advisory opinion given at the request of the Massachusetts Senate on the constitutionality of the proposed law, the majority stated that nothing short of a right to marry would eliminate the discrimination faced by same-sex couples and purge the extant laws of their unconstitutionality. Evident from the majority's reasoning was the desire to achieve substantive

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122 Id.
equality for homosexual couples, and remove the hypocrisy of labels such as 'civil unions' that immediately brand the participants second-class.

No doubt, this is not the final word on the subject, as even now Massachusetts legislators are considering an amendment to their state's constitution to ban same-sex marriages. Indeed, the issue will occupy both state and federal authorities as no less than the president has indicated his support for an amendment to the federal constitution to ban same-sex marriages. However, the possibility of some setbacks in Massachusetts and the U.S. as a whole does not diminish the magnitude of Lawrence and the importance of these developments. After hundreds of years of entrenched statutory discrimination against homosexuals, the process of reform has begun in what is surely an irreversible tide. The question is no longer whether American jurisprudence will emulate other Western democracies, but how soon.

Clearly these are only samples of the changes to legal rules on issues concerning homosexual equality, but they demonstrate several important points. First, reform has not been isolated but has occurred across jurisdictions spanning considerable geographic distances and cultural differences. The historic silence of human rights instruments has not been sufficient to foreclose change, and the enthusiasm of countries like South Africa in embracing change is pivotal in eradicating the visceral prejudices that have traditionally stymied reform. Second, reforms have not been confined simply to dismantling criminal sanctions against certain private behaviours, but have addressed a host of concerns ranging from property to insurance to family law issues to social security and so on. This reinforces the oft-overlooked fact that homosexual equality is not simply about carnal matters, but relates also to fundamental issues of personhood and the quotidian concerns that occupy any individual. As many of the judges have made clear, the reforms seek to achieve not mere equality, but the restoration of dignity, liberty and autonomy to a community of people long marginalized. These are the considerations that ought to have guided Guyana's legislators; instead, without any reasoned debate, the sexual orientation clause was dropped from Act 10 and is, for all intents and purposes, buried in a separate bill that is likely never to see the light of day.

2. The Tyrant's Will

In Guyana, since neither the president nor his legal advisers articulated their objections to implementing fully the recommendations of their own Commission, one is left merely with the demagoguery of the religious interest groups who were responsible for fuelling resistance to homosexual equality in the first
place. Their objection to the amendment in question was purportedly rooted in religious doctrine. According to their interpretations of the Bible (and other sacred texts), homosexuality is an “abomination” and “sinful,” which therefore precludes any constitutional changes that remove or threaten to remove legal sanctions and open the door to same-sex marriages. In their own words:

The Guyanese religious community . . . is equally united and unanimous based on the teachings and sacred writings of all our traditions, that it is God’s will, in his creation of humanity, that sexual intercourse, an image of God’s own power of creation, should be practiced only within the context of marriage between members of the opposite sex.125

This statement is not only internally false; it also fails to provide any legal justification for state-sanctioned discrimination on the ground of sexual orientation.

In the first place and contrary to the above claims, the Guyanese religious community was not united in its view of the proposed amendment. The debate on this issue was hijacked by key figures in the Evangelical movement, out of which the most noxious vitriol emanated, but even amidst the resulting hysteria there were voices of reason. Bishop Singh, the Head of the Roman Catholic Church in Guyana, called on Christians not to oppose the proposed amendment, stating: “The Church is . . . opposed to discrimination based on sexual orientation and supports legislation intended to enshrine this as a fundamental right.”126 Bishop Singh adverted to comments previously released in a Pastoral letter, in which he had stated:

Most of us, whether we find ourselves sexually attracted to the opposite sex or our own sex, did not choose one or the other: we simply discovered that is how we are. Homosexual persons are sexually attracted solely to their own gender. There is strong evidence that their orientation is fixed early in life (in many cases before birth), and it is totally outside of their control. Experience has taught us that no therapy or counselling can change it.127

125 United Religious Position on Rights Bill (on file with author).
Although the release reiterated the traditional (and some would say, hypocritical and unrealistic) position of ‘hate the sin, love the sinner,’ it is remarkable both for its acknowledgement of the immutable nature of sexual orientation and too for its courageous stance against the bigotry of the Evangelical community.

This disunity amongst the local Christian community is instructive, for as this and similar debates are replayed in other religions, it demonstrates graphically the inability of religious doctrine to provide a coherent basis for legislation. Common problems of language, translation and context present formidable challenges to interpretation, and call for considerable skill in navigating what is a semantic and linguistic quagmire. Gareth Moore, a Dominican priest and professor of theology and philosophy at Oxford University, has scrutinised the language and context of the Scriptures to show how traditional interpretations are fallacious and irrational, and argues that there are no cogent Biblical arguments against same-sex relationships. Regarding the story of Sodom and Gomorrah, often cited in this context, Professor Moore agrees that it refers to homosexuality, but argues that it was about attempted homosexual rape and therefore cannot be a condemnation of all homosexual acts (in the same way that condemnation of heterosexual rape cannot be a condemnation of all heterosexual acts).\footnote{Gareth Moore, A Question of Truth: Christianity and Homosexuality (2003).}

Dr. Remert Truluck, an American Baptist preacher and former professor of religion, takes an even more controversial position on the Sodom and Gomorrah story. He argues that the six main Biblical passages often used to condemn homosexuality have all been incorrectly translated and misinterpreted.\footnote{Remert S. Truluck, The Six Bible Passages Used to Condemn Homosexuals, \textit{at} http://www.truluck.com/html/six_bible_passages.html.} In support of his thesis, he presents many examples of how translations from the Greek to English, as well as the evolution of English itself, served to transform, sometimes radically so, the meaning of whole passages.\footnote{\textit{Id.}} Most famously, the word ‘know’ appears 243 times in the Old Testament in various contexts, such as to ‘know’ God, good and evil, the truth, law, people, places, and things, and based on this thematic examination, he concludes that the word simply means ‘know’ and nowhere does it have the sexual connotation that has been consistently (and incorrectly) attributed to it.\footnote{\textit{Id.}} It is this incorrect translation, he argues, that has led to a misinterpreta-
tion of the infamous story of Lot and Sodom. Dr. Truluck posits, "No Jewish scholars before the first Christian century thought the sin of Sodom was sexual. None of the Biblical references to Sodom mention sexual sins but view Sodom as an example of injustice, lack of hospitality to strangers and idolatry.'\textsuperscript{132}

Interestingly, as Islamic doctrines are subject to similar scrutiny, the same confusion rages over the meaning of words and passages. Adopting different techniques of interpretation of Qur'anic verses, Islamic scholar Dr. Scott Kugle argues that the equation of divine punishment of Lut's people (that is, Lot of the Old Testament) with a condemnation of homosexuality is a dubious conclusion.\textsuperscript{133} Kugle demonstrates how both thematic readings of Qur'anic passages and semantic examinations of particular words cast ambiguity on traditional interpretations of the story, and asserts in terms strikingly similar to Dr. Truluck's, "The narrative [of Lut] is clearly about infidelity through inhospitality and greed, rather than about sex acts in general or sexuality of any variation in particular.'\textsuperscript{134}

In fact, Dr. Kugle mounts a radical attack on traditional interpretations, and argues that Islam does not address homosexuality. In support, he states that no punishment is specified for same-sex behaviour, nor is there even any word that means 'homosexual' in the Qur'an. The closest the Qur'an comes to mentioning homosexuals is by speaking of "men who are not in need of women," but even this phrase is used descriptively and without condemnation or other negative connotation.\textsuperscript{135} Dr. Kugle concludes that far from condemning homosexuality, Islam "acknowledges and respects diversity in sexuality and sexual practices.'\textsuperscript{136}

Ultimately, as these debates make clear, many of the sacred texts were written by humans, and are therefore subject to interpretation by humans. Factor in the various translations of these texts and the changes in language and context to which they have been subject over centuries, and ambiguity in meaning becomes not merely understandable, but unavoidable. This, however, presents a critical dilemma for those fundamentalists and Parliamentarians who would legislate on the basis of religious doctrine, and that is, if the texts

\textsuperscript{132} Id.
\textsuperscript{134} Id. at 224.
\textsuperscript{135} Id.
\textsuperscript{136} Id.
themselves are not unequivocal on the subject of human sexuality, how can they in turn be invoked to justify laws that seek to regulate sexual behaviour?

An important dimension of the arguments based on religion is that, even assuming unanimity of interpretation of religious doctrine, there is no clearly discernible link between religion and law. This contradicts common perceptions and even academic opinion, but in truth, amongst the elaborate structure of civil and criminal laws that regulate our lives, one will struggle in vain to find any underlying Christian morality or Biblical sentiment. Where, for example, are the Christian values in the trade, finance and banking rules that disproportionately benefit Western governments, which relegate much of the developing world to abject poverty? Or the Christian values in the skewed intellectual property regime that allows corporate monoliths to profit at the expense of local and indigenous knowledge? In the criminal field, one often assumes, like Rostow, a more direct link between Christian morality and law, but this cannot withstand serious scrutiny. According to the Reverend Dr. Walter Wink, in only four out of twenty areas of sexual behaviour (incest, rape, bestiality and adultery) do Biblical and modern values coincide. Of those four areas, adultery is not proscribed by law, and the glaring fact is that much of what the Bible (apparently) condemns finds no expression in our laws. Equally, many Biblically condoned practices such as polygamy, concubinage and levirate marriage are not only viewed with revulsion in our societies, they are expressly forbidden.

Moreover, the Bible does not reserve its harsh penalties for sexual transgressions, but is replete with other savage and barbaric punishments. It contains sundry laws relating to personal hygiene, clothing and diet that are completely ignored even by the faithful. Perhaps the best indicator of the social distance society has travelled since Biblical times is provided by Deuteronomy 21:18-21, which orders that a “stubborn and rebellious son” is to be stoned to death. It is thus an exercise in futility to discern Christian philosophy as the rationale for our laws, sexual or otherwise, the vast bulk of

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137 See Eugene V. Rostow, The Enforcement of Morals, 1960 CAMBRIDGE L.J. 174, 197 (opining, “Men often say that one cannot legislate morality. I should say that we legislate hardly anything else.”).
138 A discussion of the realities of international trade can be found in The Unkept Promise, N.Y. TIMES, Dec. 30, 2003, at A20.
140 E.g., Exodus 35:2 (death for working on the Sabbath); Leviticus 20:10 (death for adultery); Leviticus 24:14-16 (death by stoning for blasphemy).
which have more to do with the preservation of order and the prevention of harm than with any elusive religious dogma. Advancing religious justification for modern legislation is thus simply an affront to secular traditions.

The issue of morality in general, as opposed to specifically Christian or other religious doctrine, raises questions of an altogether more subtle kind. Legal philosophers have long debated the relationship of law and morality, and this discourse is relevant given the tenor of arguments propounded by the evangelical community. As long ago as 1859, John Stuart Mill, in his celebrated essay, *On Liberty*, cautioned, "[t]he only purpose for which power can rightfully be exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant." This philosophy endured long enough to influence the Wolfenden Committee, set up to investigate homosexual offences and prostitution in the United Kingdom almost 100 years later. In their report, delivered in 1957, the Commissioners stated, "Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law’s business." These recommendations eventually led to the decriminalisation of prostitution in the United Kingdom, as well as the legalisation of homosexual acts between consenting adults over age twenty-one in private.

Nonetheless, a provocative take on the Wolfenden Report came from the distinguished English judge Lord Devlin, who posited direly that "any immorality is capable of affecting society injuriously." According to his "social cohesion theory," all societies have a shared morality which is weakened—to the point of ultimate destruction—by acts of immorality, even if committed in private and harming no one but the actor himself. Society’s own preservation, therefore, demands the enforcement of the moral views of the majority. Arguably, however, this theory is neither logically nor empirically sound. There is, to begin with, a prerequisite of identifying this "shared morality," and the preceding sketch of divergent religious views indicate the difficulties that await any such exercise. As to whether any shared morality can exist in our modern, heterogeneous societies is another even more

142 Id. at 118-19 (quoting the Wolfenden Committee).
144 Id.
difficult question. Finally, practical considerations of immense proportions await the protection of any existing shared morality, as that would entail the impossible task of policing private acts.

In any event, assuming the existence of homogenous societies and of some minimum 'shared morality' therein, one is forced to question why its preservation should be a *sine qua non* to continued survival—particularly when the history of civilization has been one of continual adaptation and change. Indeed, what Lord Devlin overlooks is that the majority is not necessarily right, and it is entirely possible for tradition or common prejudices to be passed off as morality. Dr. Kugle points out that evolving interpretations of the Qur’an have precipitated the demise of practices in Islamic societies relating to monarchical rule, slavery and the treatment of women, without accompanying societal disintegration, leading rather to the strengthening of religious belief.\(^4\) Indeed, as the European Court wryly observed in *Dudgeon*, even though the law concerning private homosexual acts between consenting males had not been enforced in Northern Ireland, no evidence was provided of how this might have negatively impacted the society.\(^4\)

Biological and scientific evidence present even more of a problem for Lord Devlin’s thesis. Biologists and anthropologists have documented homosexual behaviour in every species and in every culture from the beginning of recorded history. In what represented a groundbreaking study for its time, U.S. psychologist Alfred Kinsey demonstrated that homosexuality is “surprisingly common across lines of family, class, education and geographic background.”\(^4\) More recently, a fascinating angle on the implications of Kinsey’s results has been developed by the research of Stanford professor of biology Dr. Joan Roughgarden. Examining Darwin’s evolutionary theory, Dr. Roughgarden rejects the view that homosexuality is an “unexplained anomaly,” and discredits Darwin’s theory of sexual selection.\(^4\) Roughgarden relies on two important behavioural realities that contradict Darwin’s assertions. First, she states that there is ample evidence in nature of species that contradict his ‘peacock’ theory of males being more attractive and aggressive than females, and more fundamentally, she identifies many species that do not fit neatly into gender classifications or conform to preordained roles.\(^4\)

\(^{145}\) Truluck, *supra* note 129.
\(^{146}\) 4 Eur. Ct. H.R. at para. 60.
\(^{147}\) Burr, *supra* note 90.
\(^{149}\) *Id.* That this applies equally to the human species has been demonstrated by one recent study, which revealed that as much as 0.2% to 2% of live births have some form of
flaw in Darwin’s theories, she posits, is that mating involves more than sexual or physical procreation, and she cites examples of animals that form relationships to help rear offspring. As such, social compatibility and social relationships are more critical than mere sexual mating, and in many animal species, it is not merely a male and female who become involved in the reproductive process. Roughgarden extrapolates that for humans, homosexuality operates in much the same way, as a ‘social inclusionary trait.’ Pointing out that homosexuality is much too common to be a genetic aberration, Roughgarden concludes that it evolves “whenever same-sex cooperation helps achieve an evolutionary successful life: to survive, find mates and protect one’s young from harm.”

Equally compelling is the physiological and genetic research that seeks to unravel the aetiology of homosexuality. A number of studies of the human brain and body have explored various theories seeking to assign a biological rationale for homosexuality. Studies of prenatal hormonal influences, neurobiological factors (that is, relating to sexual differentiation of the brain), genetics, and most famously perhaps, anatomical research of the human brain itself, all suggest tantalizingly that sexual orientation is not a behavioural or environmental phenomenon, but is an immutable, inherent characteristic. The best known of the brain cell studies, one conducted by Dr. Simon LeVay, claims that the size of nuclei in the front portion of the hypothalamus (a region of the brain that controls hormones and sexuality) is smaller in homosexual than in heterosexual men. Chandler Burr concludes, after a detailed account of the various lines of scientific research being undertaken, “[E]ven at this relatively early date, out of the web of complexities it is becoming ever clearer that biological factors play a role in determining human sexual orientation.” In other words, there is a good chance that homosexuals are born that way.

Whatever the outcome of philosophical debates regarding the relationship of law and morality, if any is at all possible, the scientific advances represent a formidable challenge to Lord Devlin’s social cohesion theory. Given the prevalence of homosexuality in the human and animal kingdom, even if there

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150 Roughgarden, supra note 148.
151 Id.
152 Id. at 39.
153 Burr, supra note 90.
154 Id.
155 Id.
exists some notion of a shared morality, then it does not (and cannot) include something as universal and inherent as homosexuality. Alternatively, even if proscriptions against homosexuality do somehow form part of shared morality, repeated, cross-cultural violation of this ethic has never had dire consequences anywhere, rendering legislative intervention unnecessary. Moreover, if, as is increasingly likely, human sexual orientation is an inherent characteristic, then state-sanctioned discrimination on this ground is monstrous and ought not to exist in civilised, humane societies. A society could no more legitimately discriminate against a person because he is gay than it could if he is short, or brown-eyed, or left handed.

Many of the cases cited above, by refusing to rationalise their decisions narrowly on the ground of equality, highlight social, psychological and other imperatives that justify legal reform in relation to sexual minorities. In Dudgeon, for instance, the European Court of Human Rights recognised:

The Government right affected by the impugned legislation protects an essentially private manifestation of the human personality. . . . As compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied . . . Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved.  

In this sense, privacy involves more than a spatial element. As it was put by Justice Ackermann of South Africa’s Constitutional Court, “Privacy recognises that everyone has a right to a sphere of private intimacy and autonomy which allows human relationships to be established without interference from the outside community. The way in which sexuality is

expressed is at the core of this area of private intimacy.\textsuperscript{157} Or, as Justice Blackmun declared in his seminal dissenting opinion in \textit{Bowers v. Hardwick}, "[O]nly the most wilful blindness could obscure the fact that sexual intimacy is a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality."\textsuperscript{158}

In every discipline—psychiatry, medicine, anthropology, biology, and even law—attitudes and opinions towards homosexuality have been changing. Whether because sexual orientation is viewed as a biological construct or simply as a manifestation of human conduct to be respected in its private expression, discrimination on this ground is increasingly regarded as unjustified and irrational. The case for dismantling discriminatory laws has been eloquently put by Justice L'Heureux-Dube in her dissenting opinion in \textit{Egan},\textsuperscript{159} where two homosexual men who had lived together for more than forty-five years sought the same spousal benefits and recognition as a heterosexual couple. According to the learned justice,

\begin{quote}
Equality, as that concept is enshrined as a fundamental human right within section 15 of the Charter, means nothing if it does not represent a commitment to recognising each person's equal worth as a human being, regardless of individual difference. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity.\textsuperscript{160}
\end{quote}

Thomas Jefferson famously said, "[L]aw is often but the tyrant's will, and always so when it violates the right of the individual."\textsuperscript{161} Against the rising tide of public and judicial opinion worldwide rationalising the removal of discriminatory laws and practices against homosexuality, the president of Guyana caved into the pressure of sectarian interests and refused to sign the sexual orientation non-discrimination provision into law. In this, he was later supported by his government, despite the fact that the provision embodied a

\begin{footnotes}
\item[158] 478 U.S. 186, 204 (1986).
\item[159] See supra note 109 and accompanying text.
\item[160] See [1995] 124 D.L.R. at 631 (Can.).
\item[161] Letter from Thomas Jefferson to Isaac H. Tiffany (1819), in LETTERS OF THOMAS JEFFERSON (1975).
\end{footnotes}
recommendation made by their reform Commission after four months of public consultations. This was not merely lamentable; it was the tyrant’s will.

V. CONCLUSION

The CRC, established after events that convulsed Guyana, presented the ideal forum to initiate an overhaul of the Bill of Rights. Act 10 however, with its rag-tag collection of amendments, is a bitterly disappointing conclusion to this process, both for what it does and for what it fails to do. The reason why some areas of the Bill of Rights were addressed while others were ignored will remain an enduring mystery, and one can only speculate that the explanation lies somewhere in the fact that the entire process was politically driven. As for the recommendations actually adopted, the extent to which they were mangled in their implementation is truly astonishing. Regarding the reference to international treaties for example, there is little sense that this represents a genuine aspiration to be guided by evolving modern developments, and together with most of the so-called ‘new’ rights, these innovations seem to be more about appearance than substance. Other unforgivable lapses include the obvious unfamiliarity of the drafters with both the specifics and nuances of human rights jurisprudence, which resulted in the removal of the only reference to privacy in the Bill of Rights and the unnecessary inclusion of multiple equality rights.

One small example will suffice to illustrate how ill-conceived and poorly-executed Act 10 in fact is. Although sexual orientation was eventually discarded as a prohibited ground of discrimination, it can still be invoked via other avenues. For instance, a prospective litigant can rely on the interpretation given to “sex” as including sexual orientation by the UNHRC—an influential and relevant precedent given article 154A(1). Of course, this approach may be defeated by article 154A(2), discussed above, but that still leaves available the inchoate article 149D that grants to all persons (unclassified) equality before the law, as well as the newly added article 39(2) that mandates courts to pay due regard to “international law, international conventions, covenants and charters bearing on human rights.” In this maze of contradictory provisions, it is supremely difficult to predict a likely outcome. At this stage, all that is clear is that, despite the rhetoric that surrounded the Constitution reform process, the reality is that Act 10 surely represents the nadir of constitutional reform.