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Queering TWAIL: Tensions Between Postcolonial Sovereignty and International Law in Queer Legal Reform

The Intersection of TWAIL Critiques and LGBTQ+ Jurisprudence in the Commonwealth Caribbean

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ABSTRACT

The social and political reality for LGBTQ+ people in the Commonwealth Caribbean is a culmination of legal, political, and social colonial-era structures. These structures manifest in colonial-era legal statues that selectively target LGBTQ+ individuals and reinforce widespread homophobia throughout society. As a result, LGBTQ+ individuals are constantly met with social oppression in the form of social exclusion, harassment, discrimination, physical violence, and verbal abuse. To illustrate how colonial-era laws currently impact the lives of LGBTQ+ individuals living there and how queer rights jurisprudence have evolved over time, an intersectional theoretical lens is applied that merges third world approaches to international law (TWAIL) with queer theory.

This thesis incorporates Caribbean jurisprudence and scholarship from leading critical theorists to illuminate how colonial legacies have contributed to contemporary anti-LGBTQ+ attitudes judicially, politically, and socially. The development of a "queered TWAIL" approach examines how Caribbean courts navigate the paradox of using international legal instruments, which are argued to be rooted in Western universal traditions, to overturn laws originally imposed by British colonizers. This thesis analyzes five key judgements from across the Commonwealth Caribbean that dismantled colonial-era laws criminalizing same-sex intimacy and cross-dressing bans, revealing tensions between postcolonial sovereignty, international human rights norms, and the persistence of heteronormative legal frameworks.

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TABLE OF ABBREVIATIONS

CCJ – Caribbean Court of Justice

CRC - Convention on the Rights of the Child

CEDAW – Convention on the Elimination of All Forms of Discrimination Against Women

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

HRC – Human Rights Committee

ICC – International Criminal Court

ICCPR – International Covenant on Civil and Political Rights

IPC – Indian Penal Code

IMF – International Monetary Fund

JCPC – Judicial Committee of the Privy Council

LGBTQ+ – Lesbian, Gay, Bisexual, Transgender, Queer/Questioning, and plus

NIEO – New International Economic Order

QOCC – Queer of Color Critique

TWAIL – Third World Approaches to International Law

UDHR – Universal Declaration of Human Rights

UNIBAM – United Belize Advocacy Movement

WTO – World Trade Organization

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TABLE OF CONTENTS

INTRODUCTION

OUTLINE

The current situation for LGBTQ+[1] individuals living in the Commonwealth Caribbean[2] has been shaped immensely by colonial-era anti-LGBTQ+ laws. Depending on the country, these laws criminalize any (and sometimes even all) forms of consensual same-sex sexual intimacy. There has been a steady rise of courts challenging these colonial-era anti-LGBTQ+ laws in the Commonwealth Caribbean. In 2022 alone, Saint Christopher and Nevis, Barbados, and Antigua and Barbuda struck down laws that criminalized sexual intimacy among consenting same-sex adults. While these cases have greatly expanded the legal rights afforded to some LGBTQ+ individuals in the Commonwealth Caribbean, there are still seven Commonwealth countries that either maintain criminal provisions or have repealed previous decisions that decriminalized same-sex intimacy.

On March 25, 2025, the Court of Appeals in Trinidad and Tobago reversed the 2018 *Jones v. The Attorney General of Trinidad and Tobago* decision that decriminalized colonial-era sodomy laws in the country. Citing the country's "savings law clause," which is a "constitutional provision that shields colonial-era laws from being overturned by the courts," the Court of Appeal recriminalized

[1] The use of LGBTQ+ has been critiqued for misrepresenting the fluid nature of gender and sexual identity. As suggested by Altman, the acronym "conflates both biological and cultural understandings of sexuality and gender" distorting "the ways in which these are understood in many non-western societies." Keeping these critiques in mind, the term LGBTQ+ will be used throughout this thesis in the same way the term "queer" is applied to capture the diverse nature of sexuality and gender. See: Dennis Altman, 'The Growing Gap between Academia and Activism?' (2018) 21 Sexualities 1251, 1252.

[2] This thesis uses Westmin R. A. James' definition of the term "Commonwealth Caribbean" in his work "Buggery Laws and Gross Indecency Laws in the 'Commonwealth Caribbean'." In this definition, it refers to those states in the Caribbean Sea and in Central and South America that were British colonies. The independent states in the Commonwealth Caribbean include Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Trinidad and Tobago While it also refers to "British Overseas Territories" (territories that have chosen to remain subordinate to Great Britain rather than becoming formally independent) in the Caribbean and North Atlantic: Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Montserrat and Turks and Caicos Islands, this focus of this thesis is exclusively looking at the independent states. See: RA Westmin James, 'Buggery Laws and Gross Indecency Laws in the "Commonwealth Caribbean"' in Human Rights Watch, '"I Have to Leave to Be Me" Discriminatory Laws against LGBT People in the Eastern Caribbean' (Human Rights Watch 2018) 12.

consensual acts of same-sex intimacy between males.[3] While the maximum sentencing penalties were lowered in the new ruling, it reinforced harmful stereotypes and restrictions on sexuality for LGBTQ+ individuals living in Trinidad and Tobago. Even though there is no evidence of the law currently being enforced, its mere existence perpetuates discrimination amongst queer men and supports the claim that the advancement of LGBTQ+ rights goes against Caribbean religious beliefs and social norms. The reversal of this decision stands in stark contrast to the waves of decriminalization across the Commonwealth Caribbean.

Many countries have since reversed these laws through domestic legal pathways, most notably through Constitutional challenges at their respective state's Supreme Court by referencing regional or international human rights documents. This, however, has not resulted in permanent changes as seen in the *Jones* reversal. This raises the question of whether Caribbean courts striking down colonial-era laws on sexuality through domestic pathways or just strictly implementing international human rights law norms? It is important to be aware of how the international human rights frameworks that challenge these colonial-era laws often reproduce problematic power dynamics. This reproduction of colonial-era power hierarchies requires a critical approach. A Third World Approach to International Law (TWAIL) lens will be applied as TWAIL scholars aim to "uncover…[and] redress, the broad array of political, economic, and social asymmetries that were inaugurated in the process of colonization" and perpetuated in post-colonial international legal frameworks.[4] This approach is particularly valuable when examining current Caribbean jurisprudence as it provides a theoretical framework to analyze the tensions between colonial legacies and international human rights norms in anti-LGBTQ+ rights cases. The application of this theoretical lens aims to answer the question on whether the reliance on international norms strengthens or weakens the argument of the claimant in these cases. This approach determines if judgements are reproducing problematic, colonial-era power structures that TWAIL scholars argue are present in international human rights law.

[3] Outright Team, 'Court Decision Reverses Progress on LGBTQ People's Rights in Trinidad and Tobago | Outright International' (28 March 2025) <https://outrightinternational.org/press-release/court-decision-reverses-progress-lgbtq-peoples-rights-trinidad-and-tobago> accessed 7 July 2025.
[4] Luis Eslava and Sundhya Pahuja, 'Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law' (2012) Vol. 45 Law and Politics in Africa, Asia and Latin America 195, 198.

Additionally, in relation to international law, queer theory has been used to offer insights into how heteropatriarchal legal structures might reinforce similar unequal power relations.[5] Therefore, a queer theory lens is also essential to this analysis as it reveals the heteronormative assumptions that are embedded within colonial legal impositions and contemporary human rights frameworks that traditional judicial analyses lack. While discourse in the human rights field often focuses on achieving formal equality and legal recognition of rights, queer theory exposed how these frameworks can perpetuate the power structures by privileging Western conceptions of sexuality and gender identity. In the Commonwealth Caribbean context, this theoretical lens illuminates how colonial-era laws operate not only as legal prohibition towards same-sex intimacy, but as foundational mechanisms that naturalize heterosexuality and view all other non-conforming sexualities and identities as "unnatural."

The development of an intersection "queered TWAIL" theoretical framework is used to analyze five key cases within domestic and regional Caribbean courts, focusing on how judges navigate between international norms, colonial legacies, and local social/cultural contexts when deciding cases relating to LGBTQ+ rights. This approach not only challenges dominant narratives portraying the Caribbean as 'backward' on LGBTQ+ rights but also addresses the paradox that anti-LGBTQ+ colonial-era laws are often defended as 'traditional' Caribbean values. This thesis argues that when Caribbean courts engage with LGBTQ+ rights, they expand past the nuanced binary of resisting and reproducing colonial-era reasoning. Instead, they selectively rely on international human rights frameworks by framing these norms alongside domestic interpretations. This contradiction will be understood through a "queered TWAIL" lens.

RESEARCH QUESTIONS AND STRUCTURE

The goal of this thesis is to examine the tension between international human rights law norms and postcolonial sovereignty through the lens of recent LGBTQ+ rights jurisprudence in the Commonwealth Caribbean. This research will address multiple questions with the most important

[5] Dianne Otto, 'Introduction: Embracing Queer Curiosity', *Queering International Law: Possibilities, Alliances, Complicities, Risks* (Routledge 2018) 2.

being: What tensions exist between TWAIL's emphasis on sovereignty and the universalist claims of international LGBTQ+ rights frameworks? How do these tensions manifest in judicial reasoning? How have colonial legacies influenced contemporary LGBTQ+ laws in the Commonwealth Caribbean? How do Caribbean courts, both regionally and domestically, engage with international human rights law when deciding queer rights related cases? How can a "Queered TWAIL" lens enhance our understanding of rights jurisprudence, specifically in postcolonial contexts regarding LGBTQ+ rights in the Caribbean?

This thesis will look at several relevant sources. This includes academic scholarship as well as non-academic sources, e.g. Caribbean and international jurisprudence, historic legislation, and international legal instruments. In addition, this thesis will rely on the theoretical frameworks outlined by third world approaches to international law and queer theorists. Through this analysis, this thesis will be able to provide a unique perspective on the intersections between international human rights law critiques, TWAIL and queer theorists' perspectives on human rights law, and anti-LGBTQ+ colonial-era law in the Commonwealth Caribbean. To investigate these intersections, this thesis develops a "queered TWAIL" theoretical framework and applies it to landmark Caribbean case law. The following chapters are structured to build this argument.

Chapter two titled "Theoretical Framework: Towards a "Queered TWAIL" explores the intersection between TWAIL and queer theory alongside international human rights law norms. The role of international law in perpetuating colonial-era power structures is a core discussion amongst the two disciplines. The purpose of this section is to examine the shared concerns and potential tensions between the two, to outline their relevance to a Caribbean legal discourse, and to create an analytical framework that focuses on judicial engagement with colonial legacies and international norms. This chapter responds to the research question: What tensions exists between TWAIL's emphasis on sovereignty and the universal claims of international LGBTQ+ rights frameworks?

Chapter three titled "Colonial Legacies and the Evolution of LGBTQ+ Rights in the Commonwealth Caribbean" discusses the historical context between pre-colonial gender and sexuality frameworks, colonial-era anti-LGBTQ+ laws, and their modern-day interpretations post-independence. While this section does elaborate on the role of religion and social attitudes in

sustaining these anti-LGBTQ+ laws, the overarching purpose of this section is to examine the postcolonial paradox of viewing colonial-era laws as "traditional" Caribbean thinking. This chapter responds to the question: How have colonial legacies influenced contemporary LGBTQ+ laws in teg Commonwealth Caribbean?

Chapter four titled "Case Law Analysis: Queer Rights Jurisprudence in the Caribbean" thematically analyzes five key court cases coming from the Commonwealth Caribbean countries regarding colonial-era anti-LGBTQ+ laws in their respective countries. To do so, this section specifically focuses on the judicial reasoning used in each judgement and how courts relied upon Caribbean modes of thought, international human rights documents, or a mix of the two. The final section of this chapter focuses on the three emerging patterns within judicial engagements with LGBTQ+ related rights including shared constitutional interpretations, similar engagements with international law, and the building of a regional jurisprudence. This chapter responds to the questions: How have the tensions in sovereignty and universality claims, outlined by TWAIL and queer theory scholars, manifest themselves in judicial reasoning? How do Caribbean courts engage with international human rights laws when deciding LGBTQ+ rights related cases?

Chapter five titled "Synthesizing Theory and Jurisprudence" revisits the "queered TWAIL" framework and the application of international human rights norms in Caribbean courts. Specifically, this chapter analyses the tensions between and how courts navigate between sovereignty claims and universality. It contends that Caribbean courts exist as creators of human rights-related jurisprudence instead of merely adopters of it. This chapter responds to the question: How can a "queered TWAIL" lens enhance our understanding of rights jurisprudence, specifically in post-colonial contexts regard LGBTQ+ rights in the Caribbean?

CHAPTER 2: THEORETICAL FRAMEWORK: TOWARDS A "QUEERED TWAIL"

INTRODUCTION

The colonial legacies that continue to shape contemporary LGBTQ+ rights in the Commonwealth Caribbean cannot be adequately addressed through traditional human rights structures alone. These frameworks, often rooted in Western liberal though, fail to capture the complex postcolonial dynamics present in this region, especially considering their perpetuation of discrimination while being masked as tools of resistance. This chapter aims to develop a "Queered TWAIL" approach that explores the intersection between Third World Approaches to International Law (TWAIL) and queer theory through their interactions with international legal frameworks. Both theories fundamentally challenge the universal nature of international law and question the legal frameworks that perpetuate unequal power structures between Western and non-Western countries. This interdisciplinary approach provides a more nuanced understanding of how colonial-era power structures manifest themselves in contemporary legal structures and are fueled by social attitudes against LGBTQ+ individuals in the Caribbean.

Through the development of a "queered TWAIL" theoretical framework, this chapter allows for a critical analysis of key cases within domestic and regional Caribbean courts, focusing on how judges navigate between international norms, colonial legacies, and local contexts when deciding cases relating to LGBTQ+ rights. While most academic analyses on the Commonwealth Caribbean focus on this region from a purely human rights lens, this approach recognizes the complex nature of postcolonial legal reasoning while still acknowledging the ways colonial power structures are still present in modern day legal discourses. The remnants of colonial-era anti-LGBTQ+ laws in the Commonwealth Caribbean remain embedded in domestic legal structures. These laws, often referred to as "buggery" or "gross indecency" laws, are simultaneously viewed as preserving "traditional" Caribbean values while representing the imposition of Victorian-era European moral standards. This paradox illustrates the need for theoretical tools that can navigate the complex intersections of colonial history, contemporary legal structures, and evolving social attitudes toward sexuality and gender identity.

This theoretical intervention is both timely and relevant. The international community has faced persistent crises that have created theoretic blind spots, reinforcing the need of new theoretical frameworks that reveal hidden power structures. Queer theory provides "new insights into how international law works to reinforce unequal relations of power, resources and knowledge, and how this might be resisted."[6] In the same way feminist theory challenged the gendered framework of international law and postcolonial critiques highlighted the field's European bias, queer theory "makes visible its [hetero]sexual ordering that is so taken for granted that it is considered 'natural'."[7]

While not an exhaustive history of queer theory, this chapter does lay a foundation for a "queered" critique of international law and its relevance to postcolonial rights jurisprudence, especially within LGBTQ+ rights in the Commonwealth Caribbean. This section examines the way queer theory has developed as a critical framework within international legal studies and explores its potential for enhancing our understanding of legal frameworks, power structures, and the operation of law in modern society. Queer theory's engagement with international law represents a recent but increasingly relevant development in critical legal scholarship. It provides analytical insights that complement other critical approaches, such as feminist and postcolonial theories, while providing analytical tools for understanding how sexuality and gender operate within contemporary legal systems.

This research question helps to guide the theoretical development of a "queered TWAIL" approach: What tensions exist between TWAIL's emphasis on sovereignty and the universalist claims of international LGBTQ+ rights frameworks? Each section of this chapter builds towards the central argument that this intersectional approach is necessary to provide the analytical tools for understanding LGBTQ+ rights jurisprudence in postcolonial contexts. The first section outlines the origins of TWAIL as a theory and its critiques against universal frameworks in international human rights law. The second section explores queer theory and its approach to international law. Specifically, how does one "queer" international law and what limitations exist when viewing queer theory through a non-Western lens. Finally, the last section synthesizes these two theories

[6] ibid.
[7] Ibid.

into a "queered TWAIL" approach by examining how they intersect in relation to recent Caribbean jurisprudence.

1. TWAIL and the Critique of Universal Human Rights in International Law

i) Origins and Evolution: From TWAIL I to TWAIL II

The Third World Approach to International Law emerged as a discipline during a 1997 conference that was ironically, held at Harvard Law School.[8] This conference focused on the privileging of European and North American voices in international law, specifically on the "need to democratize the discipline and the imperative to critique the structures of international law that reproduced relations of hierarchy and discrimination."[9] The primary aim of this conference was to apply this to both international public law and international economic law to view issues of global wealth and poverty in this critical light.[10] The choice to categorize this critical legal approach as "third world" derived from the stereotypical construction of the term (meaning uncivilized, the deviant 'Other," or the "Rest") by European elites and turning it on its head.[11] In this sense, the approach aimed at criticizing the international legal system as perpetuating this colonial-era power dynamic between the West and the "Rest." Rather than seek for an alternative label, the founding TWAIL scholars chose to embrace the term and use it as a tool of resistance for critical analyses.

The movement that this conference birthed encouraged scholars to question the legitimacy of international law, especially regarding its premise in imperialism that was "central to its very identity and operations."[12] It is critical to TWAIL scholars that they trace the colonial legacies present in international law as the "formal end of colonialism did not bring about the end of colonial relations…" [13] The scholars who made up this initial conference, Obiora Okafor, Karin

[8] James Gathii, 'TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography' (2011) 3 Trade, Law and Development 26, 28.
[9] Karin Mickelson, 'Rhetoric and Rage: Third World Voices in International Legal Discourse' (1998) Vol. 16 Wisconsin International Law Journal 353, 416.
[10] Gathii (n 8) 29.
[11] Balakrishnan Rajagopal, 'Locating the Third World in Cultural Geography' (2000) Vol. 15 Postcolonialism, Globalization, and Law Third World Legal Studies 1, 1.
[12] Antony Anghie, 'Rethinking International Law: A TWAIL Retrospective' (2023) 34 European Journal of International Law 7, 9.
[13] ibid.

Mickelson, and Ratna Kapur, came from many different disciplines and contributed to the fundamental theories of contemporary TWAIL scholarship.

The work of early TWAIL scholars was not based on theoretical questions, but rather "prompted by observing what was happening in their own societies…" and recognizing the need for critical analytical tools to address the challenges the postcolonial world.[14] Antony Anghie, one of the leading scholars in the TWAIL movement, divided TWAIL theorists into two categories to showcase the evolution of the disciple: TWAIL I and TWAIL II. This categorization reflects not only chronological differences, but also the theoretical shift within the movement.

According to Anghie's analysis, TWAIL I is made up of first generation Third World international lawyers from the 1960s and 1970s who "had driven the ambitious campaign to further decolonization, consolidate Third World sovereignty, and later, to establish a New International Economic Order (NIEO)."[15] This generation of scholars was shaped by the waves of decolonialization taking place at this time and the optimistic belief these newly postcolonial countries would be able to reshape their legal systems to better reflect their own interests. Some of the most crucial scholars during this era include Mohammed Bedjaoui, Georges Abi-Saab, R.P. Anand, and T.O. Elias.

The historical context that shaped TWAIL I began to shift dramatically in the 1980s and 1990s. The combination of pre-existing Western-focused institutions like the International Monetary Fund (IMF) with the creation of the World Trade Organization (WTO) in 1994 created what many scholars recognize as a "far-reaching system that furthered the neo-liberal project, profoundly affecting the economic sovereignty of developing countries."[16] This vision of a more imperial and globalized world significantly shifted from the optimistic vision of international cooperation immediately following decolonialization. Simultaneously, the ethnic conflicts that broke out in 1990s, such as the Yugoslav Wars and the Rwandan genocide, significantly expanded international human rights and criminal law frameworks.[17] This vision of human rights, however, excluded alternative systems of political economies and promoted Western individualism.

[14] ibid 80.
[15] ibid 8.
[16] ibid 16.
[17] ibid.

TWAIL II scholars emerged from this new context and were tasked with demonstrating "how the ideas and concerns of TWAIL I scholars continued to be relevant, even if they had to be rethought and reformulated in the contexts of the 1990s."[18] One of the central debates among TWAIL II scholars was the extent to which neo-liberal economic policies had invaded international human rights law and whether it was past the point of no return. With the failure of establishing the New International Economic Order, "many Third World international law scholars became disillusioned…with international law itself."[19] The belief in an optimistic vision of international economic reform was slowly dying. At the same time, this loss of hope prompted the evolution from anti-colonial nationalism towards more problematic forms of government and even racist policies in many Third World countries.[20]

It was within this context that Third World international lawyers began developing strategies for working within the international legal system while maintaining their critical perspective. Rather than abandoning international legal frameworks altogether, many TWAIL II scholars chose to strategically engage within the institutions to better understand its limitations.

ii) Challenging Universalism and Global Hierarchies

Third World Approaches to International Law scholars fundamentally challenge the notion of universal international human rights frameworks, arguing that these instruments, despite their emancipatory rhetoric, perpetuate colonial-era power structures that have continue to shape contemporary legal discourses. While TWAIL does not simply reject human rights as a concept, scholars do analyze how certain universalist claims operate to privilege the experiences of some while marginalizing others.

The majority of modern TWAIL scholars disagree on a single, methodological approach, however, they all share a commitment to examining international law through a critical lens that focuses on the concerns pushed by the "others of international law." The purpose of a TWAIL approach has provided a way to consolidate scholars' and activists' work on the resistance, transformation, and

[18] ibid 8.
[19] ibid. 19 (citing BS Chimni, 'International Law Scholarship in Post-Colonial India: Coping with Dualism' (2010) 23 Leiden Journal of International Law 23, 42.)
[20] Anghie (n 12) 19.

reformation of international law.[21] TWAIL scholars aim to "uncover…[and] redress, the broad array of political, economic, and social asymmetries that were inaugurated in the process of colonization" and perpetuated in post-colonial international legal frameworks.[22]

In its most literal sense, human rights are understood as the rights granted to an individual simply by being a human. Thus, human rights are "universal" in the sense "that they are held 'universally' by all human beings."[23] While this establishes the existence of universal rights, TWAIL scholars argue that it does not prove that such rights currently exist. As the global human rights regime is almost completely reliant on national implementation of international frameworks, the current legal state of human rights and their enforcement is relative and dictated largely where "one has the (good or bad) fortune to live."[24] This gap between universalist perceptions of human rights implementation and the reality of this practice is one of the central arguments that TWAIL scholars seek to address.

Jack Donnelly's influential work on human rights universalism provides a useful basis for understanding the nature of TWAIL critiques. Donnelly argues that while traditional ideas ranging from Islam, Confucianism, and African context support modern internationally recognized human rights, these societies did not develop a significant body of human rights practices. The origins of "natural" human rights frameworks originates from the West as "the spread of modern markets and states has globalized the same threats to human dignity initially experienced in Europe."[25] While all humans come from complex religious, moral, political, and legal structures, "we all must deal with market economies and bureaucratic states."[26] This almost universal endorsement can be seen by the widely ratified Universal Declaration of Human Rights by a majority of states.[27] In Donnelly's view, the cultural relativism debate within the human rights field ignores the "impact

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[22] Luis Eslava and Sundhya Pahuja (n 4) 198.

[23] Jack Donnelly, 'The Relative Universality of Human Rights' (2007) Human Rights Quarterly, Vol. 29 The Johns Hopkins University Press 281, 283.

[24] ibid.

[25] ibid 287.

[26] ibid.

[27] Of the 58 members of the United Nations at the time, 48 states voted in favor, zero against, eight abstained, and two did not vote regarding the drafting of the UDHR. See: United Nations, 'UNBISnet' (*A/RES/217(III)[A]*, 21 January 2019),<https://web.archive.org/web/20190121232151/http:/unbisnet.un.org:8080/ipac20/ipac.jsp?session=14O243550E15G.60956&profile=voting&uri=full=3100023~!909326~!676&ri=1&aspect=power&menu=search&source=~!horizon> accessed 7 July 2025.

of states, markets, colonialism, the spread of human rights idea, and various other social forces."[28] When Western countries attempt to advance arguments about the universality of human rights norms, they must recognize colonialism's legacy and the underlying power behind their decisions.

TWAIL scholars criticize the primacy of Western perspectives that attempt to define what exists as a human right "norm." International human rights law exists as the "highest order," acting as the only pathway to bridge the gap between law and justice when domestic law cannot.[29] As many TWAIL scholars ask, what happens when someone questions the gap in international law itself? While most scholars attempt to reconcile this predicament through the application of other international laws onto themselves, TWAIL scholars tend to theorize why international law is given such as "emancipatory appeal" in the first place.[30] Often, this view is afforded to international human rights law's promise of universality. TWAIL scholars are critical of the term "universal" as it "invariably end[s] up elevating a particular meaning to the universal" which often reproduces European colonial-era interests and perspectives.[31] This trope often universalizes Western, liberal conceptions of rights that disregard the conception of rights elsewhere. This critique is especially relevant for the analysis of the five case studies that will be examined in subsequent chapters, as Caribbean courts must navigate complex arguments between the universal nature of human rights norms and how it reconciles with domestic interpretations of rights.

TWAIL scholars focus on how dichotomies originally constructed by colonial powers, such as civilized/barbarian and advanced/primitive, facilitated the expansion and legitimization of Eurocentric international legal standards.[32] These binaries existed as more than just descriptive categories, but rather as justification for colonial intervention and imposition upon colonized peoples. The understanding of how these binaries operated historically is crucial to recognizing how they currently shape international legal discourse. While not operating under the same terminology under the colonial-era, these binaries are still in use today under the guise of other terms, such as developed/developing, center/periphery, or even advanced/emerging.[33] TWAIL

[28] Jack Donnelly (n 23) 296.
[29] Eslava and Sundhya Pahuja (n 21) 212.
[30] ibid 213.
[31] ibid 214.
[32] ibid 196.
[33] ibid.

scholars argue that these contemporary examples maintain the same hierarchical structure as before but use fewer problematic words.

TWAIL scholars argue that international law is not neutral, but rather that it has actively helped create these divisions during colonial times and continues to maintain them in the post-colonial era through these built-in biases, which tend to favor European perspectives and interests.[34] This core argument for TWAIL scholars challenges the fundamental claim of international laws objectivity, suggesting that it continues to serve the interests of the West while claiming to serve "rest" equally.

A prominent critique within TWAIL scholarship is that international human rights norms are inherently Eurocentric. Makau Mutua, an influential voice within TWAIL II scholars, equates the promotion of universal human rights in the third word as joining the "long queue of the colonial administrator, the Bible-carrying missionary come to save the heathens, the commercial profiteer, the exporter of political democracy…"[35] Mutua's "savages-victims-saviors" metaphor provides a useful framework for the analysis of LGBTQ+ rights jurisprudence in post-colonial contexts. Mutua argues that international human rights law frameworks operate under the narrative where the "savage" Third World state violates the rights of the helpless "victims" which necessitates the call for the Western "savior."[36] The "savior" is made up of actors who are driven "by a belief in the redemption of non-liberal, usually non-European, societies and cultures from human rights abominations."[37] In this sense, "saviors" exist as international non-governmental organizations, internationals courts, or human rights instruments.[38]

Applied to recent queer rights jurisprudence cases in the Commonwealth Caribbean, this metaphor highlights how the court's reliance on international human rights instruments can re-enforce colonial-era power dynamics by positioning themselves as the "savages" in need of a Western "savior." Mutua's critique of international human rights norms allows for a nuanced examination of whether Caribbean courts are incorporating colonial-era power dynamics when referencing

[34] ibid 197.
[35] Makau W. Mutua, 'What Is TWAIL?' (2000) 31 Proceedings of the Annual Meeting (American Society of International Law) 31, 36.
[36] Makau Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (2001) Vol. 42 Harvard International Law Journal 201, 201.
[37] Ibid 237.
[38] Ibid 241.

international human rights instruments, creating the paradox where overturning colonial-era anti-sodomy laws using international legal frameworks is framed as surrendering to Western imperialism.

Obiora Okafor, another second generation TWAIL scholar, similarly emphasizes that international human rights norm discourses split the globe into two conceptional communities, the "heavenly" West and the "hellish" third world.[39] The "heavenly" West exists as a place where human rights violations simply do not occur, whereas the "hellish" third world is constantly plagued by human rights violations. In relation to LGBTQ+ rights litigation in the Caribbean, Okafor's distinction highlights the paradox where Commonwealth Caribbean countries are deciding whether to overturn laws that were originally imposed by the British while the Caribbean region is being framed as inherently homophobic.

One of the most significant insights developed by TWAIL scholars concerns what might be termed the "decolonization paradox," or the recognition that formal political independence has not necessarily resulted in meaningful liberation from colonial power structures and may, in some cases, have created new forms of subordination that are more difficult to identify and challenge than direct colonial rule.[40] This paradox manifests in numerous ways within international legal discourse. For example, many post-colonial states have inherited legal systems that were imposed during the colonial period and that continue to reflect colonial values and priorities rather than indigenous legal traditions or contemporary social needs. The maintenance of these legal systems is often justified through claims about legal continuity, the rule of law, and international legal obligations, but the effect perpetuates colonial legal frameworks long after formal independence.[41]

In the specific context of LGBTQ+ rights in the Commonwealth Caribbean, this paradox becomes particularly relevant. Many of the laws currently criminalizing same-sex conduct in Caribbean countries were originally imposed by British colonial authorities as part of a broader project of moral colonization. These laws were not reflective of indigenous Caribbean attitudes toward sexuality and gender diversity but instead represented the imposition of Victorian British moral

[39] Obiora Chinedu Okafor and Shedrack C Agbakwa, ''Re-Imagining International Human Rights Education in Our Time: Beyond Three Constitutive Orthodoxies' 14 Leiden Journal of International Law 563, 566.
[40] Anghie (n 12) 9.
[41] ibid 44.

and legal frameworks upon Caribbean societies. However, in contemporary discourses, these colonial-era laws are often defended by Caribbean political and religious leaders as representing authentic Caribbean or Christian values that must be protected against "Western liberal imperialism." This creates a deeply ironic situation in which resistance to Western cultural influence is articulated through the defense of Western colonial legal impositions, while support for LGBTQ+ rights is characterized as a form of cultural imperialism despite representing a challenge to colonial legal frameworks. This paradox creates challenges for Caribbean judges who must navigate their decisions on colonial-era anti-sodomy laws against concerns about Western imperialism, the recognition that these laws are colonial-era, and pressure from international human rights frameworks to adhere to international norms.

iii) TWAIL's Strategic Engagement with Human Rights Frameworks

TWAIL scholars argue that the current legal nature of international human rights is inherently a Western concept that perpetuates colonial-era power strictures. This statement, as controversial as it may be for human rights universalists, is the reason why TWAIL scholars were originally drawn to "human rights as a means of protecting against the depredations of the post-colonial state."[42] Instead of merely rejecting human rights as a whole, many TWAIL scholars embrace the concept of human rights in a way that promotes the amendment and adaption of the law to "make it more effective and more sensitive to the realities of those societies and the particular harms suffered by minorities and women."[43] To many TWAIL scholars, the universal nature of international human rights law is inherently Eurocentric and protects only one type of individual - the white, European, male.[44] To combat this paradigm, TWAIL scholars explore the similarities between international human rights norms and "the teachings of various religious and cultural traditions that have shaped non-Western societies...", showing how concepts of personal dignity predate the values currently present in international legal documents.[45]

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[42] ibid 79.
[43] ibid.
[44] Ratna Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism* (Routledge 2013).; Makau W. Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press 2002) <http://www.jstor.org/stable/j.ctt3fhtq0>.
[45] Anghie (n 12) 79.

Numerous queer and TWAIL scholars are active members of international organizations and human rights bodies, such as working as UN Special Rapporteurs and International Criminal Court (ICC) advisors.[46] The work of these scholars demonstrate "how the process of unsettling the colonial, heteropatriarchal, and cissexist realities of international law is not a simple problem that can be resolved by amending a treaty or deciding a case," but rather "the process requires the constant (re)deployment of queer and decolonial political will in order to address the ever-changing field of international politics."[47]

While TWAIL illuminated the global hierarchies embedded within international human rights law, queer theory offers a critical lens by examining how heteronormativity is similarly institutionalized in international law. The next section turns to this second theoretical foundation.

2. Queer Theory's Intervention in International Law

i) Foundations and Core Principles

Queer theory emerged in the 1980s as a radical departure from traditional gay and lesbian identity politics; this included gay and lesbian movements, queer AIDS activism, feminism, and poststructuralism.[48] The theoretical foundation of queer theory was established through the work of many early scholars who challenged the normative assumptions underlying sexuality and gender studies. Teresa de Lauretis originally proposed the term "queer theory" during a 1990 conference at the University of California, Santa Cruz as an attempt to challenge the heteronormative nature of academia.[49] De Lauretis used the term "queer" to "mark a certain critical distance" from the terms "gay" and "lesbian" that had become the standard for those who did not identity as heterosexual or cisgender.[50] This theoretical framework aimed to challenge the binary nature of gender and sexuality, providing the possibility, and space, for individuals "not to adhere to any one

[46] David Eichert, 'Decolonizing the Corpus: A Queer Decolonial Re-Examination of Gender in International Law's Origins' [2022] Michigan Journal of International Law 557, 588.
[47] ibid 589.
[48] Isabel Simonsen Carrascal, 'Fighting Invisibility at the Intersection of Sexuality, Gender and Race: A Queer Postcolonial Analysis of International Human Rights Law' (PhD thesis, University of Sheffield 2022) 30.
[49] Teresa de Lauretis, 'Queer Theory: Lesbian and Gay Sexualities An Introduction' (1991) Vol. 3 Differences iii, iii.
[50] ibid v.

of the given terms, not to assume their ideological liabilities, but instead to transgress and transcend them – or at the very least problematize them."[51] Her reference to discourse production laid the foundation for queer theorists' resistance to universality and the deliberate disruptiveness to sexuality and gender studies.[52] Although the idea of "queer theory" did not emerge in academia until the 1990s, it has remained a timeless and relevant approach through its "ability to remain flexible and open to new directions and discussions."[53]

Defining "queer theory" is not a simple task. Its very nature is to be disruptive and deconstructive, defying "any simple definition or synopsis" and, from its inception, has refused to be definitional.[54] Queer theory is inherently critical, resistant to sexual regimes, and at odds with "the normal, the legitimate, [and] the dominant."[55] As a result, the definition of queer theory remains fluid because what is considered "normal" is always changing. Queer theory's fluidity and resistance to accepting the "norm" allows theorists in the field to constantly respond to the evolution of our understandings of sex, sexuality, gender, and our performance of these roles. Queer theorists aim to critique the very processes that naturalize identity and perpetuate sexual hierarchies. Numerous scholars laid the intellectual groundwork for what eventually made-up queer theory and its engagement with international law. Queer theory is rooted in the writings of numerous scholars, most notably through Michel Foucault, Gayle Rubin, Eve Sedgwick, and Judith Butler.

Michel Foucault laid the foundation for early queer theories to begin reframing sexuality in relation to its historical production. Foucault's argument that "sexuality is a discursive production rather than a natural condition" in his 1976 book *The History of Sexuality* highlighted the perspective of many emerging queer theorists.[56] This focus shaped the way queer theory developed as a deconstructive tool regarding "productions of sexuality… and the assumed connections between sex, gender, and desire."[57] In the decades following, queer theory emerged as a scholarly work

[51] ibid.
[52] Isabel Simonsen Carrascal (n 48) 31.
[53] Hannah McCann and Whitney Monaghan, *Queer Theory Now: From Foundations to Futures* (1st ed., London: Bloomsbury Publishing 2019) 2.
[54] Brenda Cossman, 'Queering Queer Legal Studies: An Unreconstructed Ode to Eve Sedgwick (and Others)' (2019) 6 Critical Analysis of Law 25 <https://cal.library.utoronto.ca/index.php/cal/article/view/32562> accessed 15 June 2025.
[55] David M. Halperin, *Saint Foucault: Towards a Gay Hagiography* (Oxford University Press 1997) 62.
[56] Cossman (n 54) 25.
[57] ibid.

where sexuality itself was the focus, not only its relationship with gender and feminist critiques. Gayle Rubin was one of the first theorists to challenge feminism's claim to the field of sexuality, arguing that "it was essential to separate gender and sexuality analytically to more accurately reflect their separate social existence."[58] Rubin's contribution was critical for the development of queer theory as a distinct analytical framework that focused on sexuality outside its relationship with gender identity. Judith Bulter also famously challenged feminists who "inadvertently reinforced sexuality as 'naturally' heterosexual and thus understood gender as a fundamental binary."[59] In this sense, queer theorists critiqued feminism's focus on male/female relationships and encouraged scholarly work where implicit heteronormativity and sex/gender hierarchies were challenged.[60] This separation was "intended to represent a profound break from feminist analysis on gender and sexuality that was overwhelmingly influenced by dominance or power feminism."[61] This shift away from feminism was not a rejection of feminist ideas, but rather an expansion that address the same issues from an alternative, more queered perspective.

Eve Sedgwick, in her book *Epistemology of the Closet*, famously argued similarly, "the study of sexuality is not coextensive with the study of gender, correspondingly antihomophobic inquiry is not coextensive with feminist inquiry."[62] Sedgwick's approach to queer theory was based on deconstructing sexuality and gender from Western culture.[63] She also explored the intersection between sexuality and power structures, demonstrating through her work that "any analysis of the relation between sexual desire and political power must move along two axes."[64] These two axes included the need "to make use of whatever forms of analysis are most potent for describing historically variable power asymmetries" while the second axis views the "range of ways in which

[58] Cossman (n 54) 26.
[59] Hannah McCann and Whitney Monaghan (n 53) 8.
[60] Cossman (n 54) 26.
[61] Ratna Kapur, '2 The Sexual Subaltern and Law: Postcolonial Queer Imaginaries' in Joseph J Fischel and Brenda Cossman (eds), *Enticements* (New York University Press 2024) 65 <https://www.degruyter.com/document/doi/10.18574/nyu/9781479807635.003.0005/html> accessed 8 March 2025.http://www.jstor.org/stable/jj.25968799.5.
[62] Eve Kosofsky Sedgwick, *Epistemology of the Closet* (University of California Press 1990) 27.
[63] A quote from a Dinitia Smith interview with Eve Sedgwick "It's about trying to understand different kinds of sexual desire and how the cultural defines them." See: Dinitia Smith, '"Queer Theory" Is Entering The Literary Mainstream' *The New York Times* (17 January 1998) <https://www.nytimes.com/1998/01/17/books/queer-theory-is-entering-the-literary-mainstream.html> accessed 7 July 2025.
[64] Hannah McCann and Whitney Monaghan (n 53) 137.

sexuality functions as a signifier for power relations."[65] For Sedgwick, the classification of sexual orientation (such as gay, lesbian, bisexual, etc.) is problematic in the sense that limitations on sexuality hinders its dimensionality. By recognizing that sexuality is ambiguous and has varied interpretations among different people, one can consider "more dimensions of identity *and* reveal different forms of oppression and subordination."[66] While Sedgwick's work remains extremely influential for the development of early queer theory and its approaches to critical inquiry, her work focuses mainly on a Western-based model of thought.

Judith Butler, in their numerous writings but most notably *Gender Trouble*, aimed at the "identity and essentialist constructions of gender, insisting that chromosomal sex, gender, and desire are discursively produced and performed."[67] This concept, for which Butler coins as the "heterosexual matrix," is where sex, gender, and desire are "maintained and naturalized under a binary heterosexual logic."[68] Within this matrix, it follows that a person assigned male at birth (their sex), will express themselves as masculine (their gender), and search for a partner who is exclusively a female (their desire). The same situation stands for the reverse. Butler argues that the prevalence of this pattern over time has normalized this matrix as being the natural state of human identity and desire, thereby obscuring the performative and constructed nature of these categories. One of the main critiques to Butler's approach to gender and sex is that is relies on Western conceptions of these categories, therefore limiting the ways their work can be applied outside of a Western context.

With these core foundations set, queer theory evolved to challenge the disruption of labels and dichotomies, such as gay/straight and homo/hetero. By classifying these definitions as diametrically opposed to one another, it normalized being heterosexual and "reinforced the very static and essentialist conceptions of sex, sexuality, gender, and desire."[69] Rather than expanding

[65] Eve Kosofsky Sedgwick, *Between Men: English Literature and Male Homosocial Desire* (Columbia University Press) 7.
[66] Hannah McCann and Whitney Monaghan (n 53) 140.
[67] ibid 26.
[68] Hannah McCann and Whitney Monaghan (n 53) 122.; Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1999) 194.
[69] Hannah McCann and Whitney Monaghan (n 53) 122.

these pre-existing categories, early queer theorists questioned why categories of inclusions or exclusion existed in the first place – questioning the very foundations of sexual identity.[70]

ii) From Heteronormative Foundations to Queering International Law

The earliest discussion of the rights of LGBTQ+ individuals, internationally and indirectly speaking, took place in 1948 with the drafting and adoption of the Universal Declaration of Human Rights (UDHR) by the United Nations General Assembly.[71] The passing of this document represented a new turn in global politics post-WWII that ensured that everyone had the right to enjoy their human rights and fundamental freedoms.[72] While LGBTQ+ individuals fall into this category of *everyone*, the UDHR did not include a specific reference to the numerous countries that criminalized same-sex intimacy and trans identities at the time. Dianne Otto elaborates on the gaps in protection for the LGBTQ+ community, especially relating to male homosexuals who were specifically targeted and held in internment in Nazi concentration camps.[73] In her view, this lack of protection defied the very nature of universal human rights. As a result, the UDHR and the numerous international human rights instruments that followed, failed to ensure the rights of LGBTQ+ individuals and "confined sexuality to heterosexual marriage" for decades.[74] The "inconsistent treatment of sexuality and gender diverse peoples under international human rights law points towards the way that law and legal decisions are embedded with considerations about gender and sexuality, despite its claim to neutrality, objectivity, and universality."[75]

Between 1948 and 1981, there were few instances where the rights of LGBTQ+ individuals were challenged within regional human rights courts referencing anti-LGBTQ+ domestic laws. For example, in the 1950s numerous German citizens who were charged with violating the German Criminal Code (which prohibited same-sex acts between men) submitted a complaint to the European Commission of Human Rights alleging that their rights guaranteed by articles 8 and 14 of the European Convention of Human Rights (ECHR) had been violated. The Court determined

[70] Deborah P. Britzman, 'Is There a Queer Pedagogy? Or, Stop Reading Straight' (1995) 45 Education Theory 151, 153.
[71] Dianne Otto, 'Introduction: Embracing Queer Curiosity' (n 5) 7.
[72] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR)
[73] Dianne Otto, 'Gender and Sexual Diversity: A Question of Humanity?' (2016) 17 Melbourne Journal of International Law 1, 5.
[74] ibid 7.
[75] Isabel Simonsen Carrascal (n 48) 35.

that Germany's provisions regarding the criminalization of same-sex acts between men were legitimate relating to the "health and morals" exception to article 8.[76] This decision was only reversed in 1981 in the decision *Dudgeon v United Kingdom* which found that laws criminalizing same-sex acts between men violated article 8 of the ECHR.[77]

It was not until 1982 that the first direct reference to lesbian and gay individuals was made within an international human rights body.[78] The Human Right Committee (HRC), which bases its decisions in the International Covenant on Civil and Political Rights (ICCPR), decided a case on public morality laws and freedom of expression in Finland. In this case, the HRC found that the "Finnish government was justified in limiting the freedom of expression of positive views about homosexuality on radio and television programs, in order to protect public morals."[79] The turning point for LGBTQ+ rights in a human rights context was the 1994 decision *Toonen v Australia* where the HRC found that Tasmania's anti-sodomy laws were in violation of article 17 of the ICCPR, the right to privacy.[80] While the law was changed and the anti-sodomy laws were overturned, the negative stereotypes surrounding the LGBTQ+ community perpetuated social discrimination and a lack of acceptance.

Over the years, certain legal measures have been introduced in some countries, mostly in the West, that allowed for increased protections for LGBTQ+ related rights. This included anti-discrimination laws, decriminalization of same-sex activities, recognition of same-sex marriage, gender affirming care, and so on. The legal measures, such as anti-discrimination clauses in domestic laws, will often be understood as the realization of formal equality that mandates the same treatment for all.[81] However, substantive equality, which allows for differences in treatment that reflect traits or circumstances distinguishing categories of people, reflects the ambiguous

[76] Applications nos 104/55, 167/56, 261/57, 530/59, 1307/61, European Court of Human Rights See: Philip Girard, 'The Protection of the Rights of Homosexuals Under the International Law of Human Rights: European Perspectives' [1986] Canadian Human Rights Yearbook 3, 5.
[77] Dudgeon v United Kingdom (1981) 4 EHRR 149.
[78] Dianne Otto, 'Introduction: Embracing Queer Curiosity' (n 5) 8.
[79] Dianne Otto, 'Gender and Sexual Diversity: A Question of Humanity?' (n 73) 5.; Citing Human Rights Committee, 'Views of the Human Rights Committee under Article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights concerning Communication No R 14/61' (22 September 1982) UN Doc A/37/40, annex XIV, 161, 165 [10.3]–[11].
[80] Toonen v Australia, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (31 March 1994).
[81] Libby Adler, 'The Indeterminacy Trap', *Gay Priori: A Queer Critical Legal Studies Approach to Law Reform* (Duke University Press 2018) 45 <http://www.jstor.org/stable/j.ctv11cw5hb.5.>.

conceptions of queer identity.[82] In this sense, achieving formal equality may prove insufficient for communities whose gender and sexual identities fall outside of conventional Western frameworks.

The shift from a narrow focus on LGBTQ+ rights, characterized by measures like anti-discrimination legislation and the decriminalization of same-sex activities, towards a more theoretically queer approach to international law formally began in 2007 with the American Society of International Law's panel titled "Queering International Law." In the years that followed, numerous conferences and organizations began to host discussions relating to the ways queer theory, in combination with feminist, critical race studies, and postcolonial theories, can be applied to international legal frameworks to create a more critical, interdisciplinary approach.

What is the purpose of "queering" international law and how do scholars define it? In the legal field, especially within North American legal academies, the term "queer" or conceptualization of "queering" is synonymous with the LGBTQ+ individuals and communities.[83] The process of "queering" international law goes far beyond simply including LGBTQ+ individuals within existing international frameworks. Oftentimes "queering" international law is assumed to focus on the legal recognition of LGBTQ+ individuals, such as expanding the definition of marriage or strengthening anti-discrimination laws to be more inclusive. Queer theory allows for scholars to clearly understand the heterosexualization and normalization of international law and legal structures. The process of "queering" international law, within a queer theoretical approach, requires one to step outside the box, move away from what is familiar, and fundamentally challenge how one frames legal problems. The act of "queering" international law in this chapter is built upon Dianne Otto's understanding and will challenge the inherent assumptions and power structures present in international legal frameworks.

Scholars such as Dianne Otto, Ratna Kapur, Rohini Sen, and Cynthia Weber frame queer critique as a method of subversion. Otto describes the process as both a "scholarly and an activist project, inspired by a hope for change that is far more ambitious than LGBTI normative inclusion."[84] Weber, on the other hand, describes "queering" as recognizing sexuality as a variable that alters

[82] Ibid.
[83] Cossman (n 54) 25.
[84] Dianne Otto, 'Introduction: Embracing Queer Curiosity' (n 5) 1.

the way we view how power structures operate in the international world.[85] Sen similarly describes her process of "queering" as being both methodological and analytical, the former being represented by the "intertextual apparition of the European Christian male" as embodying international law while the latter represents the "institutionalization of this figure in the notion of sovereignty and statehood."[86] Kapur takes a much more critical approach as she describes "queering" as "an analytical tool intended to disrupt and subvert the dominant normative order and introduce a polymorphous understanding of gender, sex, and sexuality."[87] In her view, the current state of queer engagement with international human rights law has lost its radicality and anti-normative nature that is so ingrained in queer theory.[88] Each of these approaches to understanding the nature of "queering" as a form of critique moves towards a framework that focuses on transforming the reasoning behind legal frameworks by exposing the heteronormative assumptions that make up international law's conceptions of sovereignty.

iii) Postcolonial Intersections and the Limits of Queer Rights

The intersection of queer theory and postcolonial critiques are extremely relevant for understanding how international human rights frameworks function within postcolonial contexts. Postcolonial scholars argue that the idea of queer human rights perpetuate Eurocentric models of "erasing, or marginalizing articulations of non-Western perspectives on sex and sexuality…" and the promotion of Western superiority.[89] Under this line of thinking, the emergence of queer theory is a representation of a postmodern concept produced by Western white academics who do not take "into consideration non-white LGBTQ persons and intersecting oppressions that they face in their communities and wider mainstream society."[90]

The emergence of a queer of color critique (QOCC) in the 1990s criticized the separation of sexuality and race present within mainstream queer theorists. Scholars like Sagri Dhairyam

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[85] Cynthia Weber, *Queer International Relations: Sovereignty, Sexuality and the Will to Knowledge* (Oxford University Press 2016) 19.
[86] Rohini Sen, 'A Queer Reading of International Law and Its Anxieties' (2021) 3 GNLU Law & Society Review 33.
[87] Kapur (n 61).
[88] Ratna Kapur, 'The (Im)Possibility of Queering International Human Rights Law' in Dianne Otto (ed), *Queering International Law: Possibilities, Alliances, Complicities, Risks* (Routledge 2018) 132.
[89] Ibid 138.
[90] Charmaine Crawford, *Gender, Sexual Citizenship and Epistemic Injustice in the Caribbean* (1st edn, Palgrave Pivot Cham 2025) 34.

challenged this focus and the implicitness of whiteness in queer theory in her essay "Racing the lesbian, dodging white critics." In this work, she argues that queer theory has become increasingly "reckoned with as a critical discourse but concomitantly writes a queer whiteness over raced queerness; its domestications in its elaboration of sexual difference."[91] These critiques inspired a movement rooted in embracing intersectionality within the field of queer theory. In an article titled "Queer Transexions of Race, Nation, and Gender," numerous academics attempted to "locate the productive interstices of queer theory, critical race theory and postcolonial studies."[92] The authors of this article argued that "queer theory could move beyond sexuality to also address questions of nationality, gender, race, and class."[93]

Stewart Chang, writing from a postcolonial Asian perspective, discusses the hypocrisy of international gay rights advocates when labeling countries with colonial-era anti-sodomy laws as "backwards." Within this context, repressive norms regarding sexuality "are deflected onto the Asian 'Other' and away from the Western colonizer."[94] Chang describes this line of thinking as attempting to impose universal, Western interpretations of gay rights onto non-Western countries, forming a new type of imperialism.[95] In a similar fashion, Joseph Massad writes that the global gay movement has adopted the missionary role of universalizing its issues through colonial imposition on gay movements in the non-Western world, specifically in the context of the Arabic peninsula.[96] Postcolonial and queer theory scholars are constantly towing the line between an authentic postcolonial critique on the non-heterosexual sexualities and the creation of a "Third World" queer subject that merely stands in contrast with the "global gay."[97] Gayatri Gopinath, who writes about queer female subjectivities within Indian popular culture, clearly illustrates how "such formations are both capable of migrating and pollinating other cultural spaces in ways that do not fit within a homosexual/heterosexual, male/female, us/them, the West and the Rest theoretical

[91] Sagri Dhairyam, 'Racing the Lesbian, Dodging White Critics' in Laura Doan (ed), *The Lesbian Postmodern* (Columbia University Press 1994) 26.
[92] Hannah McCann and Whitney Monaghan (n 53) 185.
[93] Ibid.
[94] Stewart Chang, 'The Postcolonial Problem for Global Gay Rights' [2014] ScholarlyWorks. 341.
[95] Ibid 309.
[96] Joseph Massad, 'Re-Orienting Desire: The Gay International and the Arab World' (2002) 14 Duke University Press 361, 361.
[97] Ratna Kapur (n 88) 139.

binaries."[98] As an example, the idea of an individual "coming out" is trope in Western LGBTQ+ experiences that is not universally or uniformly experienced or a life experience that "we can assume non-Western cultures simply also go through."[99] Postcolonial and queer theory challenges the universality of this experience and attempts to understand how "queerness" is defined outside of a Western context.

Queer theory's critique of the nation-state being the primary subject of international law reveals how state structures depend on heteronormative assumptions. Through a queer lens the construction of a state is defined and held together by heterosexual family ties.[100] For example, Diane Otto discusses how Census forms, last names, birth certificates, tax arrangements, inheritance, and even housing and healthcare are "organized along the grid-lines of heterosexual kinship relationships.[101] In this sense, the expansion of rights recognition for LGBTQ+ individuals within existing frameworks would not address the heteronormative assumptions inherently present within the system.

The assumption that "queering" international law simply means that non-heterosexual or cisgender individuals are recognized and included within the system is problematic. The act of expanding the reach of international human rights law so that it "prohibits homophobic discrimination, recognizes gay marriage, and protects sexual expression as a private matter" is not indicative of queer theory's non-normative approach.[102] The nature of this assumption is not emancipatory, but rather reveals how international legal frameworks presume a "normal" form of human association by the "normal" nation-state.[103] The state oversees granting rights based on this binary system. While a rights-based approach for LGBTQ+ rights might focus solely on a state's denial of LGBTQ+ rights, a queer theory approach views the situation more broadly, in terms of the state's structures and heteronormativity.

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[98] Ibid. (citing Gayatri Gopinath, *Impossible Desires: Queer Diasporas and South Asian Public Cultures* (Duke University Press 2005) 50.)
[99] 'Introduction to Postcolonial / Queer Studies – Postcolonial Studies' (18 September 2020) <https://scholarblogs.emory.edu/postcolonialstudies/2020/09/13/introduction-to-postcolonial-queer/> accessed 7 July 2025.
[100] Dianne Otto, '"Taking a Break" from "Normal": Thinking Queer in the Context of International Law' (2007) 101 American Society of International Law 120.
[101] ibid.
[102] ibid.
[103] ibid.

3. Synthesizing a "Queered TWAIL" Framework

i) Theoretical Intersections

The Third World Approach to International Law framework has laid the foundation for critical analyses on international law and its perpetuation of colonial-era power structures. By focusing on the economic, political, and social inequalities in international legal frameworks, TWAIL exposes the complicity of law within colonial and neoliberal exploitation by the West. TWAIL scholars challenge the notion that universal human rights, arguing that a gap exists between the universalist perceptions of human rights implementations compared to the reality of its implementation in practice. While TWAIL scholars have made significant contributions to understanding colonial legacies in international human rights law, they have largely overlooked the ways sexuality and gender function as key sites of colonial and postcolonial power imbalances. One of the most central ideas of queer theory is its disagreement with fixed identities and normative structures. It resists the concept that sexual and gender identities are static in place and unchangeable. This intersectional framework shifts towards a more fluid understanding of power, identity, and resistance. This section explores the intersection of a "queered" TWAIL approach, not merely through the analysis of gender and sexual identities within pre-existing legal frameworks, but rather by reorienting TWAIL's methodologies to include queer perspectives.

TWAIL and queer theory share fundamental concerns that make their synthesis possible. These include a critical approach to the universality of specific power hierarchies and cultural contexts. In their view, the universalist claims perpetuate the privileging of some while marginalizing others. Both view that seemingly neutral frameworks perpetuate hierarchical relationships. Additionally, TWAIL and queer theory critique colonial legacies and their impact on contemporary legal structures and social attitudes. While still critical of them, both theories do not encourage the complete abandonment of international legal frameworks, but rather the strategic engagement with these institutions to understand its inherent limitations.

Both TWAIL and queer theory, however, are independently limited in their application to postcolonial LGBTQ+ rights cases. For instance, TWAIL scholars sometimes inadvertently rely on fixed structures when viewing how categories (such as sovereign subjects) function as tools of exclusion and hierarchy. This assumption behind fixed categories can overlap with other identity

formations, excluding their fluidity. While many TWAIL scholars do touch upon gender and sexuality,[104] the focus of these characteristics is neglected when it comes to positioning them as key sites of colonial and postcolonial power hierarchies. Queer theorists, on the other hand, sometimes rely on Western conceptions of sexuality and gender. This risks the universalization of Western LGBTQ+ experiences and suggests political strategies that might not translate to non-Western contexts. Excluding the work of decolonial queer theorists and queer of color critiques, queer theorists sometimes pay insufficient attention to postcolonial power dynamics and their impact of contemporary legal frameworks.

To "queer TWAIL" is to view sexuality and gender not only as concerns resulting from contemporary laws but rather concerns ingrained within both domestic and legal frameworks. The colonial project extended far beyond just economic, material, and political domination. It also implemented the regulation of sexuality, desire, and intimacy through the imposition of heteronormative legal codes and criminalization of any sexuality deemed non-normative. The legacies of these colonial impositions are still present in the legal systems of many countries today, most notably in the form of anti-sodomy laws. A "queered TWAIL" critique situates queer struggles at the center of legal analysis in postcolonial countries.

A "queered TWAIL" approach challenges the Western, liberal desire for rights recognition and inclusion that is overwhelmingly present in international human rights discourses. While the call for legal recognitions, such as through marriage equality or anti-discrimination laws, is still extremely important, it is just as important to see how it can work to reinforce the heteronormative structures that queer theory seeks to challenge. This approach maintains this critical approach so that the guarantee of liberal rights recognition is not synonymous with queer liberation under postcolonial contexts. The expansion of queer inclusion does not respond to the root causes that leave colonial power structures untouched.

[104] See: Adithya A Variath and Riya Kadam, 'India and Queering International Law: How International Legal Theory Is "Orienting" the "Disoriented" Domestic Queer Jurisprudence in India' (Social Science Research Network, 17 December 2022) <https://papers.ssrn.com/abstract=4451053> accessed 7 July 2025.; Dianne Otto, 'The Gastronomics of TWAIL's Feminist Flavourings: Some Lunch-Time Offerings' <https://brill.com/view/journals/iclr/9/4/article-p345_3.xml> accessed 7 July 2025.; David Eichert, 'Decolonizing the Corpus: A Queer Decolonial Re-Examination of Gender in International Law's Origins' (2022) 43 Michigan Journal of International Law 557.

ii) Application to Caribbean Jurisprudence

In the context of the Commonwealth Caribbean, where colonial-era anti-sodomy laws continue to criminalize queer expressions of sexuality gender and where regional courts must navigate the tensions between sovereignty, culture, and international human rights norms, a "queered TWAIL" approach offers key insights into an emerging debate. This approach can be used to analyze not only legal texts, but also the cultural narratives, political pressures, and historical legacies that shape how queerness is governed in postcolonial legal contexts.

An examination of colonial-era anti-LGBTQ+ laws reveals that they were not simply legal regulations imposed by the British, but rather as broader projections of moral imperialism that aimed to reshape Caribbean societies according to British social norms. The implementation of a "queered TWAIL" approach traces how these laws intersected with other colonial impositions, including the right to marriage and family structures. Through this approach, the continuity of colonial-era systems within the legal system reflects the colonial values rather than pre-colonial legal traditions or contemporary social needs.

A "queered TWAIL" approach to Commonwealth Caribbean jurisprudence provides a method for critically examining colonial legal legacies, the postcolonial continuity of these legacies, and contemporary resistance to repealing these frameworks. This approach recognizes that the struggle for LGBTQ+ rights in postcolonial contexts cannot be separated from broader struggles against colonial legacies. It reveals the need for a nuanced analysis that moves beyond simple binaries of tradition versus modernity, local versus international, and authentic versus imposed. Instead, this approach attempts to understand how colonial legacies continue to shape contemporary legal discourses and how a transformative legal change can occur in ways that are both culturally grounded while still being internationally engaged.

Chapter 3: Colonial Legacies and the Evolution of LGBTQ+ Rights in the Commonwealth Caribbean

Introduction

To understand the current landscape for LGBTQ+ individuals in the Commonwealth Caribbean, it is important to trace exactly how colonial-era power structures have manifested in modern political and social attitudes. This analysis challenges the notion that the Commonwealth Caribbean countries are "inherently" homophobic by examining the deliberate imposition of heteropatriarchal legal frameworks during the colonial period and their strategic reinforcement in the post-independence era. This colonial legacy, however, intersects with many other factors, most notably the religious transformations that took place during British colonization of the region.

The remnants of colonial-era anti LGBTQ+ laws in the Commonwealth Caribbean remain embedded within domestic legal structures, creating what legal scholars describe as "social and legal sanction[s] for discrimination, violence, stigma, and prejudice" against LGBTQ+ individuals living and visiting these countries.[105] These laws, often referred to in legal documents as "buggery" or "gross indecency" laws, are more than just historical artifacts. They are the continuation of colonial-era morality clauses that still actively marginalize LGBTQ+ individuals and shape contemporary Caribbean society.

Caribbean societies "host a variety of religious and spiritual traditions that encompass a diversity of [cultures] which were assembled through violent and exploitative circumstances during colonialism, slavery and indentureship."[106] Regardless of the current religious makeup of Caribbean countries today, "mainstream religious ideologies continue to uphold Judeo-Christian values established under colonialism."[107] As mainstream Christian beliefs in the Caribbean region promote and perpetuate heteronormativity, discrimination against LGBTQ+ individuals is rooted in more than just colonial-era legal statutes.

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[105] Human Rights Watch (n 2) 1.
[106] Charmaine Crawford, '"Unbearable Knowledge": Sexual Citizenship, Homophobia and the Taxonomy of Ignorance in the Caribbean' (2019) 44 Journal of Eastern Caribbean Studies 115, 131.
[107] ibid.

This chapter examines queer rights jurisprudence in the Commonwealth Caribbean, specifically on the criminalization of same-sex intimacy. By tracing the evolution from pre-colonial conceptions of gender and sexuality, through colonial impositions, and the impact of post-independence modification, this chapter focuses on how these laws currently function not merely as empty statutes, but as foundational elements of institutionalized discrimination that impact contemporary anti-LGBTQ+ attitudes.

1. Pre-colonial Gender and Sexuality Frameworks

To properly examine the colonial imposition of anti-LGBTQ+ laws, it is crucial to understand what these laws originally challenged. Pre-colonial Caribbean societies, while extremely diverse across the region, did not institutionally criminalize consensual same-sex intimacy. In contrast to the strict understanding of sexuality and gender identity implemented under British colonial rule, pre-colonial interpretations of sexuality in the Caribbean did not form "a primary basis for social identification."[108] In many cases, "queerness" applied to many features of Caribbean society, including kinship patterns, political identity, and race relations that "do not quite fit with expectation or with models of the settler nations of the 'West' and Global North."[109] For instance, women used their bodies "in ways that were discordant with the notions of respectable gender and sexuality within compulsory White-male-heterosexism" that characterized the colonial period.[110]

Gloria Wekker's description of same-sex relations among women in indigenous Suriname illustrates this divide between pre-colonial expression of sexuality and Western models.. In her analysis, she explains the term *mati wroko*, meaning "working class women who typically have children and engage in sexual relationships with men and with women, either consecutively or simultaneously."[111] In contrast, a "true *mati*" are working class women who were exclusively involved with women.[112] Wekker claims that both terms emerged from the "cultural and political circumstances of the plantations that shaped sexual subjectivity in the 'black Diaspora'." [113] In the

[108] Kamala Kempadoo, 'Caribbean Sexuality: Mapping the Field' [2009] Caribbean Review of Gender Studies 1, 2.
[109] Krystal Ghisyawan, 'Queer-(in') the Caribbean: The Trinidad Experience' in Ashley Tellis and Sruti Bala (eds), *The Global Trajectories of Queerness: Rethinking Same-Sex Politics in the Global South* (Amsterdam 2015) 161.
[110] ibid 162.
[111] Gloria Wekker, *The Politics of Passion: Women's Sexual Culture in the Afro-Surinamese Diaspora* (Columbia University Press 2006) 172.
[112] ibid.
[113] ibid 2.

case of *mati*, this sexual behavior is separated from personhood and not considered to be an identity but rather "as a way of socially and sexually organizing one's life."[114] Thus, one does not identify as being *mati* but rather as one doing *mati work*. As a result, the universalized terms relating to sexuality, such as "lesbian" and "gay," are not suited to define this indigenous Caribbean conception of sexuality. These definitions of sexuality also lack the complexity to understand how constructions of gender, such as masculine and feminine categories, intertwine with constructions of sex.[115] These traditional Caribbean organizations of homoerotic relationships and matrilineal family structures were demonized as "deviant from the European norm" and subsequently targeted by British colonizers.[116]

While the absence of criminalization does not indicate broad acceptance, it does show that the punitive legal framework targeting same-sex intimacy was entirely foreign to most Caribbean societies. This reality undermines the contemporary claims that same-sex intimacy and gender diverse identities are a "Western" import threatening tradition Caribbean values. Understanding pre-colonial Caribbean sexualities exposes how colonial laws disrupted indigenous norms. The next section details the history of British legal structures and how anti-LGBTQ+ laws were slowly implemented.

2. Colonial-era Legal Legacies

The criminalization of same-sex intimacy in the Caribbean began with the systematic export of British moral and legal standards during the colonial period. The notion that homosexuality was a deviant, immoral, and inherently abnormal form of sexuality that needed to be psychiatrically "treated" prevailed in Western Europe between the eighteenth and nineteenth centuries.[117] Male homosexuality in England, especially during the Middle Ages, was viewed as perverse and immoral, representing a fundamental divide from the classical family structure that underpinned British society.[118] The British heteropatriarchal family structure based on heterosexual procreation

[114] ibid 162.
[115] Kempadoo (n 108) 10.
[116] Rhoda Reddock, 'Gender, Sexuality and Caribbean Diversity' (Institute for Women, Gender and Development Studies (IWGDS), Anton de Kom University, Leysweg Suriname, 20 April 2018) 10.
[117] Charmaine Crawford (n 106) 124.
[118] Netta Murray Goldsmith, *The Worst of Crimes: Homosexuality and the Law in Eighteenth-Century London* (Ashgate Publishing Limited 1998).

and gender roles promoted homophobic rhetoric towards and the subjugation of colonized Caribbeans.

Buggery is a term that has historically encompassed homosexuality, bestiality, and pedophilia. This was because no distinction was made between "normal homosexuals" and those "who preyed on very young boys."[119] In the eighteenth century, the term "buggery" was used interchangeably with "sodomy" within legal documents and formal English "generally to describe sexual intercourse between men."[120] The first "buggery" act originated in 1533 under the reign of English King Henry VIII, who deemed "anal sex, bestiality and other non-procreative sexual acts as unnatural and therefore sinful sexual acts against God and man."[121] The act was later altered during the reign of Edward VI, fully repealed by Mary Tudor, and finally placed on the statute books again under Elizabeth I in 1562.[122] While initially punishable by death, this penalty was later changed to life in prison when the act was made permanent in 1861.[123] This act reflected the power of religion and the state, especially relating to "normalizing" British moral codes.

The rise in British colonial power and its participation within the Transatlantic Slave Trade the eighteenth century quickly spread moral standards to its colonies. Britian exported these barbaric, heteronormative views on sexuality and gender onto its colonies in the hopes that it would bring "European morality to these uncivilized colonies," subjecting them to Western moral standards.[124] As a result, "a body of raced, gendered and sexed post-slavery criminal laws, and their legal constrictions of deviance and conceptions of punishment, shadow the modern Caribbean."[125] The 1861 British Offences Against the Person Act laid the groundwork for the passage of "buggery" and "gross indecency" laws throughout the former British colonies. This Act equated sodomy with bestiality, stating:

[119] ibid 31.
[120] ibid x.
[121] Charmaine Crawford (n 90) 45.
[122] ibid.
[123] Netta Murray Goldsmith (n 118) 31.
[124] Mahalia Jackman, 'They Called It the "Abominable Crime": An Analysis of Heterosexual Support for Anti-Gay Laws in Barbados, Guyana and Trinidad and Tobago' (2016) 13 Sex Res Soc Policy 130, 131.
[125] Arif Bulkan and Tracy Robinson, 'Enduring Sexed and Gendered Criminal Laws in the Anglophone Caribbean' [2017] Caribbean Review of Gender Studies 219, 221.

Unnatural Offences

Sodomy and Bestiality.

> 61. Whosoever shall be convicted of the abominable Crime of Buggery, committed either with Mankind or with any Animal, shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for Life or for any Term not less than Ten Years.[126]
>
> 62. Attempt to commit an infamous Crime. Whosoever shall attempt to commit the said abominable Crime, or shall be guilty of any Assault with Intent to commit the same, or of any indecent Assault upon any Male Person, shall be guilty of a Misdemeanor, and being convicted thereof shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for any Term not exceeding Ten Years and not less than Three Years, or to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour.[127]

These laws were implemented in the Caribbean colonies as "there was no pre-existing culture or tradition … that required the punishment of consensual same-sex conduct."[128] The act was rooted in Victorian-era Eurocentric and Christian values and resulted in the imposition of a moral standard that did not exist in pre-colonial Caribbean societies. Colonial authorities used anti "buggery" laws not only to regulate sexual behavior but also to reinforce broader systems of social control that maintained colonial-era power structures.

3. Post-Independence Reinforcement

Building on these legal foundations, post-independence governments had the opportunity to reassess the legacies of these colonial-era laws. Independence was achieved by most Commonwealth Caribbean countries by the end of the 1960s, giving them the opportunity to reassess colonial legal legacies. Instead of repealing these laws, Caribbean governments "strategically redrafted morality into their criminal codes to restrict same-sex activity through

[126] British Offences Against the Person Act 1861, s 61.
[127] British Offences Against the Person Act 1861, s 62.
[128] Human Rights Watch (n 2) 12.

stiffer penalties for buggery."[129] These amendments, implemented primarily in the 1980s, "significantly refined the definition of buggery or the unnatural crime and increased the severity of the punishment."[130] This reinterpretation of colonial-era morality standards was "entangled with religious doctrine" and advocated for by the church and other religious civil society organizations."[131] The timing of these amendments coincided with the rise of evangelical Christianity in the Caribbean and the growing concerns of Western influence.

Sexual conduct that deviated from established heterosexual norms is characterized as unnatural in many legal systems.[132] Some countries retain direct iterations of the 1861 Offenses Against the Person Act in their current legal frameworks. For example, Jamaica's current Offenses Against the Person Act, last amended in 2014, outlaws "buggery" almost verbatim to the original 1861 British Act. Jamaica diverges from the 1861 British Act in its current Offenses Against the Person Act, stating that the attempt to engage in "buggery" with a man is punishable by a maximum of seven years instead of two.[133]

In other cases, some countries chose to repeal colonial-era laws and pass their own versions of them. For example, the Parliament of the Republic of Trinidad and Tobago passed the Sexual Offenses Act (1986) that repealed the 1861 Offenses Against the Person Act.[134] Amended in 2000, Trinidad and Tobago's Sexual Offenses Act carried much stricter punishments for those charged with committing acts of "buggery" and "serious indecency." In addition, this Act the broadened the definition of "buggery" to include any form of anal intercourse, including that between individuals of a different sex. The 2000 Sexual Offenses Act very clearly defines "acts of serious indecency" as an "act, other than sexual intercourse (whether natural or unnatural), by a person involving the use of the genital organ for the purpose of arousing or gratifying sexual desire."[135] Whereas the Jamaican law explicitly characterizes "buggery" as unnatural, the Trinidad and

[129] Charmaine Crawford (n 90) 49.
[130] Tracy Robinson, 'Authorized Sex: Same-Sex Sexuality and Law in the Caribbean' in Barrow, de Bruin, and Carr (eds), *Sexuality, Social Exclusion and Human Rights* (Ian Randle Publishers 2009) 12 <https://papers.ssrn.com/abstract=3502491> accessed 8 July 2025.
[131] Charmaine Crawford (n 90) 49.
[132] Joseph Gaskins Jr., '"Buggery" and the Commonwealth Caribbean: A Comparative Examination of the Bahamas, Jamaica, and Trinidad and Tobago', *Human Rights, Sexual Orientation and Gender Identity in The Commonwealth: Struggles for Decriminalisation and Change.* (2013) 432.
[133] Offences Against the Person Act 2014 (Jamaica), art 77.
[134] Joseph Gaskins Jr. (n 133) 434.
[135] Sexual Offences Act 2000 (Trinidad and Tobago).

Tobago law does state that vaginal sex is "the only and most 'natural' option for sexual intercourse."[136] However, by equating homosexuality with other charges, such as rape or incest, these laws "conflate these violent [sexual] offenses with same-sex intimacy."[137] While neither Jamaica nor Trinidad and Tobago use these laws to prosecute individuals solely based on their sexuality,[138] it does not mean that the laws are not harmful. The existence of state-sponsored "buggery" laws "impose the stigma of criminality upon same-sex eroticism" even when portrayed as being gender neutral.[139]

The attachment to colonial structures extends past just anti-LGBTQ+ laws. In the case of the Bahamas, the Cayman Islands, Trinidad and Tobago, and Turks and Caicos Islands, the court of last resort is the Judicial Committee of the Privy Council (JCPC).[140] This court, which is based in London, dates to 1833 and is made up of justices from the United Kingdom Supreme Court.[141] The continuation of colonial legacies in the Commonwealth Caribbean are not only based on unenforced "buggery" or "gross indecency" laws, but also in the continued reliance on colonial court structures.

4. Contemporary Landscape for LGBTQ+ Individuals

Within the last decade, many of the Commonwealth Caribbean countries have begun removing "buggery" laws from their state constitutions and criminal codes. As of 2025, seven countries have laws that criminalize same-sex conduct between consenting adults: Grenada, Jamaica, Saint Vincent and the Grenadines, Guyana, Saint Lucia, Dominica, and most recently Trinidad and Tobago.[142]

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[136] Joseph Gaskins Jr. (n 133) 434.
[137] ibid 436.
[138] In these two cases, individuals were charged with buggery in combination with other crimes. "Three men are expected to appear before a Sangre Grande magistrate later today to answer charges of buggery after kidnapping and raping a 14 year old boy." ('Three Men Held for Buggery on 14-Year-Old Boy - Trinidad Guardian' <https://www.guardian.co.tt/article-6.2.445775.eed4cc6979> accessed 8 July 2025.). In 2011, a 58 year old man was sentenced to 24 years for the buggery of a 12 year old boy." (Sascha Wilson, '58-Year-Old Found Guilty of Buggery' <http://www.guardian.co.tt/article-6.2.455228.5f2ae7d444> accessed 8 July 2025."
[139] Christopher R Leslie, 'Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws' (2000) 35 Harvard Civil Rights- Civil Liberties Law Review 103, 112.
[140] Yasmin Morais and Yemisi Dina, *Legal Research Methods for the English-Speaking Caribbean* (2024) 71.
[141] ibid 73.
[142] Human Rights Watch (n 2) 13.

The status of colonial-era laws currently impacting anti-LGBTQ+ legislation is complicated. Even countries that have decriminalized same-sex conduct lack comprehensive anti-discrimination protections, creating a legal limbo where same-sex intimacy is legally permitted but discrimination based on sexuality and gender orientation is unchecked and remains socially stigmatized. Even when there are legal protections against discrimination based on sexual orientation and gender identity, these protections are not uniform across the region. Further, many Commonwealth Caribbean countries which currently have anti-LGBTQ+ legislation do not actively prosecute individuals based solely on their sexual orientation or gender identity.[143] Despite this, the mere existence of these criminal provisions perpetuates discrimination and social stigma for LGBTQ+ individuals, especially men who have sex with men, in the Commonwealth Caribbean. Due to the high degree of social stigmatization towards the LGBTQ+ community within the Commonwealth Caribbean, queer individuals are left in fear of harassment, rejection, and even physical violence from relatives, neighbors, friends, and strangers.[144]

The view that granting rights to LGBTQ+ individuals is imperialistic and deviant in nature helps to contextualize the extensive spread of homophobia in the Caribbean. The murder of 16-year-old Jamaican teen Dwayne Jones who was attacked for wearing women's clothing shows how public resentment towards the LGBTQ+ community has led to organized violence against queer individuals.[145] In response to Jones' murder, some individuals took to social media to justify the killing, arguing that Jones had provoked the attack by "bringing his behavior into the public."[146] Even political officials have displayed a similar resistance to the normalization of queer rights.[147]

The "unnatural" nature of non-heterosexual intimacy has fueled state sponsored violence against LGBTQ+ individuals and homophobic rhetoric among politicians and religious groups. Conservative political and religious leaders in the Commonwealth Caribbean have co-opted the narrative that British colonization is the main reason that homosexuality has "invaded" the islands. Therefore, the continuance of anti-LGBTQ+ laws is removing colonial traces rather than

[143] Joseph Gaskins Jr. (n 133) 435.
[144] Human Rights Watch (n 2) 28.
[145] 'Jamaica: Cross-Dressing Teenager Murdered | Human Rights Watch' (1 August 2013) <https://www.hrw.org/news/2013/08/01/jamaica-cross-dressing-teenager-murdered> accessed 8 July 2025.
[146] ibid.
[147] 'Jamaica, Caribbean: No Gays in Golding's Government' (*Global Voices*, 23 May 2008) <https://globalvoices.org/2008/05/23/jamaica-caribbean-no-gays-in-goldings-government/> accessed 8 July 2025.

perpetuating them. During a protest against the acceptance of homosexuality in Jamaica, a Kingston religious group called Prayer 2000, "urged the government to keep traditional values and not to abolish the anti-sodomy law."[148]

The importation of Christian values within the legal system resulted in the eventual spread of Christianity across the Caribbean region. The spread of Christianity within the European colonization projects was mainly through missionary work of Roman Catholics and Protestants in the Commonwealth Caribbean region.[149] The early missionary projects included the Church of England (Anglican), the Church of Scotland (Presbyterian), and other branches of Christianity such as Baptists, Congregationalists, Methodists, and the Moravians.[150] While these branches do not relate to the current Christian makeup of the Commonwealth Caribbean, the implementation of Christian ideals have had lasting impacts on the religious identity and social attitudes of the region. With the rise of the United States of America as a world superpower, the spread of conservative evangelical Christianity and Pentecostal churches displaced the British missionary-found churches.[151] This expression of Christianity now dominates the contemporary makeup of Caribbean Christian identity.[152] Within the Commonwealth Caribbean, church communities at central to social life and play an important role in shaping social attitudes and moral codes.[153] When churches align with anti-LGBTQ+ sentiments, it often perpetuates stereotypes about the LGBTQ+ community and leads to further social stigmatization.

Despite the recent legal advancements for LGBTQ+ individuals in the Commonwealth Caribbean, the social acceptance of LGBTQ+ people has been met with clear opposition. Not only is this a product of Christian influence, but it is the result of seeing acceptance as an "attempt by the West

[148]Stoyan Zaimov and Christian Post Reporter, 'Jamaican Pastors Rally in Support of Anti-Sodomy Law; Fear Homosexuality Acceptance' (24 June 2013) <https://www.christianpost.com/news/jamaican-pastors-rally-in-support-of-anti-sodomy-law-fear-homosexuality-acceptance.html> accessed 8 July 2025.
[149] Roderick R Hewitt, 'Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Guyana, Anguilla, British Virgin Islands, Cayman Islands, Montserrat, Turks and Caicos Islands, Trinidad and Tobago' in Kenneth R Ross, Ana Maria Bidegain and Todd M Johnson (eds), *Christianity in Latin America and the Caribbean* (Edinburgh University Press 2022) 204 <https://www.jstor.org/stable/10.3366/j.ctv2mzb0p5.26> accessed 9 July 2025.
[150] ibid.
[151] ibid.
[152] ibid 205.
[153] Human Rights Watch (n 2) 34.

toward more tolerance for the gay community."[154] The rise in "anti-LGBTQ+" movements and homophobic rhetoric from conservative politicians around the globe have fueled support for overturning pro-LGBTQ+ decisions.

[154] H Patrick Wells, 'A Leap of Faith: TWAIL Meets Caribbean Queer Rights Jurisprudence—Intersections with International Human Rights Law' (2020) 43 Dalhousie Law Journal 397, 401.

Chapter 4: Case Law Analysis: Queer Rights Jurisprudence in the Caribbean

Introduction

Having established the colonial and postcolonial background of anti-LGBTQ+ laws in the Commonwealth Caribbean, this chapter explores how Caribbean courts have engaged with these legacies in recent case law that addressed LGBTQ+ related rights. The decriminalization of same-sex intimacy and cross-dressing throughout the Commonwealth Caribbean represents an emerging shift in judicial reasoning. Courts must respond to cases that fundamentally challenge colonial-era anti-buggery and anti-cross-dressing laws while navigating the complex relationship between international human rights and domestic constitutional frameworks. This analysis looks at five cases spanning from 2016 to 2024, focusing specifically on how Caribbean courts are engaging with colonial-era laws and their development of distinctly Caribbean approaches to queer rights jurisprudence that reflect domestic and international legal frameworks. This chapter analyzes how Caribbean courts navigate between colonial-era laws and emerging human rights consciousness though a "queered TWAIL" framework.

The following chapter examines five cases: *Orozco v. Attorney General of Belize* (2016), *McEwan et al. v. Attorney General of Guyana* (2018), *Jones v. Attorney General of Trinidad and Tobago* (2018, appealed in 2025), *Jamal Jeffers v. Attorney General of St. Kitts and Nevis* (2022), and *B.G. v. Attorney General of Dominica* (2024). The cases demonstrate the judicial evolution of jurisprudence against LGBTQ+ rights related laws and examine how courts approach the incorporation of international frameworks in domestic legal interpretations. These decisions position Caribbean courts as active agents of legal reform rather than simply passive recipients of universal human rights standards. As a result, courts selectively incorporate international legal norms while prioritizing domestic legal frameworks, in turn, challenging colonial-era power structures.

The selection criteria for cases included those that focused on judicial reasoning with colonial-era legacies relating to LGBTQ+ rights, addressed the tension between international and domestic frameworks, and approached contemporary human rights standards in their legal reasoning. While

all five cases fit these criteria, they each represent different approaches to this challenge over a period of time. Each case contributes to the emerging pattern of decriminalization in the Commonwealth Caribbean and the analysis of each case shows its implications for legal developments in the future.

The analysis reveals three patterns within the jurisprudence: the emergence of "living constitution" interpretations that allow for contending colonial legislation, the development of strategic approaches to international human rights law that maintain domestic legal sovereignty, and the creation of regional jurisprudence emphasizing a distinct Caribbean approach to constitutional interpretation. This chapter will respond to the question: How do Caribbean courts engage with international human rights laws when deciding LGBTQ+ rights related cases?

1. Belize Sets Precedent

i) Caleb Orozco v. The Attorney General of Belize (2016)

The 2016 *Caleb Orozco v. The Attorney General of Belize (Orozco)* decision marked a new era in Caribbean legal history as Belize became the first Commonwealth country to decriminalize consensual same-sex intimacy between adults. This case established the precedent for constitutional interpretation within human rights jurisprudence that influenced future legal challenges across the Caribbean.

Caleb Orozco, a Belizean citizen who faced discrimination and persecution because of his sexual orientation, brought this constitutional challenge against Section 53 of the Belize Criminal Code, chapter 101, which stated that: "[e]every Person who has carnal intercourse against the order of nature with any person or animal shall be liable to imprisonment for ten years"[155] In his first Affidavit, Orozco expressed that his "worth and dignity as a human being and value as a member of society are not recognized" due to his sexual orientation because of the prejudicial nature of Section 53. [156] Orozco alleged that his constitutional rights were limited for this reason, listing four specific incidents that involved vulgar abuse and menacing threats of violence against him.[157]

[155] Criminal Code (Belize), ch 101, s 53.
[156] *Caleb Orozco v The Attorney General of Belize* [2016] Supreme Court of Belize Claim No. 668 of 2010 [28].
[157] ibid.

This case was originally filed by Orozco and the United Belize Advocacy Movement (UNIBAM, for which Orozco was then-president of) against the Attorney General of Belize on September 24, 2010. The claimants originally sought to declare Section 53 of the Belize Criminal code as unconstitutional, however, UNIBAM was found to lack standing in bringing the case. As a result, Orozco became the primary claimant with UNIBAM and other organizations (such as the Commonwealth Lawyers Association, Human Dignity Trust, and International Commission of Jurists) listed as interested parties for the claimant while the Roman Catholic Diocese, Anglican Diocese, and the Evangelical Association of Churches were admitted as interested parties for the defendant. Arguments began being delivered on May 7, 2013, with the final judgement being delivered on August 10, 2016.

The court's judgement provided crucial historical context for Section 53, tracing the origins of "buggery" laws to English common law before assessing any arguments. The court traces the origin of "buggery" laws as coming from English common law through its recognition of sodomy as an "offence against God" in the treaties of Freta and Britton between 1290 and 1300.[158] Following King Henry VIII's rift with the Catholic Church, a statute from 1533 "reinstituted the offence of sodomy which became triable in secular courts."[159] This statute stated that anyone found guilty of committing buggery "with mankind or beast" faced the punishment of death.[160] Excluding the re-enactment of this statute in 1563, this statute was not superseded in Belize until 1861 with the passage of the Offenses Against the Person Act where the death penalty was replaced with life imprisonment.

The court clearly acknowledged the slow codification of British colonial possessions globally and within the Caribbean colonies.[161] The court also referenced the drafting of the Indian Penal Code, which came into force in 1860, that included "buggery" in section 377.[162] The Indian Penal Code has long been the subject of colonial-era legal challenges in India, which the court uses to juxtapose against the implementation of a comprehensive criminal code within the Caribbean context. In the case of Belize, its criminal code was drafted by an English lawyer, R.S. Wright, who originally

[158] ibid 5.
[159] ibid.
[160] Submission of the Clergy Act 1533
[161] *Caleb Orozco v. The Attorney General of Belize* (n 156) 5.
[162] ibid.

laid the legal foundation for the drafting of a criminal code for Jamaica in 1870, which ended up not being implemented in that country. This criminal code was implemented in Belize (then, British Honduras) on December 15, 1888, and stated that:

> "Whoever is convicted of unnatural carnal knowledge of any person, with force or without the consent of such person, shall be liable to imprisonment with hard labour for life, and in the discretion of the Court to flogging."[163]

In most cases of colonial "buggery" laws, those acts were classified under "unnatural crime" clauses.[164] However, in the case of Belize, this was classified under the "public nuisance" category. The Supreme court explicitly notes that fact.[165] This code was eventually repealed and replaced by Ordinance No. 4 of 1944 with very similar wording to the Section 53 of Belize's criminal code.[166] The court makes the distinction between the original 1870 criminal code and Section 53 extremely clear, showing that elements from the colonial era were altered to be more restrictive.

In the Orozco case, the court shifted its focus towards the interpretation of Section 53, specifically its broad and undefined terminology. As indicated, Section 53 established that "every Person who has carnal intercourse against the order of nature with any person or animal shall be liable to imprisonment for ten years."[167] The Court noted that there are no clear judicial definitions of the terms "carnal intercourse" and "against the order of nature."[168]

The *Orozco* case examined the constitutionality of Section 53 within the broader context of how colonial-era legislation could be challenged through constitutional interpretation. The claimant argued that while Section 53 appeared to be neutral and applicable to everyone, especially as the provision begins with the term "Every Person,"[169] its practical application disproportionately targeted gay men as they were "surveilled and harassed by authorities because of their sexual orientation."[170] This argument laid the foundation for future cases in examining the practical

[163] RS Wright, *Drafts of a Criminal Code and a Code of Criminal Procedure for the Island of Jamaica, with an Explanatory Memorandum* (1877) Cd 1893.
[164] Offences Against the Person Act 1864 (Jamaica).
[165] *Caleb Orozco v. The Attorney General of Belize* (n 156) para 9.
[166] ibid para 10.
[167] Criminal Code (Belize), ch 101, s 53.
[168] ibid para 13.
[169] Criminal Code (Belize), ch 101, s 53.
[170] Charmaine Crawford (n 90) 114.

effects of legislation rather than merely focusing on its formal language in future cases. Additionally, the court recognized that while the Preamble of the Belize Constitutional "affirms that the Nation of Belize "shall be founded upon principles that acknowledge the supremacy of God, faith in human rights and fundamental freedoms, the position of the family in a society of free men and free institutions, the dignity of the human person and the equal and inalienable rights with which all members of the human family are endowed by their Creator," it does not stand that reference to God relates exclusively to Christianity.[171] It also does not mean that religious values and principles can be used in interpretation of the Constitution as the "plain language of the Constitution must be given a liberal and purposive interpretation."[172]The Chief Justice of the Court, Kenneth Benjamin, reiterated that the Constitution of Belize is a "living instrument," which interpretation must evolve with the changing values of society.[173] The court reiterated that this interpretation stems from regional and domestic case law, Boyce v. R. (2004) in the JCPC and R. v. Lewis (2007) in the Barbados Court of Appeal.[174] This approach became foundational for subsequent cases, providing a framework that allows courts to challenge colonial-era legislation without rejecting the domestic constitution entirely.

The Supreme Court further addressed the international human rights framework in analyzing the *Orozco* case. Indeed, this is grounded in the country being a signatory of numerous international covenants, including the Charter of the Organization of American States, the Inter-American Democratic Charter, the United Nations Charter, and the Universal Declaration of Human Rights.[175] Even though the state is a signatory to these conventions, TWAIL scholars might have expected the court to reject international standards and rely solely on domestic interpretations. This expectation stems from TWAIL's critique that international law often serves as a vehicle for the imposition of Western colonial power. The court's approach to international human rights frameworks avoided a complete rejection and uncritical adoption of international standards. The judge noted that "decisions in relation to human rights issues have been informed by developments in international law" and acknowledges that Belizean human rights jurisprudence "owes its

[171] Constitution of Belize, preamble.
[172] *Caleb Orozco v. The Attorney General of Belize* (n 156) para 57.
[173] ibid para 58.
[174] See: *Boyce v R* [2004] UKPC 32, (2004) 64 WIR 37 [24] and *v Lewis* (2007) 70 WIR 75 [74] (Barbados CA)
[175] Ministry of Foreign Affairs, Foreign Trade and Immigration, Government of Belize, 'International Conventions' https://mfa.gov.bz/multilateral-international-conventions/ accessed 7 July 2025

provenance to the European Convention on Human Rights."[176] The court, however, consistently reiterated that these international influences informed their constitutional interpretations rather than completely overriding domestic legal frameworks. The court acknowledged that "the streams of domestic law and international law ought to flow in the same direction in establishing fundamental norms applicable to the rights conferred by the Constitution."[177] The judgement references decisions rooted in international covenants and definitions. For instance, the Court recognized that the definition of "sex" included sexual orientation based on a definition by the UN Human Rights Committee which was famously used in the 1992 *Toonen v. Australia* case that prompted the overturning of anti-sodomy laws in Australia. This strategic use of international jurisprudence established a pattern that would be followed by subsequent Caribbean cases. Other regional courts used international precedents and provisions to support expansive constitutional interpretation while maintaining that their decisions were grounded in domestic constitutional provisions rather than solely in international legal frameworks.

This case also positively impacted other decriminalization cases in different Caribbean Commonwealth countries based on its analysis of "public morality." Belize's Supreme Court mentions the public morality clause through its reference to religious leader's arguments in Belize. Namely Bishop Philip Wright (the head Anglican Church in the Diocese of Belize) and Pastor Eugene Crawford (the President of the Belize Association of Evangelical Churches) argued that Section 53 was justifiable for maintaining "public morality." Whereas Bishop Wright specifically argued that Section 53 was "integral to the protection of the common good and public morality to the extent that its repeal would be inimical to the preservation of society as ordered by the creator," Pastor Crawford deemed that Section 53 exists for safety reasons, public order, and public health.[178] The court determined that the violation of these constitutional rights cannot be justified by "public morality" and rejected the State's argument. As a result, the defense of public morality clauses as a justification for anti-LGBTQ+ was severely limited.

[176] Charmaine Crawford (n 90) 120.
[177] *Caleb Orozco v. The Attorney General of Belize* (n 156) para 59.
[178] ibid para. 76, para. 78.

The Supreme Court of Belize found that Section 53 of the Belize Criminal Code, chapter 101 violated multiple constitutional rights including the right to human dignity,[179] privacy,[180] freedom of expression and non-discrimination,[181], and equality before the law.[182] The *Orozco* decision was appealed in 2018, however, the Court of Appeals upheld the original decision in December 2019. This solidified the precedence of this case throughout the Commonwealth Caribbean. The appellate confirmation established this decision as a stable foundation for future cases, demonstrating how this approach to constitutional interpretation with international legal frameworks stands up against appeal. The impact of the *Orozco* decision extended well past the borders of Belize. It provided a template for other countries to legally challenge colonial-era anti-LGBTQ+ laws in a successful manner. This case demonstrated that domestic legal interpretation can incorporate international legal developments without compromising national sovereignty.

2. Building Momentum: Regional Expansion and Judicial Dialogue

The success of the *Orozco* case triggered a surge of similar legal challenges across the Commonwealth Caribbean, with courts increasingly engaging in judicial reasoning that referenced international human rights frameworks and regional precedents. This period saw the emergence of what can be characterized as a distinctly Caribbean judicial approach to LGBTQ+ rights, with courts explicitly referencing decisions from neighboring jurisdictions while developing their own approaches to constitutional interpretation. While *Orozco* set precent for decriminalization through constitutional interpretation, subsequent courts approached similar challenges with slight variations, particularly in their treatment of colonial-era legacies outside of “buggery” laws. As seen in the *McEwan* case explained below, it shows how challenges to gender expression were treated by a regional Caribbean court, the Caribbean Court of Justice (CCJ).

i) McEwan et al. v. Attorney General of Guyana (2018)

The 2018 *McEwan et al. v. Attorney General of Guyana* case brought the issue of colonial-era anti-LGBTQ+ legislation before the Caribbean Court of Justice, legitimizing this approach to queer rights jurisprudence at a supranational level. This decision focused on the colonial-era Guyanese

[179] Constitution of Belize, s 3(c).
[180] ibid. and s 14(1).
[181] ibid s 12.
[182] ibid s 6(1); 16

law that criminalized cross-dressing and specifically targeted individuals identifying as transgender or gender non-conforming. Thus, as far as the facts of the case are concerned, *McEwan et al.* differs from other cases under this research's analysis.

Under the 1893 vagrancy law in Guyana, Section 153(I)(XLVII) of the Summary Jurisdiction (Offences) Act[183], it was a criminal offence for a man to dress in women's attire or a woman to dress in men's attire in public for "any improper purpose."[184] More specifically, Section 153 defined cross-dressing as: "*being a man, in any public way or public place, for any improper purpose, appears in female attire; or being a woman, in any public way or public place, for any improper purpose, appears in male attire."*[185] Those found guilty of the offence of cross-dressing understood as indicated above were liable to a fine between 7,000 and 10,000 dollars.

The claimants in *McEwan et al.* consisted of four individuals who were convicted and punished for cross-dressing in public. All four individuals were charged with loitering and wearing female attire for an "improper purpose." In this case, the female attire worm by the claimants consisted of a pink shirt, tights, skirts, and wigs. All four individuals were held in police custody without any indication as to why they had been arrested and detained. The individuals eventually learned their reason for arrest when they were taken to a separate court, the Georgetown Magistrate's Court, a few days after. All the claimants pleaded guilty to violating section 153(1)(xlvii) of the Summary Jurisdiction (Offenses) Act and received a fine for cross-dressing in public. Following the sentencing, however, the Magistrate told the claimants that they must "go to church and give their lives to Jesus Christ" and advised them that "they were confused about their sexuality; that they were men, not women."[186]

Within the first case against the High Court of Guyana, the claimants argued that their rights were violated, specifically their right to be informed of the reasons for their arrest and detention,[187] the

[183] Summary Jurisdiction (Offences) Act (Guyana), s 153(I)(XLVII). The section reads—"Every person who does any of the following acts shall, in each case, be liable to a fine of not less than seven thousand dollars... (i)...(ii)...(xlvii) being a man, in any public way or public place, for any improper purpose, appears in female attire, or being a woman, in any public way or public place, for an improper purpose, appears in male attire; or (xlviii)..."
[184] Charmaine Crawford (n 90) 137.
[185] Summary Jurisdiction (Offences) Act (Guyana), s 153(I)(XLVII).
[186] *Quincy McEwan et al v The Attorney General of Guyana* [2018] Caribbean Court of Justice Appellate Jurisdiction CCJ Appeal No. GYCV2017/015 [10].
[187] Constitution of Guyana, arts 139(3), 144(2)(b).

right to retain and instruct legal counsel,[188] and the validity of section 153 and the remarks made by the Magistrate. They challenged the mere fact that the text of section 153 was vague and discriminatory. In 2013 the High Court determined that the police violated their constitutional duty to inform the appellants of the reason for their arrest, however, the judge determined that the challenges against the content of section 153 were unfounded as it was protected by the savings law clause, a clause that aimed to provide stability within the transition period of colonial rule to independence by protecting existing laws from abrupt constitutional changes.

Following the original decision by the High Court, the appellants appealed their case to the Court of Appeal in 2017. While the Court of Appeals entertained some of the submissions by the appellants, they still determined that Section 153 was protected from constitutional change by the savings clause.[189] Additionally, the Court of Appeals agreed with the lower court's decision that section 153 was not discriminatory based on gender identity. The Court of Appeals also found that the expression "improper purpose" was not broad or vague as argued by the claimants.

In the final appeal to the CCJ, the appellants argued that their Constitutional rights were violated under Article 149 (the right to equality and non-discrimination), Article 146 (the right to freedom of expression), Article 40 (the right to be protected under the law), and Article 144 (the right to a fair hearing).[190] It was not until June 2018 that the CCJ ruled that Section 153 was unconstitutional as it "violated the rights of the appellants by discriminating against and criminalizing them due to their gender identity and expression as transgender persons…[as it] infringes on their personal autonomy which includes both the negative right to not be subjected to unjustifiable inference by others and the positive right to make decisions about one's life."[191] The CCJ also determined that Section 153 reinforced stereotypes that "conduces to the stigmatization of those who do not conform to tradition gender clothing" and cannot be reasonably justified.[192]

The court had to maneuver around the savings law clause. It found that "Article 149(1) of the Constitution protects the people of Guyana from discrimination. No law can be enacted that is

[188] ibid 139(3).
[189] *Quincy McEwan et al. v. The Attorney General of Guyana* (n 186). Para. 23.
[190] ibid.
[191] Charmaine Crawford (n 90) 144.
[192] *Quincy McEwan et al. v. The Attorney General of Guyana* (n 186) para 72.

discriminatory of itself or in its effect," sidestepping the clause.[193] The Chief Justice of the CCJ also emphasized the importance of viewing the Constitution as "dynamic" and the necessity to adapt to changing norm, especially when it comes to discrimination cases. [194]

When it came to violations outlined in Article 146, the CCJ determined that section 153 specifically targeted LGBTQ+ individuals and, in turn, justified the harassment of this community by encouraging "humiliation, hate crimes, and other forms of violence" against them.[195] The CCJ concluded that this stands "at complete variance with the aspirations and values laid out in the Guyana Constitution."[196]

The CCJ came to its decision based on their examination of regional and international instruments and judgements. Indeed, the examination of international obligations is grounded in the provision of Article 39(2) of the Guyana Constitution, which mandates that courts "pay due regard to international law, international conventions, covenants and charters bearing on human rights" when they interpreted any cases related to fundamental rights provisions.[197] The CCJ relied on the Inter-American Court of Human Rights' Advisory Opinion on the *Proposed Amendment to the Political Constitutional of Costa Rica related to Naturalization* in relation to equality and dignity.[198] Further, it referred to principles outlined by CEDAW Committee,[199] and jurisprudence from Canada,[200] India, [201] the United States of America,[202] and Belize.[203] The CCJ recognized the obligation for the Guyana courts to pay due regard to international human rights norms, however, it expanded its reliance by referencing jurisprudence in Belize. As a result, the CCJ grounded its decision in domestic jurisprudence while still upholding the values of international human rights norms.

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[193] ibid 62.
[194] ibid 41.
[195] *Quincy McEwan et al. v. The Attorney General of Guyana* (n 186) para 79.
[196] ibid.
[197] Constitution of Guyana.
[198] *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica* (Advisory Opinion OC-4/84) Inter-American Court of Human Rights, Series A No 4 (19 January 1984).
[199] Committee on the Elimination of Discrimination against Women, 'General Recommendation No 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women' (2010) UN Doc CEDAW/C/GC/28 [22].
[200] *R v Nova Scotia Pharmaceutical Society* [1992] 2 SCR 606.
[201] *National Legal Services Authority v Union of India and Ors* [2014] 4 LRC 629.
[202] *Papachristou v City of Jacksonville* 405 US 156 (1972).
[203] *Watson v R* (2004) 64 WIR 241 [46] (Lord Hope).

The CCJ acts as the final appellate court, commonly called the "court of last resort," for Barbados, Belize, and Guyana.[204] By bringing the *McEwan et al.* case to the CCJ, it demonstrated that challenges to colonial-era anti-LGBTQ+ laws were gaining acceptance at the one of the highest levels of Caribbean jurisprudence. Additionally, the CCJ's understanding of gender identity moved beyond heteropatriarchal constructs promoted by political leaders and religious organizations.[205] For instance, the CCJ stated that "a person's choice of attire is inextricably bound up with the expression of his or her gender identity, autonomy and individual liberty. How individuals choose to dress and present themselves is integral to their right to freedom of expression."[206] This approach aligns with postcolonial queer critiques on the binary nature of gender identity. This judicial recognition of gender expression as a fundamental right represents a departure from the colonial legal frameworks present in the Caribbean region. By recognizing that gender identity transcends binary classifications imposed by colonial-era laws, the CCJ created a legal pathway for similar challenges to discriminatory laws in the Caribbean.

ii) Jason Jones v. Attorney General of Trinidad and Tobago (2018)

The 2018 *Jason Jones v. Attorney General of Trinidad and Tobago* decision demonstrated the potential and limitations of relying heavily on international human rights frameworks in challenging colonial-era legislation without grounding decisions in domestic interpretations. Jason Jones, a citizen of Trinidad and Tobago but not a permanent resident, petitioned the High Court of Justice in Trinidad and Tobago to strike down sections 13 and 16 of the Sexual Offenses Act. By doing so, this would result in the decriminalization of consensual same-sex sexual activity. The claimant asked the Court to determine whether the State has the constitutional authority to criminalize same-sex activity between consenting adults.

Jones argued that Sections 13 and 16 of the Sexual Offenses Act of 1986 were unconstitutional and violated his right to equality before the law, freedom of thought and expression, and respect for private and family life. Section 13 criminalized "buggery," defined as sexual intercourse *per anum* by a male person with a male person or by a male person with a female person" with a

[204] Yasmin Morais and Yemisi Dina (n 141) 73.
[205] Charmaine Crawford (n 90) 146.
[206] *Quincy McEwan et al. v. The Attorney General of Guyana* (n 186) para 76.

punishment for a period of up to twenty-five years in prison.[207] Section 16 criminalized acts of "gross indecency," defined as "an act other than sexual intercourse (whether natural or unnatural), by a person involving the use of the genitalia organ for the purpose of arousing or gratifying sexual desire" with a punishment for a period of up to five years in prison.[208] The Hight Court of Trinidad and Tobago found in favor of the claimant, declaring that both sections 13 and 16 of the Sexual Offenses Act of 1986 were ruled to be "unconstitutional, illegal, null, void, [and] invalid."[209]

The *Jones* decision highlighted the tension with colonial-era legal mechanism, specifically the savings law clause. As previously indicated, these clauses were implemented to provide stability within the transition period of colonial rule to a state's independence by protecting existing laws from abrupt constitutional changes. This clause represented a complex challenge for Caribbean courts attempting to repeal colonial-era anti-LGBTQ+ related laws as it is specifically designed to prevent these kinds of changes. The state attempted to invoke the savings clause "to exempt Section 13 from judicial review," but it was denied by the Court.[210] This issue, however, was not settled as this decision by the High Court has been appealed due to the court's interpretation of the savings law clause.

The *Jones* decision was significant for its detailed historical analysis that traced the origin of anti-buggery laws in colonial English laws through post-independence Trinidad and Tobago. This analysis demonstrated judicial awareness of the colonial origins of anti-buggery laws and provided context for understanding these laws as products of the colonial era rather than timeless principles.

The court upheld its current constitutional supremacy in its decision and stated that it supersedes the authority of colonial-era principles. Indeed, the court noted: "[t]o cling to the presumption of constitutionality is, to my mind, and with the greatest respect, a symbol of a further clinging to the vestiges of the colonial idea of the supremacy of Parliament which has, to my mind, been

[207] Sexual Offences Act 1986 (Trinidad and Tobago), s 13.
[208] *Sexual Offenses Act 1986* (Trinidad and Tobago) Act No. 27 of 1986, s 16. & High Court of Justice [HCJ], Trinidad and Tobago [T&T], 2018, p. 4).
[209] *Jason Jones v The Attorney General of Trinidad and Tobago* [2018] High Court of Justice in the Republic of Trinidad and Tobago Claim No. CV2017-00720 [176.1].
[210] Charmaine Crawford (n 90) 128.

supplanted by the Constitution.[211] This statement explicitly frames constitutional interpretations as a post-colonial project that rejects colonial power structures and legal hierarchies.

The courts approach to international law was more aggressive than the approach taken in the *Orozco* and *McEwan et al.* decisions. This is visible in the extensive references to international jurisprudence, including the High Courts of Canada, Gambia, the United Kingdom, Ireland, South Africa, India, Grenada, the United States, and many others. The judgement also drew heavily from international human rights norms by referring to the decisions made by the European Court of Human Rights (ECtHR) and the United Nations Human Rights Committee, specifically regarding Article 17 of the ICCPR in *Toonen v. Australia*. The court explicitly embraced international human rights standards, stating that "the consolidation of rights and freedoms of the individual… is necessarily fashioned out of local experience and culture with due regard being paid to the international norms in relations to individuals."[212] This approach to relevant international standards and other state's domestic laws was more incorporated in the judgement than in other related cases in the Commonwealth Caribbean, with international legal norms playing a more direct role within the court's interpretation.

In March of 2025, the Court of Appeal of Trinidad and Tobago agreed to the appeal submitted by the Attorney General. This reinstated the savings clause protection and overturned the 2018 decision that decriminalized same-sex intimacy. Thus, in 2025, the colonial-era anti-LGBTQ+ law was reinstated, albeit with lesser provisions than indicated in the 1986 Sexual Offenses Act. It indicates a weakness for courts to rely heavily on international human rights norms, especially when it contradicts a constitutional provision like the savings clause. The reversal demonstrates the importance of developing constitutional arguments that can withstand savings law clauses and other colonial-era mechanisms that are designed to protect colonial-era legislation from constitutional or judicial challenges.

3. Balanced Judicial Reasoning

The period following the initial *Jones* decision saw more Commonwealth Caribbean countries challenging colonial-era anti-LGBTQ+ laws through an approach that balanced international

[211] *Jason Jones v. The Attorney General of Trinidad and Tobago* (n 209) para 99.
[212] ibid 106.

human rights frameworks and domestic constitutional supremacy. Both the 2022 *Jamal Jeffers v. Attorney General of St. Christopher and Nevis* and the 2024 *B.G. v. Attorney General of Dominica* decisions reflect this judicial pattern.

i) Jamal Jeffers v. Attorney General of St. Christopher and Nevis (2022)

Jamal Jeffers v. Attorney General of St. Christopher and Nevis resulted in the repeal of two colonial-era laws that limited same-sex sexual activities between consenting adults. The claimants, Jamal Jeffers and a non-profit organization called the St. Kitts and Nevis Alliance for Equality, sought for a declaration that sections 56 and 57 of the Offenses Against the Person Act of 1986 were unconstitutional. Section 56 focuses on sodomy and bestiality provisions, stating that "any person who is convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable to be imprisoned for a term not exceeding ten years, with or without hard labor."[213] Section 57 focuses on the attempt to commit an infamous crime, stating that "any person who attempts to commit the said abominable crime or is guilty of any assault with intent to commit the same…shall be liable to be imprisoned for a term not exceeding ten years, with or without hard labor."[214] The claimant argued that both sections contravene the right to protection of personal privacy contained in Section 3(c) of the Constitution, the right to freedom of expression contained in Section 12 of the Constitution, and the right to protection from discrimination on grounds of sex contained in Section 15 of the Constitution. [215]

One of the main points of contention within this case was the definition of "buggery" While the provisions do not define "buggery" or "the abominable crime," the High Court in the *Jeffers* decision recognizes that it includes sexual intercourse *per anum* by a man with a man or women, whether or not it takes place "in public or private, and regardless of the age of the participants involved, and whether or not they are consenting."[216] With this settled, the Court was able to come to their final judgement regarding the constitutionality of section 56 and 57 of the Offences Against the Person Act.

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[213] Offences Against the Person Act 1986 (St Kitts and Nevis), s 56.
[214] Offences Against the Person Act 1986 (St Kitts and Nevis), s 57.
[215] *Jamal Jeffers et al v The Attorney General of St Christopher and Nevis* [2022] High Court of Saint Kitts and Nevis Claim No. SKBHCV2021/0013 [19].
[216] *ibid 10, 12.*

Unlike Trinidad and Tobago and Belize, Saint Christopher and Nevis lacks a savings clause in its Constitution. Therefore, as referenced in section 2 of the Saint Christoper and Nevis Constitution, the court is allowed "to modify the language of any law that was in existence prior to Independence to bring it into conformity with the Constitution."[217] Under this section, the High Court of St. Christopher and Nevis struck down sections 56 and 57 of the Offenses Against the Person Act of 1986, remediating the phrasing to exclude consensual same-sex sexual activity between adults in private. The Court found that these sections violated the rights of personal privacy and freedom of expression granted to its citizens under the Constitution.

In reaching their final judgement, the Court reinforced their duty to adopt a generous interpretation and interpret the Constitution as a living document as a review of this nature "necessitates periodic re-examination of its application to evolving contemporary norms."[218] The Court makes clear references to relevant Constitutional provisions and recognizes the supremacy of the Saint Christopher and Nevis Constitution. Additionally, the Court built onto the liberal constitutional interpretation framework laid out in the *Orozco* decision. The Court also extensively cited cases from other Caribbean countries as well as regional courts, such as the *McEwan* decision brought to the Caribbean Court of Justice. Additionally, the Court references various international documents like the International Covenant on Civil and Political Rights, decisions from the European Court of Human Rights, and general comments on the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of Discrimination Against Women (CEDAW).

However, the court was careful to establish the hierarchical relationships between these different sources of law. The court explicitly noted that Saint Christopher and Nevis are not bound by the ICCPR as they have neither signed nor ratified it.[219] Additionally, while the Court recognized that both the CRC and CEDAW are ratified by Saint Christopher and Nevis, "the Constitution is the supreme law and the General Comments by international bodies do not and cannot override the language of the Constitution which is unambiguous."[220] While this section specifically refers to whether "sexual orientation" is included in the term "sex" when looking at provision prohibiting discrimination on the basis of sex, the court's line of reasoning aligns with the argument that

[217] Constitution of Saint Christopher and Nevis.
[218] *Jamal Jeffers et al. v. The Attorney General of St. Christopher and Nevis* (n 215) para 22.
[219] ibid 91.
[220] ibid 95.

Caribbean courts are allow international human rights norms to inform their decisions but do not let them override their own Constitutional frameworks.

The court's line-of-reasoning demonstrates a sophisticated understanding of the relationship between different sources of law and their importance of maintaining legitimacy for judicial decisions. By grounding its decision firmly in constitutional interpretation while acknowledging the value of international human rights norms, the court developed an approach that can potentially withstand the kinds of challenges that had led to the reversal of the *Jones* decision.

ii) B.G. v. The Attorney General of the Commonwealth of Dominica and Others (2024)

This line of reasoning, as mentioned above in the *Jeffers* case, was elaborated further in Dominica with *B.G. v. The Attorney General of the Commonwealth of Dominica and Others*. In April 2024, the High Court of Dominica struck down discriminatory laws criminalizing same-sex intimacy. Within the judgement, the court found that Sections 14 and 16 of the Sexual Offenses Act (SOA) of 1998 were unconstitutional.[221]Section 14 of the Sexual Offenses Act of 1998 criminalized all forms of consensual same-sex intimacy, deeming it as "gross indecency," and imposed a maximum sentence of 12 years in prison.[222] Section 16 of the Sexual Offenses Act of 1998 prohibited "buggery," which included any individual who engaged in consensual anal sex and imposed a prison sentence of up to 10 years or committal to a psychiatric hospital.[223] Section 16 not only targeted men who have sex with men, but also heterosexual couples who engage in consensual anal sex. While the Court acknowledged that neither of these Sections have been enforced over the past twenty years, the claimant focuses on the fact that this does not eliminate the risk of future enforcement and shows that the laws are not necessary in a democratic society.[224]

The claimant, referred to as B.G. and a citizen of the Commonwealth of Dominica, argued that sections 14 and 16 violated the constitutional rights guaranteed to all Dominican citizens including, right to freedom of expression, right to freedom of assembly and association, right to privacy of

[221] *BG v The Attorney General of the Commonwealth of Dominica* [2024] The Eastern Caribbean Supreme Court Commonwealth of Dominica Claim No. DOMHCV2019/0149 [107.1/2].
[222] ibid 3.
[223] ibid 3.
[224] ibid 5.

home including the protection from entry of others on one's premises without consent, right to security of the person, right to protection from inhuman or degrading punishment or other treatment, and the right to protection from discrimination.[225] While the Court did not find a violation of all of these rights, they did determined that three of the aforementioned constitutionally guaranteed rights were infringed upon. These include the right to liberty, the right to personal privacy, and freedom of expression.[226]

The judgement makes it very clear that the case was determined not "whether the actions, choices, lifestyle or otherwise of the claimant are right" but whether Sections 14 and 16 of the SOA violated the rights guaranteed to Dominican citizens through the Constitution of Dominica.[227] The Constitution is deemed to be supreme law of the land while still acting as a living document where constitutional interpretation regarding the protection of human rights is applicable. This indicates the weight in which the court gives domestic documents when deciding on this case, a precedence stemming from *Orozco*.

The judgement cited international jurisprudence from the High Courts of Botswana, United States of America, India, United Kingdom, South Africa, Kenya, Nigeria, Zimbabwe, Ireland, and Canada, alongside Caribbean precedents from Antigua and Barbuda, Belize, Saint Christopher and Nevis, Trinidad and Tobago, and Honduras.

The court also drew from regional bodies, including the Caribbean Court of Justice in *McEwan v. Attorney General of Guyana* and the Eastern Caribbean Court of Appeal in *Harding v. Superintendent of Prisons et al.* This extensive engagement with regional jurisprudence demonstrated the emergence of a uniquely Caribbean judicial dialogue about LGBTQ+ related rights, with courts building on precedents from neighboring jurisdictions while developing their own approaches to constitutional interpretation. The judgement also relied on international human rights documents such as the International Covenant on Civil and Political Rights, the American Convention on Human Rights, the European Convention on Human Rights, the UN Human Rights Committee, the Inter American Court of Human Rights. In addition to these instruments, the

[225] ibid.
[226] ibid 39.
[227] ibid 2.

claimant also references the Special Rapporteur on Torture and the Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity.

The court was careful to position these international references as the sole basis for decisions made regarding domestic constitutional interpretation. The orders issued at the end of the judgement exclusively reference violations to the Constitution of Dominica, emphasizing that the court's decision is grounded in domestic legal frameworks that acknowledge international standards rather than completely relying on them.

The approaches undertook in both *Jeffers and B.G.* represent the evolution in Caribbean judicial reasoning that has been developing since *Orozco*. The court demonstrated specific engagement with international human rights law while maintaining clear constitutional supremacy, developing an approach to anti-LGBTQ+ jurisprudence that benefits from international legal frameworks without compromising domestic legal sovereignty or legitimacy.

4. Emerging Pattern of Judicial Engagement with LGBTQ+ Rights

Analyses of these five cases reveals three key patterns that characterize Caribbean judicial engagement with LGBTQ+ rights and demonstrate the emergence of a distinctly Caribbean approach to constitutional interpretation in the post-colonial context. These patterns illustrate how Caribbean courts are developing their own form of legal interpretations that navigate between colonial legacies, domestic constitutional authority, and international human rights norms.

i) Patterns of Constitutional Interpretation

Caribbean courts across all five cases embraced the constitutional approach that their constitutions existed as "living instruments" that evolved with changing social norms. This approach provided the foundation for challenging colonial-era legislation while maintaining constitutional legitimacy, providing a mechanism for legal evolution that respected both the constitutional text and social change. To do this, the courts consistently provided a detailed, historical analysis of colonial-era anti-LGBTQ+ legislations, tracing their origins to English moral standards rather than indigenous legal traditions.

The evolution of this approach demonstrated increasing judicial sophistication over time. The courts consistently framed their decisions as constitutional interpretations rather than impositions

of "Western" legal standards, positioning themselves as active agents of legal change rather than passive recipients of universal human rights principles.

ii) International Law Engagement Strategies

Caribbean courts also seemed to develop a unique approach to international human rights law that, from a broad interpretation, avoids the uncritical adaptation of international standards. Each of the courts consistently referenced international jurisprudence and human rights frameworks as influences for constitutional interpretation, while maintaining a clear divide between domestic constitutional frameworks and international norms.

The evolution of this approach across the five cases demonstrates how Caribbean courts navigate the relationship between international and domestic law. Early cases like *Orozco* in 2016 established the basic framework for engaging with international human rights law, while later cases like *B.G.* in 2024 demonstrated how this framework could be applied in increasingly sophisticated ways that maximized the benefits of international engagement while minimizing the risks to perceived domestic legal sovereignty, such as in the *Jones* case. In this sense, the courts position international human rights law as informing constitutional interpretation rather than completely determining it.

The cases decided more recently, such as *B.G.* and *Jeffers*, seem to clearly articulate the perceived hierarchy between domestic and international law. Both judgements ensure that their engagement with international legal frameworks does not compromise their domestic constitutional authority. This clarity helps to insulate decisions from the criticism that they are perpetuating foreign legal impositions or bring in "outside" principles.

iii) Building Regional Jurisprudence

One of the most important patterns was the emergence of a distinctly Caribbean judicial dialogue that developed region-specific approaches to constitutional interpretation of LGBTQ+ rights related cases. This style of regional jurisprudence represents a form of legal integration based on shared colonial histories, similar constitutional frameworks, and common challenges relating to anti-LGBTQ+ laws.

This pattern is evidenced through the extensive cross-referencing between Caribbean cases and the expansion of precedential frameworks that expand over multiple state jurisdictions. All five cases extensively cite decisions from other Caribbean jurisdictions, demonstrating the emergence of a cohesive, regional jurisprudential dialogue. Additionally, courts are also building upon the legal reasoning developed in earlier cases while still rooting their decisions in its own specific constitutional circumstances.

Chapter 5: Synthesizing Theory with Jurisprudence

Introduction

This chapter explores how the application of a "queered TWAIL" approach expands the understanding of the way courts navigate between domestic and international law. This chapter responds to the question: How can a "queered TWAIL" lens enhance our understanding rights jurisprudence, specifically in postcolonial contexts regarding LGBTQ+ rights in the Caribbean? It argues that when it relates to the application of international human rights norms within jurisprudence, Caribbean courts portray themselves as interpreters of human rights-related jurisprudence instead of merely adopters of it. The following sections revisit the "queered TWAIL" theoretical framework described in chapter two, the tension between sovereignty and universality claims in jurisprudence, and finalizes the approach towards decolonial queer jurisprudence.

1. Revisiting the "Queered TWAIL" Framework

As TWAIL scholars have laid the foundation for critical analyses on colonial structures present in international law. In their view, international legal frameworks are complicit in the perpetuation of economic, political, and social inequalities within Western colonial and neoliberal foundations. TWAIL scholars focus on postcolonial states' sovereign rights to resist neo-imperial influences, which include international legal systems. The dichotomies of the "heavenly West"/ "hellish Rest" by Okafor and the savage/victim/savior metaphor by Mutua illuminate how international human rights frameworks can reproduce colonial-era binaries.

While queer theorists sometimes rely on Western conceptualizations of sexuality and gender identity, the intersection of a queer theoretical approach allows for a more nuanced view regarding the way sexuality and gender frameworks also function as sites of colonial imposition through the universalization of Western conceptions of these frameworks. Sedgwick argues that deconstructing sexuality and gender from Western interpretations is vital to understand the intersection between sexuality and power structures. By restricting sexuality and gender identity into set categories, it hinders the dimensionality of these expressions. "Queering" as a form of critique focuses on the transforming the reasoning behind legal frameworks by exposing the heteronormative assumptions that characterize international laws and their conceptions of sovereignty claims.

Sovereignty claims are often invoked not to defend pre-colonial perceptions of sexuality and gender identities, but to preserve colonial-era laws that are reframed as "traditional" Caribbean values. On the other hand, international human rights frameworks are demonized by some as being foreign "Western" imports despite their usefulness in dismantling colonial-era laws. LGBTQ+ rights jurisprudence in the Commonwealth Caribbean does not occur as an imitator or resister of Western impositions, but as an independent legal agent.

Whereas TWAIL scholars' critique universal standards within international law, this does not mean that they suggest abandoning the rights altogether. Universal LGBTQ+ rights discourses, when applied uncritically, can reproduce Western savior narratives. Yet, the complete rejection of international laws risks reinforcing colonial-era, heteropatriarchal state structures and dismantling progress for queer legal protection. In this sense, the application of a "queered TWAIL" approach does not reject LGBTQ+ rights discourse *per se* but recognizes and critiques the structures through which these rights are defined and normalized.

The application of a "queered TWAIL" highlights the intersection between domestic sovereignty concerns, international norms, and postcolonial queer politics. This approach allows for a deeper reading of Caribbean jurisprudence, offering not merely a critique but rather the possibilities in regional rights jurisprudence that focuses on the historical and performative dimensions of identity. By reading beyond formal legal reasoning, it allows for a more extensive engagement with colonial-era power structures within legal systems. Having revisited the theoretical tools developed earlier, the following sections respond to the research questions presented in the introduction. These questions help to reflect on the insights gained through viewing all five cases with a "queered TWAIL" approach in mind.

2. Tensions Between Sovereignty and Universality

A question emerges from this analysis: why is it assumed that Caribbean courts are surrendering their sovereignty when applying international human rights norms? This assumption requires contextualization within the region's colonial history. It is crucial that none of the Commonwealth Caribbean countries were independent at the time that the Universal Declaration of Human Rights was drafted. Even when considering the development of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights in 1966,

eight Commonwealth Caribbean countries still had not gained independence.[228] These countries had no input in the development of these standards.

Within a "queered TWAIL" approach, the mere fact that Caribbean courts reference and rely on international norms is not a contradiction of their own sovereignty. Rather, this reliance exists as a strategic legal paradox where courts engage with international frameworks as tools for domestic constitutional development rather than external impositions. The assumption that only two options exist for jurisprudence in postcolonial states, whether that be resisting/reproducing colonial-era norms or sovereignty/universality, is not productive. By recognizing that these tensions do not have binary answers, it forces one to recognize who defines rights and whose histories are centered within international law.

Caribbean courts demonstrate the strategic reliance on international law. The court in *Caleb Orozco v. The Attorney General of Belize* (2016) applied both constitutional interpretation and international law strategically to challenge section 53. The court did this without appearing as if they surrendered to "Western" influence. The *Orozco* judgement clearly iterated that Constitution of Belize acts as a "living instrument" as judicially pronounced within regional court decisions.[229] As a result, the court found that international jurisprudence relating to human rights issues was to be used as an aid for their interpretation. The Court embraced international norms strategically, not as a submission to international standards but rather an alignment of domestic values within these norms. In *McEwan et al. v. The Attorney General of Guyana* (2018), the court emphasized the violation of one's dignity in relation to discrimination against the appellants. The court applied both domestic and international precedence to assert this claim but grounded its argument in domestic constitutional interpretation. In *Jamal Jeffers v. The Attorney General of St. Christopher and Nevis* (2022), the court applied a "living constitution" approach that centered Caribbean jurisprudential agency instead of "Western" rights impositions. In *B.G. v. The Attorney General of the Commonwealth of Dominica* (2024), the court expressed that its decision was not based on if the claimant's actions were right, but whether his constitutional rights were violated by sections 14 and 16 of the Sexual Offenses Act. The court expressed that the Constitution of Dominica

[228] Bahamas (1973), Grenada (1974), Dominica (1978), St. Lucia (1979), St. Vincent (1979), Antigua and Barbuda (1981), Belize (1981), St. Christopher and Nevis (1983)
[229] *Caleb Orozco v. The Attorney General of Belize* (n 156) para 58.

existed as a living document that interprets whether human rights are violated. The court extensively cited international jurisprudence and frameworks as well as former Caribbean jurisprudence relating to "buggery" laws. In *Jason Jones v. The Attorney General of Trinidad and Tobago* (2018), the court framed sovereignty claims through the savings clause. The 2018 decision viewed the constitution as superseding the authority of colonial-era principles, yet the 2025 appeal of the case reframed the legality of "buggery" to fall into the hands of legislation passed by the Parliament of Trinidad and Tobago.

While the reliance on international legal frameworks could be considered a form of Caribbean sovereignty erosion (in the form of a new iteration of the "decolonization paradox" where political independence has not resulted in meaningful liberation from colonial power structures), the current approaches taken by Caribbean courts blurs this view. A "queered TWAIL" approach aims at critiquing international legal frameworks and transforming the legal reasoning behind them. When it relates to the conceptualization of human rights, this approach points towards promoting the amendment and adaptation of related frameworks allow courts to become cognizant of the social realities of the region.

Conclusion

In conclusion, this thesis has attempted to provide a brief overview of the way colonial-era legacies impact contemporary LGBTQ+ laws and attitudes in the Commonwealth Caribbean. By synthesizing Third World Approaches to International Law with queer theory, this thesis offered an intersectional approach that examined how colonial legacies and international legal norms have structured contemporary LGBTQ+ rights jurisprudence in the Commonwealth Caribbean.

Colonial legal legacies have altered contemporary perceptions of sexual morality, perpetuating stereotypes that LGBTQ+ individuals are unnatural, deviant, and even immoral. Not only is this rooted in anti-LGBTQ+ legal provisions throughout the region, but also the spread of Christianity by missionaries during the colonial-era. The recent spread of conservative and evangelical branches of Christianity in the region specifically target LGBTQ+ individuals through strict interpretations of biblical literature. Whilst Christianity remains the dominant religion within the Caribbean region, the religious exclusion of same-sex intimacy has been co-opted by political leaders. In combination, these legacies have resulted in increased harassment, familial rejection, and physical violence against queer individuals in the Commonwealth Caribbean.

By applying a "queered TWAIL" lens to understand colonial legal legacies socially, historically and through recent jurisprudence, this thesis argued that while international human rights law is often framed as a liberatory force, it sometimes reinforces colonial-era power dynamics when applied uncritically in postcolonial contexts. Through case studies from Belize, Guyana, Trinidad and Tobago, St. Christopher and Nevis, and Dominica, this thesis demonstrated how judicial reliance on international human rights norms can challenge colonial structures, especially when these norms are applied reflecting on historical contexts. In each of the judgements examined, the courts consistently view domestic constitutions as "living instruments" that evolve with changing social norms. This portrayal laid the foundation for later Caribbean courts to challenge colonial-era legislation with maintaining constitutional legitimacy. In doing so, courts selectively engaged with international human rights frameworks in such a way that courts avoided the critique that they uncritically adopted "foreign" standards. By framing judgements to be based in domestic legal frameworks while still reinforcing international norms, it allows courts to maintain a clear divide while recognizing international standards. To conclude, the five cases indicated that a pattern of

Caribbean judicial dialogue was emerging. The cross-referencing of previous Caribbean jurisprudence amongst the five cases represented legal integration based on the countries' shared colonial histories, constitutional frameworks, and legacies of anti-LGBTQ+ laws.

This research has contributed to the underdeveloped body of literature by exploring how colonial legacies have influenced LGBTQ+ laws and attitudes in the Commonwealth Caribbean. Research on this topic rarely approaches it with a critical legal analysis, especially when viewing recent Caribbean jurisprudence that focus on anti-LGBTQ+ laws. Thus, this thesis serves as a foundation for future studies that focus on colonial legal legacies in jurisprudence within postcolonial contexts. The findings of this thesis can inform future studies looking at the application of a "queered TWAIL" approach to contexts outside of the Commonwealth Caribbean, especially those colonized by countries other than the British.

Future research must focus on analyzing queer rights jurisprudence in the Commonwealth Caribbean through a lens that does not replicate colonial-era power dynamics. The continued portrayal of the Caribbean as inherently homophobic by western-based human rights organizations and former colonial powers has not altered regional perceptions of queer rights. Additionally, the push for the region to fully embrace international human rights norms that would grant Caribbean LGBTQ+ individuals the legal recognition of rights promulgates the perception that same-sex intimacy is a "Western" or foreign import. While the trend of same-sex intimacy decimalization among the Commonwealth Caribbean countries is promising, it must be recognized that these judicial decisions do not impact directly impact the rights of Western subjects. The universalization of gay rights-related changes by the "global gay movement" should focus on aiding the Caribbean subject in their struggle for rights recognition rather than focusing on the number of "Western" countries that have already enshrined these rights. The portrayal that the Commonwealth Caribbean is finally "catching up" with the rest of the world in relation to LGBTQ+ rights only serves to perpetuate negative stereotypes deeming the region as being inherently homophobic.

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