

**A LEGAL
ANALYSIS OF THE
ECONOMIC, SOCIAL
AND CULTURAL
RIGHTS LANDSCAPE
IN JAMAICA**



A Legal Analysis of the Economic, Social and Cultural Rights Landscape in Jamaica



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Prepared by Christopher Harper
Foreword by Tracy Robinson LL.B (Hons), LEC, LL.M (Dist.)

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Foreword

In January 1961, eighteen months before Jamaica gained independence, its government announced the introduction of a human rights policy that gave priority to, among other things, non-discrimination in employment and the rights to education and cultural development.¹ This early acknowledgement of the importance of economic, social, and cultural rights (ESCR) never made it to the text of Jamaica's independence Constitution of 1962, which modelled the European Convention on Human Rights. Preeminent constitutional law expert, Dr. Lloyd Barnett, concluded that 'while the [1962] Constitution provide[d] for the protection and enforcement of the traditional rights and liberties enjoyed under the common law, it le[ft] basically cultural and socio-economic matters to be dealt with by the political branches of the Government.'²

Jamaica's ambivalence about ESCR has persisted. By 1975, Jamaica had ratified both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). However, having ratified the American Convention on Human Rights in 1978, Jamaica has not signed nor ratified the Additional Protocol To The American Convention On Human Rights In The Area Of Economic, Social, And Cultural Rights, 'Protocol Of San Salvador', which came into effect in 1999.

Early in the process to reform the 1962 Constitution, the Constitution Commission rejected the inclusion of justiciable or enforceable ESCR in the amended constitution. In 1993, it recommended that 'there should be reference in the Constitution to certain social and economic aspirations, but not as enforceable rights.'³ The 1993 report also dismissed the calls for recognition of Maroons and Rastafari in the Constitution, concluding that there was no good reason for recognition of any 'particular interest group'.⁴ The outcome of the two decade long reform process, the 2011 Charter of Fundamental Rights and Freedoms, produced only modest progress in recognition of ECSR, notably the right to a primary education and the right to a healthy environment.

The lack of regard and recognition of ESCR in Jamaica is only part of the problem. As critical is our paucity of knowledge in Jamaica and the Anglophone Caribbean about what we mean by economic, social and cultural rights, and why it is so important to respect, protect and fulfil these rights. Globally, it has been found that civil law countries are nearly four times more likely to incorporate economic and social rights as common law countries like Jamaica and approximately one third make such rights in their constitutions justiciable.⁵ There is considerable diversity in the content of ESCR. Our attention is usually drawn to 'standard social rights' like education and health.⁶ Economic rights related to work and employment have limited protection under the right to freedom of association in the Jamaica Constitution. Environmental rights can be broadly classified under the banner of ESCR and have a strong collection dimension and are new to the Jamaica Constitution.⁷ Other rights like the right to development, housing, land and water have been described by some as 'non-standard social rights'.⁸ The right to participate in cultural life tends to get slim attention within ESCR discussions. Despite dismissing the calls for constitutional recognition of Rastafari and Maroons as distinct cultural groupings, Jamaica has reported to the Committee on Economic Social and Cultural Rights that it has policies that promote and protect the cultural diversity of Jamaica, including these groups. However, the Committee has called for Jamaica 'to take effective measures effective measures to protect traditional knowledge and cultural expressions' and to better protect the economic, social and cultural rights of the Maroons.⁹

1 Steven Jensen, 'From This Era of Passionate Self-Discovery: Norman Manley, Human Rights and the End of Colonial Rule in Jamaica' in A. Dirk Moses, Marco Duranti and Roland Burke (eds), *Decolonization, Self-Determination and the Rise of Global Human Rights Politics* (CUP 2000) 236.

2 Lloyd Barnett, *The Constitutional Law of Jamaica* (OUP 1976) 435.

3 Jamaica, Report of *The Constitutional Commission*, Jamaica (August 1993) 20.

4 *Ibid*, 28-31.

5 Courtney Jung, Ran Hirschl and Evan Rosevear, 'Economic and Social Rights in National Constitutions' (2014) 62 *American Journal of Comparative Law* 1043.

6 *Ibid* 1054.

7 *Ibid* 1055

8 *Ibid*. See generally, Ramona Biholar, 'Imagining Caribbean Development: The Right to Development and the Reparation Nexus' in Carol C. Ngang, Serges D. Kamga and Vusi Gumede (eds), *Perspectives on the Right to Development* (2019 PULP) 314.

9 Committee on Economic, Social and Cultural Rights, 'Concluding observations on the combined third and fourth periodic reports of Jamaica, adopted by the Committee at its fiftieth session (29 April–17 May 2013)' E/C.12/JAM/CO/3-4 (10 June 2013).

This Report fills an important gap in the literature on human rights protection in Jamaica and Anglophone Caribbean, more generally, first by offering a foundation in these rights.¹⁰ It clarifies the history of the rights and the scope and meaning of specific ESCR. In the context of the ICESCR, Harper examines the prohibition of non-discrimination; equality of men and women; the right to work; the right to social security; protection of the family; the right to an adequate standard of living; the right to health and the right to education. Indeed, the right to education may be the most universally recognised ESCR around the world.¹¹

Dismissing the oversimplification that civil and political rights generate negative obligations, while ECSR produce positive ones, Harper demonstrates the interdependence and indivisibility of all human rights. He devotes appropriate attention to thorny debates in the field of ESCR. Notably, he tackles the crucial question of justiciability, since the impediment to greater constitutional protection of ESCR in Jamaica and the wider Anglophone Caribbean has been the claim that these rights are not amenable to enforcement by the courts. The Report also explains the concept of 'progressive realization' of ESCR, a 'linchpin of the Covenant', and shows concretely how the Committee on Economic, Social and Cultural Rights has assessed Jamaica's obligation to meet this standard.

A chapter of the Report is devoted to looking at the ESCR of LGBT people in Jamaica, and appropriately so, especially given the ESCR violations faced by LGBT people and the role of J-FLAG in commissioning the report. The Report confirms what I learnt as the inaugural Rapporteur on the Rights of LGBTI Persons at the Inter-American Commission on Human Rights (2014-15), that inequality and discrimination against LGBT people in the Americas are manifested in heightened negative ways in the availability, accessibility and acceptability of the rights to health, education, and work, among others. The gap analysis in Chapter 4 examines structural elements such as legislation, process considerations such as monitoring, and outcome elements such as violations. This analysis and the final recommendations in Chapter 5 will be valuable to both state actors and civil society. Among its many recommendations, the establishment of a national human rights institution in Jamaica is urgently needed to advance the protection of not just ESCR but all human rights.

A strength of this Report is that it signals ways to improve recognition and protection of ESCR and at the same time does not yield to an entirely pessimistic outlook on ESCR in Jamaica. Especially valuable is the Report's analysis of the rights to equality before the law, equitable treatment by a public authority and non-discrimination under the 2011 Charter of Fundamental Rights and Freedoms as critical components of the protection of ECSR. Harper demonstrates how the broadened guarantee of the right to equality and non-discrimination in 2011 has important implications for the justiciability of ESCR under the Jamaica Constitution.

Indeed, at its heart, social and economic rights are aimed at responding to entrenched social and economic inequality and promoting substantive equality. In her 2012 analysis of the new equality rights, constitutional scholar, Se-shauna Wheatle made the point that "the inclusion in the Constitution of a justiciable right to education is a manifestation of the state's duty to protect and promote equality in particular contexts."¹² Wheatle's insight should be critical to the interpretation of the 2011 Charter, but it is also a reminder of other ways in which the Charter responds to social and economic inequalities. For the first time in 2011, 'social class' is included as a prohibited ground of discrimination. The 2011 Charter also borrowed from the pioneering Constitution of the Republic of South Africa the possibility that non-state actors could be liable for breaches of the Constitution.¹³ Sykes J explained that this new approach to allowing the Constitution to apply horizontally 'was deliberately copied from a country with significant inequality between different social groups and that section along with others was, perhaps, seen as a way of addressing that inequality through judicial decision on the scope and meaning of the Bill of Rights.'¹⁴ Regrettably, the 2011 Charter, as Wheatle noted in 2012 and Harper also shows, entrenches and codifies other forms of social exclusion and inequality through savings law clauses and limited grounds of discrimination. Making sense, if one can, of these contradictions will demand diligent judicial interpretation but should ultimately be matters for constitutional reform as well.

10 See also Westmin James, 'Social and Economic Rights in the Caribbean', in Richard Albert, Derek O'Brien, Se-shauna Wheatle, *The Oxford Handbook of Caribbean Constitution* (OUP 2020) 455.

11 Jung and others.

12 Se-Shauna Wheatle, "The Right to Non-discrimination and equality and the Jamaican Charter of Fundamental Rights" (2012) WILJ at 133, 134.

13 Jamaica Constitution, s 13(5).

14 I 15 November 2013, Full Court, Jamaica [191] (Sykes J).

President of the Caribbean Court of Justice, Adrian Saunders, recently said that “A society which promotes respect for human rights is one which supports human development and the realisation of the full potential of every individual.”¹⁵ Economic, social and cultural rights are a fundamental aspect of our ability to realise our potential. The inter-American human rights system has long argued that the right to life, which is guaranteed in all constitutions in the Americas, contemplates a right to a dignified life and ‘the conditions that guarantee a dignified existence’, including adequate housing, education, health, water, among other things.¹⁶ In the end, human rights are meant to be ‘tools that allow people to live lives of dignity, to be free and equal citizens, to exercise meaningful choices, and to pursue their life plan’.¹⁷ Economic, social and cultural rights are central to that vision.

Tracy Robinson
24 August 2020

¹⁵ *McEwan v Attorney General of Guyana* [2018] CCJ 30 (AJ)[70].

¹⁶ See generally, Thomas Antkowiak, ‘A Dignified Life and the Resurgence of Social Rights’ (2020) 18 *Nw UJ Int'l Hum Rts* 1.

¹⁷ Alicia Ely Yamin, ‘Will we take suffering seriously? Reflections on what applying a human rights framework to health means and why we should care’ (2008) *Health and Human Rights* 45.

Introduction

Economic, Social and Cultural Rights (ESCR), over the course of the last decade, have arguably “emerged from the shadows and margins of human rights discourse to claim a central place”¹⁸ and has been reasonably understood by many as being those rights and entitlements concerned with the substance of human life and the basic social and economic conditions needed to live a life of dignity and freedom.

Despite notions which have long characterized human rights as being universal, indivisible, interdependent and interrelated, ESCR have been traditionally perceived to be ‘aspirational’, vague and secondary to the enjoyment of civil and political rights (CPR), largely requiring positive action, more in line with policy formulation and inherently non-justiciable.¹⁹ Such notions have conservatively relegated ESCR to a second-class status which has arguably “had a negative impact on the possibilities to claim effective implementation of these rights,”²⁰ especially at the domestic level.

Nevertheless, irrespective of the scepticism which has characterized the approach to ESCR, there has been considerable progress in challenging and reformulating the ideas about the nature, scope and applicability of such rights in modern socio-legal and political contexts. Accordingly, there is arguably even greater room to explore the potential of these rights and their overall contribution to the enhancement of the human rights landscape, especially within particular contexts and in relation to specific groups of people.

Firstly, despite the growing recognition of human rights protection within Jamaica and notwithstanding the fact that Jamaica has ratified the International Covenant on ESCR (ICESCR), these rights remain restricted or have limited constitutional protection.²¹ The lingering cynicism demonstrated throughout the reform process towards ESCR has more or less upheld the position that the Covenant has not necessarily “given rise to a legally binding commitment on the Government to safeguard all the rights recognized in the treaty” because they are arguably better suited for the public policy domain, are relatively perceived to be confined by the anticipated financial burden which such rights questionably impose and are disputably incognizable before the domestic courts.

Secondly, within the Jamaican legal landscape, members of the LGBT community are reduced to second class citizens because they lack legal protection against discrimination. As observed, discrimination “undermines the fulfilment of ESCR...and that groups of individuals continue to face socio-economic inequality, often because of entrenched historical and contemporary forms of discrimination.”²² Accordingly, LGBT Jamaicans face discrimination from schools, their own families, their communities and even by the government. They are thought to suffer disproportionately from unemployment, homelessness, abuse, physical and mental violence and are more prone than the general population to health problems like HIV and severe depression.²³ With this in mind, J-FLAG has commissioned this research paper as part of an EU-funded project to improve the protection and promotion of ESCR of LGBT Jamaicans.

18 Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, (2008) Cambridge University Press 3

19 Lucy Richardson, “Economic, Social and Cultural Rights (and Beyond) in the UN Human Rights Council,” (2015) *Human Rights Law Review* 409-440, 412

20 Fons Coomans (ed.) *Justiciability of Economic and Social Rights*, (2006) Maastricht Series in Human Rights, Intersentia 2

21 Stephen C Vascianne, “Human Rights Law in the Commonwealth Caribbean” (Audiovisual Library of International Law, United Nations) <http://legal.un.org/avl/pdf/ls/Vasciannie_outline.pdf> Accessed March 28 2020

22 UNCESCR, General Comment No 20 (2009) E/C.12/GC/20 para 1

23 Randy Seepersad (et al), *The Jamaica National Crime Victimization Survey*, (2013) Ministry of National Security, Kingston

With this said, this legal analysis will therefore seek to determine the extent to which Jamaica's laws protect ESCR while identifying opportunities for their substantive improvement.

Chapter 1 will investigate the origins of ESCR, their sources and the impact of their history on the nature, scope and status of these rights. It features a comprehensive analysis of a State's obligations under international human rights to respect, protect and fulfil ESCR while ascertaining the extent to which such obligations have evolved over the last decade. It also provides a substantive overview of the scope of the individual rights examined specifically within the context of this particular analysis so as to provide a conceptual basis for the remit of the subsequent Chapter.

Chapter 2, in contextualizing the examination of ESCR recognition, will explore the Charter of Fundamental Rights and Freedoms and the extent to which it has accommodated ESCR. Accordingly, this Chapter will examine the reform process which led to the adoption of the Charter in 2011 in order to identify the reasoning behind the limited recognition of ESCR within the instrument and whether there exists any opportunities to guide future reform given the notable jurisprudential developments achieved within this field. This Chapter will also explore the state reporting process as provided for under the United Nations (UN) treaty-based mechanism in order to ascertain the status of Jamaica's compliance with the obligations enumerated within ICESCR so as to establish a foundation from which gaps can reasonably be identified and contextualized.

Chapter 3, in supplying the context within which this analysis has been framed, will examine whether the socio-legal environment, as framed by Chapter 2, adequately responds to the needs of LGBT persons living in Jamaica and offers sufficient protection against ESCR violations.

Chapter 4 and 5, will finally present the gaps and recommendations determined from this analysis. Chapter 3 will outline the challenges and the gaps in protecting ESCR whereas Chapter 4 will provide practical guidance on the development of ESCR, especially in the context of protecting LGBT people.

Methodology

This legal analysis was conducted by completing a desk review of the relevant legal material on ESCR. The information generated mainly depended on primary sources such as international treaties, case law and legislation and secondary sources such as state reports, lists of issues, concluding observations and a wide variety of academic socio-legal journal articles and technical reports.

Additionally, three (3) key informant interviews were conducted to gather qualitative perspectives on the ESCR and resolve any theoretical differences commonly considered when navigating issues related to the substance of economic, social and cultural rights.

Challenges/Limitations

- Requests were sent to five (5) human rights practitioners but only three (3) acknowledged the request.
- A 20-day timeline was given to draft this legal analysis which allowed for a comprehensive assessment of the landscape, but more time was needed to conduct research and present findings on a few aspects of this study.

Examining the Legal Framework of Economic, Social and Cultural Rights

History of ESCR

"Finding a precise point of departure for 'a history' of ESCR is an inherently controversial matter."²⁴ Being able to identify any singular moment in time in an effort to contextualize the origins of ESCR would be riddled with biases and as argued would be "politically charged."²⁵ While the intention is not to superimpose a westernized perspective, there is nevertheless some value in locating the discourse from as early as post-World War II developments in international human rights law, namely the adoption of the 1945 UN Charter, the 1948 Universal Declaration of Human Rights (UDHR) and the 1976 ICESCR which arguably offers a more robust and relevant basis from which to deduce and frame the concepts and positions examined within this Chapter.

While there is considerable room to investigate the scope of the UN Charter and position it as a relatively accurate starting point for the international protection of ESCR, there has been considerable documentation which suggests that much of the substantive conceptual work regarding the origins, emergence and internationalization of the ESCR was accomplished during the creation of the ICESCR. Accordingly, while an expansive examination would be more prudent given that which is intended to be accomplished, the limits of this particular assessment recognizes that a more comprehensive summation would be reasonably achievable and is sufficient enough to base the substantive analysis subsequently presented.

UN Charter

By 1945, the world had been devastated by two World Wars and hindered by the effects of an economic and social crisis mounted by the Great Depression. World leaders, in what was established by the 1945 UN Charter and designated as the United Nations, sought to establish a foundation "for the universal protection of a set of rights fundamental to the life of every individual." Described as "the starting point in an endeavour to create legal instruments protecting human rights," this Charter had arguably provided a basis from which the specification of ESCR as rights in need of protection could be relatively inferred.

Though not explicitly mentioned, it has been argued that the reference made to "social progress" in the Charter, supported "the case for the inclusion of ESCR in the UDHR."²⁶ In its preamble, the Charter outlined a mandate "to promote social progress and better standards of life in larger freedom"²⁷ and "to employ international machinery for the promotion of the economic and social advancements of all peoples."²⁸ The Charter also provided that the UN in "creating conditions of stability and well-being"²⁹ ought "to promote higher standards of living, full enjoyment and conditions of economic and social progress and development,"³⁰ "solutions of international economic, social, health and related problems"³¹ and "universal respect for...human rights and fundamental freedoms for all..."³²

24 Daniel Moeckli, Sangeeta Shah and Sandesh Sivkumar, *International Human Rights Law*, Third Ed. (2018) Oxford University Press, 4

25 Ishay Micheline, *Human Rights Reader: Major Political Essays, Speeches and Documents from Ancient Times to the Present*, (2004) Routledge, xxii

26 Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent*, (2000) University of Pennsylvania Press, 2

27 UN Charter 1945, Preamble

28 Ibid

29 Ibid, Article 55

30 Ibid, Article 55(a)

31 Ibid, Article 55(b)

32 Ibid, Article 55(c)

A fundamental component of the UN Charter, which arguably had to role to play in the legitimacy afforded to ESCR, was the establishment of the Economic and Social Council (ECOSOC). Under the Charter, the Council had the discretionary power to “make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all,”³³ and “set up commissions in economic and social fields for the promotion of human rights.”³⁴ The authority afforded to the ECOSOC, particularly as it evolved into one of the principal organs of the UN, “emphasized the importance of collectively addressing economic and social problems”³⁵ and cleared a path for the establishment of the UN Commission on Human Rights which was implicitly mandated to draft an international bill of rights.

Universal Declaration of Human Rights

Following the establishment of the ECOSOC, the UN Secretariat was invited to produce a “documented outline of a draft declaration”³⁶ to be presented at the first meeting of the Committee in 1947. However, this mandate, one which was desirous of creating a human rights instrument applicable to all states and peoples across the globe, encountered political and ideological contention particularly as it related to the inclusion of ESCR.

In examining the *Travaux Préparatoires*³⁷ of the ICESCR, it appears clear that while some States were in favour of incorporating ESCR, there were others who felt that the Commission had no place involving itself “with matters in the economic field which came under the general heading ‘freedom from want’.” Opposing States argued that the inclusion of ESCR was mere humbug and justified their challenge on the basis that guaranteeing them would depend heavily on the resources of a State. Accordingly, ESCR were deemed inappropriate for inclusion in such an instrument, too demanding of positive state action and a reasonability that should be delegated to specialized UN agencies. This contention arguably represents one of the first documented instances of the traditional perspectives that came to restrict the relative progress of ESCR in the realm of international law and will be subsequently explored in greater deal.

Nevertheless, despite the opposition, the secretariat produced an outline with 48 proposals which favoured a wider, more general declaration. This outline was later revised to fill gaps relating to ESCR which raised even more contention. Concerns about the capacity of developing states and their limited resources dominated the dialogue around the decision to expand the inclusion of ESCR³⁸ but the compromise achieved by the final document was “to enshrine the realization of ESCR indispensable to an individual’s dignity and free development of his personality through national effort and international cooperation and in accordance with the organization and resources of each State.”³⁹

The UDHR was adopted in December 1948.

International Covenant on Economic, Social and Cultural Rights

Amidst the discussions around the UDHR and in expanding the discourse about human rights guarantees within a post-war climate, it was observed that “the international consensus about human rights was an aggressive one” and the desire for a machinery of rights implementation and realization was a strong one.

Accordingly, the General Assembly in 1948, following the adoption of the UDHR requested that the Commission on Human Rights prioritize the preparation of a draft Covenant on human rights and measures of implementation. As documented, parallel to the process of creating the UDHR, a working group of the Commission prepared a draft covenant which contained CPR only. The focus on CPR triggered discontent among some states in particular while others took comfort in a perspective that a convention safeguarding ESCR would be subsequently created. This was on the basis that at the time of drafting, there was a commonly held belief that ESCR were less universally recognized than CPR,

33 Ibid, Article 62

34 Ibid, Article 68

35 Ben Saul (ed.) *The International Covenant on Economic, Social and Cultural Rights: Travaux Préparatoires*, (2016) OASIL

36 John Humphrey, “The International Bill of Rights: Scope and Implementation” (1976) 17 *William & Mary Law Review* 3, 527-541, 528

37 Ben Saul (n 35)

38 Ibid

39 UDHR 1948, Article 22

would be better served in a declaration as opposed to a convention and that their inclusion might hinder the immediate adoption of the covenant. Moreover, some States argued that ESCR were non-justiciable and required different method of implementation. This contention represented “an existing ideological conflict between East and West which characterized much of the dialogue and perspectives surrounding human rights particularly at that time.”⁴⁰ The eastern bloc, such as the USSR championed ESCR as they associated it with the aims of a socialist society while the western bloc, on the other hand, affirmed that leveraging CPR was consistent with the principles of liberty and democracy which guided a free world.⁴¹

In response, at the ECOSOC’s request, the General Assembly declared inter alia “that the enjoyment of civil and political freedoms and of ESCR are interconnected and interdependent⁴².” Accordingly, the Commission under the instructions of the ECOSOC was requested to “include in the draft Covenant a clear expression of ESCR in a manner which related them to civil and political freedoms proclaimed by the draft Covenant.”⁴³ However, noting the difficulties with harmonizing the perceived distinction between the categories of rights, the ECOSOC urged the General Assembly to consider substituting a singular draft Covenant with two separate instruments “in order for them to be approved and open to signature at the same time⁴⁴.”

However, the act of drafting two Covenants was not free from criticism. The separation of rights into two distinct covenants, as argued by some, was evidence of the inherent opposition the two categories of rights, which led to “excessively monolithic views as to the nature, history and philosophical conception of each group of rights.”⁴⁵ It became more and more evident that at “at the level of implementation, the two Covenants displayed marked differences”⁴⁶ consistent with the East-West ideological divide of the 1950s and 1960s. This designation maintained CPR as inherently different in nature from ESCR in so far as the latter would lack judicial enforceability and monitoring provisions related to state reporting, individual communications and state complaint procedures. Nevertheless, the substantive version of the ICESCR was virtually completed in 1962, opened for signature in 1966 and entered into force in 1976.

Having set out the historical overview of the emergence of ESCR within the international human rights landscape, this Chapter will now illustrate and examine the subsequent events which arguably reconciled some of the ideological and conceptual tensions and led to the jurisprudential developments related to the nature and scope of ESCR.

Committee on ESCR

In relatively recent times, the Committee on ESCR has emerged as the “principal forum in which the implications of the concepts of ESCR have been and are being explored.”⁴⁷ Established in 1987, the Committee is a UN body of 18 “experts with recognized competence in the field of human rights, serving in their personal capacity, due consideration being given to equitable geographical distribution and to representation of different forms of social and legal systems”⁴⁸ who monitor the implementation of the ICESCR by its State parties.

Through its artillery of methods employable to ensure that treaties retain their relevance in a dynamic system,⁴⁹ the Committee has creatively interpreted and developed the provisions of the Covenant by providing a clearer understanding of its normative content.⁵⁰

With that said, this legal analysis therefore takes advantage of two of the numerous mechanisms utilized by the committee namely the consideration of state reports and the issuance of general comments to present the learning which is framed in a way

40 Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development*, (1995) Oxford Monographs in International Law, 9

41 Bertrand Ramcharan (ed.) *Human Rights Thirty Years After the Universal Declaration*, (1979) 41

42 Craven (n 40) 18

43 Ibid, 19

44 Ibid, 20

45 Ibid

46 Eibe Riedel, Gilles Giacca and Christophe Golay (eds.) *Economic, Social and Cultural Rights in International Law: Contemporary Issues and Challenges*, (2014) Oxford University Press 7

47 Magdalena Sepulveda, *The Nature of the Obligation under the International Covenant on Economic, Social and Cultural Rights*, (2003) Intersentia, 311

48 OHCHR, Resolution 1985/17

49 Moeckli (n 24) 68

50 Sepulveda (n 47) 33

that critically examines the substantive concerns related to the core content and conceptual framework of ESCR. While the use of state reports will feature more predominately in Chapter 2 which explores ESCR within the context of Jamaica, this Chapter will rely on the general comments which “provide authoritative guidance on the general treaty obligations of states parties and sets out how the Committee interprets the scope of the substantive provisions of their respective treaty.”⁵¹

Having laid this foundation, this Chapter will now present the most current and relevant positions and arguments in a comprehensive manner in an effort to unpack and contextualize the substance and development of the obligations emanating from the ICESCR. As such, it will outline and probe the critically relevant aspects of ESCR with the aim of establishing a basis from which some of the perspectives throughout this paper can be reasonably framed.

Conceptual Framework on ESCR

In examining the conceptual framework of ESCR, it would be prudent to acknowledge the relevant dichotomic characterizations and legally designated human rights frameworks which exist to influence and inform these obligations.

Firstly, there are those who are of the view that a negative-positive dichotomy exists between ESCR and CPR. Traditionally, CPR have been identified as inherently negative in that “they require only that governments should abstain from activities that would violate them.”⁵² ECSR, on the other hand, have been characterized inherently positive in that “they require active intervention on the part of governments and cannot be realized without such intervention.”⁵³

However, this position is arguably no longer tenable and the rigidity and strict characterization used to classify these rights has been considered largely inaccurate and as such, it would be incorrect to suggest that any particular right has only one kind of duty associated with it. Critiques of the traditional dichotomy are well known and therefore there is no need to illustrate this debate in this particular analysis. Nevertheless, it should be understood that all rights give rise to both positive and negative state obligations.⁵⁴

Secondly, it is worth noting that the Committee in assessing the nature of State parties’ obligations has employed a tripartite typology to affirm that in certain key respects, ESCR are similar to CPR because both types of rights involve three types of duties namely respect, protect and fulfil which are inherently the conditions necessary for realizing human rights.⁵⁵ In expounding on this, the Committee has also affirmed that not only has it used the typology to guide its understanding of the substantive provisions contained within the Covenant but it has also recognized that all three can occur individually or in combination which lends support to the premise that they can either exist side by side or exclusively.

Obligation to Respect

Under their obligation to respect, States affirm to “abstain from interfering with the freedom of individuals.”⁵⁶ With respect to the context of ESCR, it should be understood as a duty to refrain from interfering directly or indirectly with the enjoyment of particular socio-economic goods or benefits by every individual under the State’s jurisdiction.⁵⁷ This obligation requires that States, including their organs and agents, “refrain from acts which would serve to deprive individuals of their rights under the Covenant.”⁵⁸

51 Moeckli (n 24) 392

52 Philip Alston and Gerald Quinn, “The Nature and Scope of States Parties Obligations under the International Covenant on Economic, Social and Cultural Rights” (1987) 9 Human Rights Quarterly 156, 159

53 Ibid

54 Sepulveda (n 47) 126

55 Langford (n 18) 484

56 Craven (n 40) 109

57 Gilles Giacca, *Economic, Social and Cultural Rights in Armed Conflict*, (2014) Oxford University Press 52

58 Moeckli (n 24) 97

Obligation to Protect

The obligation to protect is one understood by the Committee on ESCR as “measures by the State to ensure that enterprises or individuals do not deprive individuals of their access”⁵⁹ to the relevant rights. This encapsulates a duty to ensure that persons within the remit of its jurisdiction are not subject to or suffer from human rights violations commissioned by third parties. As articulated, emphasis should be placed on State action necessary for the prevention, prohibition, and punishment of third-party interferences and the provision of redress where necessary. Furthermore,⁶⁰ it has been noted that while the State cannot reasonably be held accountable for failing to protect individuals from every adverse interference carried out by third parties, the extent of its liability should account for failures that can be linked to or reasonably associated with its shortcomings in protecting individuals from others. The case of *Velasquez Rodriguez v Honduras*⁶¹ which involved the forced disappearance of a student activist by unidentified abduction, while not examining an issue related to ESCR, arguably illustrates an instructive position. The Courts articulated that:

“the state is obligated to investigate every situation involving a violation of the rights protected by the [American] Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim’s full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention⁶².”

Obligation to Fulfill

States are required to take “the necessary measures to ensure the satisfaction of the needs of the individual that cannot be secured by the personal efforts of that individual.”⁶³ It requires states to adopt appropriate legislative, administrative, budgetary, judicial, and other measures towards the realization of ESCR. Interpreted as requiring States to take positive steps towards the enjoyment of rights, the obligation to fulfil also has a multifaceted nature that extends itself to include obligations to facilitate, to provide and to promote,⁶⁴ particularly as it relates to ESCR.⁶⁵ It includes the removal of obstacles and the “implementation of measures to modify discriminatory social and cultural patterns which result in the disadvantage of vulnerable groups.”⁶⁶ This subcategorization was necessary to avert criticisms which suggested that the obligation to fulfil was generally cost-intensive.

Nature and Scope of ESCR

Article 2 of the ICESCR provides that:

“Each state party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, **to the maximum of available resources, with a view to achieving progressively the full realization** of their rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

Article 2 (1), according to some, “lays down programmatic statements as to how ESCR are to be implemented.” It imposes a duty on States to take steps to the maximum of their available resources, to achieve the full realization of Covenant rights progressively. It “is of particular importance to a full understanding of the Covenant and must be seen as having a dynamic relationship with all of the other provisions.” A provision which has been the subject of extensive academic, legal and juridical consideration, this analysis, given its limits, will attempt to frame the discussion in a comprehensive manner by presenting the critical and relevant components of the long-standing debate.

59 Langford (n 18) 17

60 *ibid* 97

61 *Velasquez Rodriguez v Honduras (Merits)*, IACTHR Series C No 4 (29 July 1988)

62 *Ibid* para 176

63 Craven (n 40) 109

64 UNCESCR, General Comment No. 14, E/C.12/2000/4

65 Moeckli (n 24) 99

66 International Commission of Jurists (ICJ), Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability <https://www.refworld.org/docid/4a7840562.html>

Progressive Realization

Described as the “linchpin of the Covenant,”⁶⁷ the concept of progressive realization recognizes that States are required to continuously take steps forward in order to achieve the full realization of the rights recognized in the Covenant. Accordingly, it entails both an “obligation to continuously improve conditions and an obligation to abstain from taking deliberately retrogressive measures except under certain circumstances.”⁶⁸

As articulated by the Committee, while it has been regarded as a necessary and flexible device reflecting the realities of the real world and the difficulties often faced by States in achieving the goal of ensuring the full realization of such rights, the objective of the Covenant is to impose a “specific and continuing obligation”⁶⁹ upon States to move “as expeditiously and effectively as possible”⁷⁰ towards such a goal. This interpretation, as understood by some, supports the position that in progressively realizing ESCR, States should not delay their efforts to realize these rights and should achieve them in the shortest possible time. Therefore, the obligation requires a “continuous improvement of conditions over time without backward movement of any kind”⁷¹ and the “effective use of resources available.”⁷²

Maximum Available Resources

With respect to the maxim of ‘maximum available resources,’ States are obligated, regardless of their levels of economic development, to ensure respect for minimum subsistence right for all.⁷³ As a result, one particular nuance that has been traditionally associated with ESCR has been its perceived dependence on economic resources.

While arguments have been made to suggest that this reliance in essence allows State parties to make excuses for failures or delays in realizing these particular rights, the drafters of the Covenant were of a different view. The insertion of this condition was “merely a recognition of the fact that many States did not have sufficient resources to undertake the large-scale action required by the Covenant immediately.”⁷⁴

Minimum Core Obligation

Described by some as a “floor” below which socio-economic conditions should never be permitted to fall, the concept known as minimum core obligation is a principle designed by the Committee “...to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party.”⁷⁵ It refers to the “essential elements without which a right loses its substantive significance as a human right.”⁷⁶ Arguably, it is recognized as a useful mechanism that has the potential to bridge the gap between socio-economic goals and the available resources of a State. It assumes that each right should be realized “to the extent that it provides for the basic needs of every member of society,”⁷⁷ and accordingly establishes a legal minimum standard that should be obtained by states parties, irrespective of their economic realities.

Despite its character, there are those who have criticized the ‘minimum core obligation’ as being a “ceiling” as opposed to a “floor” which suggests that the imposition of any kind of minimum core content to which States are inherently bound might influence their understanding to degree which causes them to associate adequate compliance with the achievement of an absolute bare minimum.

67 Craven (n 40) 106

68 Sepulveda (n 47) 319

69 Ibid, 319

70 UNCESR, General Comment No 3, E/1991/23 para 9

71 Craven (n 40) 132

72 United Nations, The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1987) para 23

73 Ibid, para 25

74 Craven (n 40) 136

75 UNCESCR, (n 70), para 10

76 Coomans (n 20) 17

77 Craven (n 40) 141

Nevertheless, there are more schools of thought which seem to rebut that line of thinking. Firstly, one of the main purposes of establishing a minimum core approach is to prevent States from having an opportunity to opt out of their obligations under the treaty.⁷⁸ In clear terms, where a State has been able to associate its failure to meet its minimum core obligation with the lack of available resources, the burden exists on the State to demonstrate that every effort has been made to use all resources at its disposal to satisfy minimum obligations. Moreover, the Committee has also acknowledged that even amidst economic disparity in the form of demonstrably inadequate resources, an obligation remains on the State to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances.⁷⁹

Immediate Effect

One of the most common misconceptions about ESCR is that they do not give rise to an obligation of immediate effect. However as affirmed by the UNCESCR, “while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect.” As established by the Committee, the duty to take steps or adopt measures directed towards the full realization of the rights contained in the Covenant⁸⁰ and the prohibition of discrimination⁸¹ both have immediate effect.

While there have been concerns around the dichotomy created between the immediate and progressive implementation of the rights contained within the Covenant, there is well established thinking which suggests that the “notion of progressive realization does not detract from the fact that the Covenant also imposes obligations of immediate effect.”⁸² This is on the recognizable basis that where the realization of rights is not impeded by a lack of resources, such rights should be immediately put into effect.⁸³

Justiciability

Beyond the conceptual framework of ESCR examined above, this legal analysis would arguably benefit from some consideration about whether such rights can be deemed justiciable. While a full analysis is not possible given the focus this particular paper, a brief yet comprehensive overview will nevertheless be furnished.

For the purpose of this analysis, the term justiciability is to be understood as the “ability to claim a remedy before an independent and impartial body when a violation of a right has occurred or is likely to occur⁸⁴.” It implies access to mechanisms that guarantee recognized rights and as observed, justiciable rights grant rights-holders a legal course of action to enforce them, whenever the duty bearer does not comply with its duties.

However, when critically examining the concept of ESCR justiciability, a slew of arguments that challenge the legitimacy of such justiciability, particularly in the domestic context are often revealed.

Firstly, as presented, arguments against ESCR have framed them as being too vague, inherently of a positive nature and resource dependent. However, as has been identified, there are “a number of conceptual and practical developments originating from the international, regional and domestic spheres which demonstrate a range of possibilities for the justiciability of ESCR.”⁸⁵

Secondly, there are those who are of the position that ESCR adjudication is anti-democratic in nature. As articulated, “the role of nationally elected representatives is usurped when courts pass judgments on matters of social policy and resource allocation.”⁸⁶ This position considers even further the violation of the doctrine of separation of powers which arguable recognize that matters of policy are the domain of the executive and the legislature.

78 Audrey Chapman and Sage Russell, *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, (2002) Intersentia, 10

79 UNCESCR (n 70) para 11

80 UNCESCR, (n 64) para 30

81 UNCESCR, (n 22) para 7

82 Craven (n 40) 136

83 Ibid

84 ICJ (n 66) 48

85 Ibid 6

86 Langford (n 18) 31

However, in examining the legal role played by the courts, a convincing rebuttal would suggest that a judiciary constitutionally empowered to review the realization of ESCR would be fulfilling its constitutional function and its role of the branch which is to interpret,⁸⁷ apply,⁸⁸ and enforce the law⁸⁹ and as has been argued, “a rigid separation of powers is neither desirable nor possible.”⁹⁰ In expounding, it has been observed that consistent with modern governments is a requirement that there be cooperation among various powers and therefore maintaining any strict separation would be “counter-productive and inefficient.”⁹¹ Constitutional courts have determined that the inter-play between and the mutual independence of political branches, namely the executive and the legislature, “create an opening for the judiciary to provide balance, thereby promoting the rule of law and accountability in the government.”⁹² Accordingly, “retaining this balance between different branches of Stare does not preclude judicial involvement in the adjudication of ESCR.”⁹³ The judiciary, in respect of ESCR, therefore serves to evaluate these political branches in an effort to ensure that they are receptive to the rights of the underprivileged as guaranteed by the constitution.⁹⁴

Lastly, those against the justiciability of ESCR often question “whether judicial bodies are suitably situated to ascertain and understand the relevant facts of a case, navigate a minefield of potential competing policy choices and resource demands and craft appropriate and functional remedies.”⁹⁵ However, in responding to this, it is apparent that the constitutional function of the court which requires them to assess whether a States have adequately complied with their legal obligations best answers such a question. Courts often partake in “an exercise of traditional judicial competences which requires hearing from the rights claimant and other witnesses about the particular situation at issue, considering evidence from expert witnesses about the broader policy issues, hearing arguments from the parties and finally applying the law to the facts in a fair and impartial manner.”⁹⁶ Their work as adjudicators is also supplemented by their ability to refine their own expertise through on-the-job experience or judicial education. Accordingly, it becomes clear that “judges are no less capable of deciding matters relating to ESCR than any other matter involving technical or complex issues.”⁹⁷

Beyond this, there is another layer to justiciability that would prove useful to this discourse and that concerns their protection as essential corollaries of civil and political rights. In examining this bit, it would be useful to acknowledge the Court’s history of indirectly guaranteeing ESCR by interpreting CPR as encompassing certain aspects of such rights. A method referred to as the “integrated approach,”⁹⁸ this formulation arguably operates within the premise that human rights are interdependent and indivisible and therefore warrant judicial protection, albeit by indirect channels. It is worth noting that in jurisdictions where the adjudication of ESCR is limited or non-existent, the ability to protect ESCR is made possible “through the judicial application of duties deriving from CPR, particularly where those duties are closely interrelated to ESCR obligations.”⁹⁹

However, while useful in affording relative protection to ESCR, this strategy arguably has its limitations. As suggested by some, “not all aspects of ESCR can be framed in terms of CPR.” An example provided by some serves to substantiate this claim – “He who is ‘only’ hungry, homeless or without healthcare cannot count on having the legitimacy of his claim enforced by the judiciary.” In advancing a critique of this approach, it has been argued that “it does not provide general conclusions on the issue of justiciability of ESCR.”

87 Ibid, 33

88 Craig Scott and Patrick Macklem, “Constitutional Ropes of Sand or Justiciable Guarantees: Social Rights in a New South African Constitution” (1992) 141 U PAL REV 1, 17

89 Ibid

90 *Director of Personal Administration v Cooper* TT 2005 CA 5 at [29] per Sharma CJ

91 Tracy Robinson, Arif Bulkan and Adrian Saunders, *Fundamentals of Caribbean Constitutional Law*, (2015) Sweet and Maxwell 334

92 Ibid, 313

93 ICJ (n 66) 104

94 Jeanne Woods, “Justiciable Social Rights as a Critique of the Liberal Paradigm” (2003) 38 Texas International Law Journal 763, 773

95 Langford (n 18) 35

96 Bruce Porter, Nolan and Malcolm Langford, *The Justiciability of Social and Economic Rights: An Updated Appraisal*, (2007) Centre for Human Rights and Global Justice Working Paper Series No 14, 17

97 ICJ (n 66) 105

98 Ida Koch, “Economic, Social and Cultural Rights as Components in Civil and Political Rights: A Hermeneutic Perspective” (2006) 10 International Journal of Human Rights 405, 408

99 ICJ (n 66) 65

Substantive Rights

Having investigated the origins of ESCR, the nature, scope and status of their corresponding obligations and the impact of their evolving conceptual formulations, this section will now provide an overview of a number of individual rights specifically identified so as to provide a conceptual basis for the remit of the subsequent Chapter. Of the list of rights enumerated in the Covenant, eight (8) have been selected for closer assessment because they represent the major thematic areas where LGBT Jamaicans experience disadvantage and marginalization the most. Accordingly, the following provisions will be critically examined:

1. the prohibition of non-discrimination;
2. equality of men and women
3. the right to work;
4. the right to social security;
5. protection of the family
6. the right to an adequate standard of living
7. the right to health
8. the right to education

Non-Discrimination

Article 2(2) of the ICESCR sets out that:

“The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

As articulated by the Committee on ESCR, “non-discrimination and equality are fundamental components of international human rights law and essential to the exercise and enjoyment of ESCR.”¹⁰⁰ This principle is recognized throughout the Covenant and requires State parties to guarantee non-discrimination in the exercise of each of the ESCR enshrined within and can only be applied in conjunction with those rights. Accordingly, for the purpose of this assessment, the concept of discrimination should be understood as constituting “any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing, of Covenant rights.”¹⁰¹

Based on this understanding and consistent with a number of international instruments directly addressing discrimination, there are four critical elements namely:

1. Differential treatment;
2. Based upon certain prohibited grounds;
3. Which has a specific intention or effect; and
4. In relation to covenant rights

which will be examined closely.

¹⁰⁰ UNCESCR (n 22) para 2

¹⁰¹ Ibid para 7

Firstly, as determined by the Committee on ESCR, “**differential treatment** based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This approach includes an assessment of whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant right and solely for the purpose of promoting the general welfare in a democratic society. Additionally, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects.”¹⁰²

Secondly, Article 2, paragraph 2 outlines the **prohibited grounds of discrimination** as “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” The inclusion of other status indicates that this list is not exhaustive and other grounds may be incorporated in this category.

Ordinarily, when determining whether a person is distinguished by one or more of the prohibited grounds, identification shall, if no justifications exists to the contrary, be based upon self-identification by the individual concerned. Membership also includes association with a group characterized by one of the prohibited grounds or perception by others than an individual is part of such a group.¹⁰³

Thirdly, as outlined by some,¹⁰⁴ in order for **differential treatment** to constitute discrimination contrary to Article 2(2), it is not necessary for the State to intend to discriminate against the group in question. The fact that a particular act or omission has the effect of treating certain groups differently will be sufficient. With this said, it should come as no surprise that the concept of discrimination employed by the Committee is a broad one which considers a number of classifications namely:

1. Formal Discrimination¹⁰⁵

As articulated by the Committee on ESCR, “eliminating formal discrimination requires ensuring that a States constitution, laws and policy documents do not discriminate on prohibited grounds; for example, laws should not discriminate on prohibited grounds.”

2. Substantive Discrimination¹⁰⁶

Merely addressing formal discrimination will not ensure substantive equality as envisaged and defined by Article 2(2) of the ICESCR. The effective enjoyment of Covenant rights is often influenced by whether a person is a member of a group characterized by the prohibited grounds of discrimination. Eliminating discrimination in practice requires paying sufficient historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations. State parties must therefore immediately adopt the necessary measures prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive discrimination.

3. Direct Discrimination¹⁰⁷

This occurs when an individual is treated less favorably than another person in a similar situation for a reason related to a prohibited ground. Direct discrimination also includes detrimental acts or omissions on the basis of prohibited grounds where there is no comparable similar situation.

4. Indirect Discrimination¹⁰⁸

This refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds if discrimination.

102 Ibid para 13

103 Ibid para 16

104 Ben Saul, David Kinley, Jacqueline Mowbray, *The International Covenant on Economic Social and cultural Rights: Commentary, Cases and Materials* (2014) OSAIL

105 UNESCR (n 22) para 8

106 Ibid

107 Ibid para 10

108 Ibid

5. Systematic Discrimination¹⁰⁹

According to the Committee, systematic discrimination can be understood to mean discrimination against some groups which is pervasive, persistent and deeply entrenched in social behavior and organization and often involves unchallenged or indirect discrimination. It can be understood as legal rules, policies, practices or predominant cultural attitudes in either the public or private sector which create relative disadvantages for some groups and privileges for other groups.

As a result, the Committee has recognized that “States parties must adopt an active approach to eliminating systematic discrimination and segregation in practice. It will require a comprehensive approach with a range of laws, policies and programmes, including temporary special measures.¹¹⁰ States parties should consider using incentives to encourage public and private actors to change their attitudes and behavior in relation to individuals and groups of individuals facing systemic discrimination or penalize them in case of non-compliance.”¹¹¹

Lastly, according to the Committee, discrimination occurs where differential treatment ‘has the **intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights,**’ which reasonably suggests that the operative scope of Article 2(2) is limited to discrimination which affects the recognition, enjoyment or exercise of Covenant rights.

Equal Rights of Men and Women

Article 3 of the ICESCR provides that:

“The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

As has been noted by the Committee, “gender affects the equal right of men and women to the enjoyment of their rights. Gender refers to cultural expectations and assumptions about the behaviour, attitudes, personality traits and physical and intellectual capacities of men and women, based solely on their identity as men and women. Gender-based assumptions and expectations generally place women at a disadvantage with respect to substantive enjoyment of rights, such as freedom to act and to be recognized as autonomous, fully capable adults, to participate fully in economic, social and political development and to make decisions concerning their circumstances and conditions. Gender-based assumptions about economic, social and cultural roles preclude the sharing of responsibility between men and women in all spheres that is necessary to equality.”¹¹²

These systems and assumptions which cause women’s inequality in the enjoyment of ESCR are often invisible because they are deeply embedded in social relations, both public and private, within all States.¹¹³ The inequality in the lives of women is deeply embedded in history, tradition and culture and affects women’s access to ESCR. This inequality contributes to their economic dependence, denial of personal autonomy and lack of empowerment. These, in turn, limit further women’s ability to participate in public life, including for a for economic, social, political and legal policy and decision making.

In light of this, Article 3 seeks to ensure equality between men and women in the enjoyment of ESCR. It is closely related to the general prohibition on discrimination in Article 2(2) which also prohibits discrimination on the basis of sex. Drafters felt that it was essential to retain Article 3 despite sentiments that it duplicated Article 2(2) as it was necessary to reaffirm the equal rights of men and women, a position consistent with the wishes of the General Assembly which at the time was preoccupied with the issue of sexual equality.

109 Ibid para 12

110 “measures...aimed specifically at correcting the position of members of a target group in one or more aspects of their social life, in order to obtain effective equality. In their strongest form, such special measures involve the preferential treatment of members of a previously disadvantaged group over others in the allocation of jobs, university places, and other benefits. For example, when two equally qualified persons apply for a job, priority is given to the female applicant, or a certain number of university places are reserved for racial minorities.” Moeckli (n 7) 162

111 UNCESCR (n 22) para 39

112 UNCESCR, General Comment No 16, E/C.12/2005/4 para 14

113 Ben Saul et al (n 104)

Accordingly, as acknowledged by the Committee, while the Covenant provides for non-discrimination, Article 3 is to be read as integrally related, mutually reinforcing and serving in conjunction with each specific right guaranteed under part III of the Covenant, in a manner similar to Article 2(2).¹¹⁴

Moreover, as laid out by the Committee, Article 3, like Article 2(2), requires both formal and substantive equality and the removal of both direct and indirect discrimination. Within the context of this particular provision, discrimination has been understood to mean “any distinction or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

The essence of Article 3 is that the rights set forth in the Covenant are to be enjoyed by men and women on a basis of equality, a concept that carries substantive meaning. While expressions of formal equality may be found in constitutional provisions, legislation and policies of Governments, Article 3 also mandates the equal enjoyment of the rights in the Covenant for men and women in practice.

Moreover, the Committee also acknowledges that discrimination on the basis of sex can intersect with discrimination on other bases so as to leave certain groups of women particularly marginalized and disadvantaged.

The Right to Work

Article 6 of the ICESCR sets out that:

“The State Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts and will take appropriate steps to safeguard this right.”

“The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedom to the individual.”

The Right to Just and Favourable Conditions of Work

Article 7 of the ICESCR sets out that:

“The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure in particular:

- (a) remuneration which provides all workers, as a minimum, with:
 - i. fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
 - ii. a decent living for themselves and their families in accordance with the provisions of the present Covenant
- (b) safe and healthy working conditions;
- (c) equal opportunity for everyone to be promoted in his employment to a higher level, subject to no considerations other than those of seniority and competence;
- (d) rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

¹¹⁴ UNCESCR (n 112) paras 2-3

The Committee on ESCR recognizes that “every individual has the right to be able to work, allowing him/her to live in dignity. The right to work contributes at the same time to the survival of the individual and to that of his/her family, and in so far as work is freely chosen or accepted, to his/her development and recognition within the community.”¹¹⁵ The right brings dignity because it allows a person freedom to choose their work, but also because it enables personal development and social and economic inclusion, including through self-reliance, self-esteem and the sense of social worth that comes from an individual’s contribution to the economy and society.¹¹⁶

The ICESCR proclaims the right to work in a general sense in Article 6 and explicitly develops the individual dimension of the right through the recognition in Article 7.

The right to work is an individual right that belongs to each person and is at the same time a collective right. It encompasses all forms of work, whether independent work or dependent wage-paid work and should not be understood as an absolute and unconditional right to obtain employment. As laid out in Article 6, it includes the right of every human being to decide freely to accept or choose work which implies not being forced in any way to exercise or engage in employment nor to be unfairly deprived of employment.

As outlined, the exercise of work in all its forms and at all levels requires the existence of a number of interdependent and essential elements, such as availability, accessibility, acceptability and quality.

Now, the right to just and favourable conditions of work, as outlined in Article 7 is one which arguably serves a number of inter-related purposes¹¹⁷. It is recognized in the Covenant and other international and regional human rights treaties as well as related international legal instruments including conventions and recommendations of the International Labour Organization (ILO).¹¹⁸ The enjoyment of the right is a pre-requisite for, and result of, the enjoyment of other Covenant rights. Logically following the right to work in Article 6 as a corollary, it is a right which identifies a non-exhaustive list of fundamental elements to guarantee just and favourable conditions of work. The scope of the provision yields a number of considerations related to:

1. remuneration;
2. safe and healthy working conditions;
3. equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence; and
4. rest, leisure, reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays

amongst others.

In situating the provision, there was a challenge whereby States wished for Article 7 to do more than merely repeat the principles proclaimed in the UN Charter and the UDHR but to avoid reproducing detailed provisions embodied within ILO Conventions. Therefore, the level of protection afforded to Article 7 allowed it to serve as a link between general aspirations and more detailed labour instruments.

115 UNCESCR, General Comment No. 18, E/C.12/GC/18, para 1

116 Saul (n 104)

117 UNCESCR, General Comment No 23, E/C.12/GC/23

118 Although many ILO Conventions relate directly and indirectly to just and favorable conditions of work, there are a number which are relevant to the interpretation of this particular right namely: Hours of Work (Industry) Convention, 1919 (No 1.); Weekly Rest (Industry) Convention, 1921 (No. 14); Equal Remuneration Convention, 1951 (No. 100); Discrimination (Employment and Occupation) Convention 1958 (No 111); Occupation Safety and Health Convention 1981 (No. 155); Part Time Work Convention, 1994 (No. 175); Maternity Protection Convention, 2000 (No. 183)

Right to Social Security

Article 9 of the ICESCR sets out that:

“The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.”

The Committee on ESCR recognizes that the right to social security is of central importance in guaranteeing human dignity for all persons when they are faced with circumstances that deprive them of their capacity to fully realize their Covenant rights.¹¹⁹ It encompasses the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection from:

- (a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age or death of a family member;
- (b) unaffordable access to health care; or
- (c) insufficient family support, particularly for children and adult dependents.¹²⁰

As a general observation, social security, through its redistributive character, plays an important role in poverty reduction and alleviation, preventing social exclusion and promoting social inclusion.¹²¹

Supplementary to this formulation, the International Labour Organization (ILO) has also sought to provide its own perception. It describes social security as “very important for the well-being of workers, their families and the entire community. It is a basic human right and a fundamental means for creating social cohesion, thereby helping to ensure social peace and social inclusion. It is an indispensable part of government social policy and an important tool to prevent and alleviate poverty. It can...contribute to human dignity, equity and social justice.”¹²²

Accordingly, the right to social security can therefore be understood quite extensively as a vital means of ensuring an individual's subsistence and securing their basic socio-economic rights under the Covenant.

In securing these basic rights, due regard must be given to the normative content of the right to social security which includes the right not to be subject to arbitrary and unreasonable restrictions of existing social security coverage and is guided by a number of essential factors namely availability,¹²³ social risks and contingencies,¹²⁴ adequacy,¹²⁵ accessibility¹²⁶ and relationship with other rights.¹²⁷

119 UNCESCR General Comment No 19, E/C.12/GC/19, para 1

120 Ibid, para 2

121 Ibid, para 3

122 International Labor Organization (ILO), Conclusions concerning Social Security, ILC89-PR16-312-En.Doc (2001) 16 para 2

123 UNCESCR (n 119), para 11

124 Ibid para 12-21

125 Ibid, para 22

126 Ibid, para 23-27

127 Ibid, para 28

Right of Families

Article 10 of the ICESCR provides that:

“The States Parties to the present Covenant recognize that:

The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.”

Article 10 protects the family, including children and crosses over into the same or similar subject matter of some other ICESCR rights namely rights to work, social security, non-discrimination and equality.

As articulated, “Article 10 deliberately begins with the central idea that the family is entitled to ‘the widest possible protection. This core principle is supplemented by the description of the family as the natural and fundamental group unit of society.” It is underpinned by various social, cultural and moral assumptions about the ‘natural’ role of the family in social order, although in its interpretation there is a substantial flexibility and relativity in the notion of the family.”¹²⁸ In outlining the scope of family, there are a number of considerations that have been made:

1. The absence of formal marriage bonds, especially where there is a local practice of customary or common law marriage will not preclude the existence of a family. Local cultural considerations are therefore significant;
2. The dissolution of marriage does not destroy family relationships involving children. Family does not refer solely to the family home as it exists during the marriage and survives divorce to encompass relationships between parents and child.
3. Marriage itself is not essential to the notion of family. A family may arise from ‘cohabitation’. Therefore, de facto couples may qualify which are sometimes defined under national laws by reference to minimum time periods spent living together or other indicia of a shared life.¹²⁹
4. Social and cultural conceptions of the family are crucial in defining it (excluding harmful traditional marriage practices which are contrary to human rights such as polygamy, forced marriage, child marriage and the like.)
5. While recognizing the diversity of family types, some minimal requirements for the existence of a family are, however, necessary, such as life together, economic ties, a regular and intense relationship amongst other things.

The obligation on the States to provide protection and assistance for the ‘establishment’ of the family first implies that the State must not interfere in its establishment, or permit non-state actors to so interfere. States must therefore eliminate any barriers to the right to found a family, including arbitrary, unreasonable, disproportionate or discriminatory restrictions on marriage or cohabitation, or the choice of parents to have children.

¹²⁸ Saul (n 104) 728

¹²⁹ In principle, same sex couples can still constitute an unmarried family given that the latter concept is delinked from marriage. While the legal recognition of same sex unions may not be a ‘core obligation’ under Article 10(1), the existence of a ‘family’ entitled to protection turns on the characteristics of the relationship rather than a ‘legal’ marriage, the gender of partners or majority social attributes.

Right to an Adequate Standard of Living

Article 11 of the ICESCR sets out that:

“The State Parties to the present Covenant recognize the right of everyone to an adequate standard of living for him self and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The State Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect, the essential importance of international cooperation based on free consent.

Of particular note is the immense scope of this article which encompasses a number of individual rights such as the right to food and the right to housing. While no general all-encompassing position exists on the right to an adequate standard of living, there has been clear attempts by the Committee on ESCR to substantiate its various elements. Accordingly, given the focus of this paper and the thematic concern related to the accessibility to housing by LGBT Jamaicans, this particular right will be presented.

As articulated, housing is fundamental to many aspects of our existence and is keenly associated with a number of other human rights. Housing, according to some scholars, connotes the essential elements of space, privacy and identity in social existence of individuals being human beings. Accordingly, the right to housing applies to everyone and should be construed generously to take in a number of considerations that allow for the full enjoyment of the right.

The right to housing, as described by the Committee is one which should be seen as a right “to live somewhere in security, peace and dignity.”¹³⁰ It is integrally linked to other human rights and it takes into account a variety of considerations, most importantly that it should be ensured to all persons irrespective of income or access to economic resources.¹³¹ Moreover, the reference to housing in Article 11 is one that comes with a qualifier which demands that housing be classified as adequate housing.

The concept of adequacy is particularly significant in relation to the right to housing since it serves to underline a number of factors which must be taken into account in determining whether particular forms of shelter can be considered to constitute adequate housing for the purposes of the Covenant. As articulated by the Committee, “while adequacy is determined in part by social, economic, cultural, ecological and other factors, there is a belief that it is nevertheless possible to identify certain aspects of the right that must be taken into account for this purpose in any particular context.”¹³² These factors include:

1. Legal Security of Tenure;
2. Availability of Services, Materials, Facilities and Infrastructure;
3. Affordability;
4. Habitability;
5. Accessibility;
6. Location; and
7. Cultural Adequacy:

130 UNCESCR, General Comment No 4, E/1992/23 para 7

131 Ibid

132 Ibid, para 8

Beyond the express right to adequate housing, there is another dimension that has been reasonably identified and explored by the Committee. The issue of forced evictions is one that has been regarded as being prima facie incompatible with the requirements of the Covenant.¹³³

Forced evictions is a term which has been adopted by the Committee and defined as “the permanent or temporary removal of individuals, families and/or communities against their will from their homes and/or land which they occupy without the provision of and access to appropriate forms of legal and other protection.”¹³⁴

The practice of forced evictions is widespread and affects persons in both developed and developing countries. The clarification provided by the Committee is one which sought to provide further guidance as to the implications of such practices in terms of the obligations contained within the covenant. As is largely understood, evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights.

Where those affected are unable to provide for themselves, the State Party must take all appropriate measure, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land as the case may be is available.

In identifying those disproportionately affected by forced evictions, the Committee notes that “women, children, youth, older persons, indigenous people, ethnic and other minorities and other vulnerable individuals and groups all suffer disproportionately from the practice of forced evictions.”¹³⁵ Accordingly, there is a need to ensure the guarantee of legal safeguards such as non-arbitrariness, non-discrimination, due process and procedural fairness, including consultation and participation in decision-making, access to remedies, compensation and the provision of adequate rehousing.

Right to Health

Article 12 of the ICESCR sets out that:

“The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”

“The steps to be taken by the States Parties to the present covenant to achieve the full realization of this right shall include those necessary for:

1. The provision for the reduction of the stillbirth and of infant mortality and for the healthy development of the child;
2. The improvement of all aspects of environmental and industrial hygiene;
3. The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
4. The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

As recognized by the Committee, “health is a fundamental human right indispensable for the exercise of other human rights.”¹³⁶ Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity.

133 Ibid, para 18

134 UNCESCR, General Comment No 7, E/1998/22, para 3

135 Ibid, para 10

136 UNCESCR, (n 64) para 1

The right to health is not to be understood as a right to be healthy. The right to health contains both freedoms and entitlements. The freedoms include the right to be control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.

It has been recognized as an inclusive right extending not only to timely and appropriate medical care but also to the underlying determinants of health, such as access to safe water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, access to health-related education and information, including on sexual and reproductive health, and freedom from discrimination.¹³⁷

Beyond recognizing the broad socio-economic context in which the right to health exists, the Committee has also formulated a set of broad policy objectives for the guidance of states in their realization of the right. The Committee laid out four 'interrelated and essential elements' of the right to health namely: availability,¹³⁸ accessibility,¹³⁹ quality¹⁴⁰ and acceptability.¹⁴¹

Right to Education

Article 13 the ICESCR sets out that:

"The State Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity and shall strengthen the respect for human rights and fundamental freedoms they further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

"The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

- (a) Primary education shall be compulsory and available free to all;
- (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means and in particular by the progressive introduction of free education;
- (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
- (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
- (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

As articulated by the Committee, "education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth."¹⁴²

137 Ibid para 4

138 Ibid para 12(a)

139 Ibid, para 12(b)

140 Ibid, para 12(c)

141 Ibid, para 12(d)

142 UNCESCR, General Comment No. 13, E/C.12/1999/10, para 1

Education operates as a multiplier, enhancing the enjoyment of all individual rights and freedoms where the right to education is effectively guaranteed, while depriving people of the enjoyment of many rights and freedoms where the right to education is denied or violated.

Article 13(2) sets out in detail the requirements for achieving the right to education in respect of different levels of education: primary, secondary, technical and vocational education, higher education and fundamental education and as has been recognized, education in all its forms and at all levels should exhibit the following interrelated and essential features¹, namely: availability, accessibility, acceptability and adaptability.

CHAPTER TWO

Economic, Social and Cultural Rights within the Jamaican Context

Constitutionalizing ESCR

A constitution which specifies all that citizens are legally entitled to ESCR as enforceable or justiciable law arguably presents the strongest case.¹⁴³ Moreover, any mechanism which accords ESCR the same level of protection as afforded to CPR in the domestic constitutional order is also arguably the most effective.¹⁴⁴ Constitutionalizing ESCR through direct entrenchment “impose substantive, binding obligations on States to provide for the socio-economic needs of the people whom they govern as opposed to imposing a moral obligation on the State to do so.”¹⁴⁵ This process represents an affirmation of the needs of most people within society and thereby enshrines them as rights enjoyed by equal members in a community. In examining the future of ESCR in national law, some have concluded that such rights

“should be made legally enforceable in principle, as they are rights that protect the necessities of life and provide the foundations of an adequate quality of life and the conditions for the pursuit of human dignity and equal opportunity. As they are rights concerning the welfare of disadvantaged members of society, they reflect the social aspect of [our] existence as citizens and members of a common humanity, representing an important counterpart to CPR.”¹⁴⁶

In support of this, there are those who have conceived the notion that “the explicit protection of ESCR sends out a strong symbolic message about society’s commitment to the interests and needs of the most excluded.”¹⁴⁷

Constitutionality of ESCR in the Jamaican Charter

Caribbean constitutions have long been regarded as primary sources¹⁴⁸ of human rights guarantees and all Commonwealth Caribbean countries have enshrined in their constitutions certain fundamental rights and freedoms which, according to some, are versions of some of the basic human rights outlined in the UDHR.¹⁴⁹

In 2011, after an extensive period of constitutional reform, Jamaica replaced its 1962 independence bill of rights with the “Charter of Fundamental Rights and Freedoms (The Charter).” The Charter has one extensive subsection which contains 19 provisions that secure a mixture of rights expressed in very general terms. In examining its recognition of ESCR, the 2011 Charter expanded the list of rights guaranteed by providing the right to enjoy a healthy and productive environment¹⁵⁰ and the right to publicly funded pre-primary and primary school level education¹⁵¹ arguably consistent with international conventions to which Jamaica has ratified.

In examining the reform process which led to the adoption of the Charter and the relative expansion to include some ESCR, there is utility in presenting specific considerations in order to supplement the analysis. Based on a report¹⁵² of the Joint Select Committee tasked with considering a Bill entitled “The Charter of Rights (Constitutional Amendment) Act”, there are a number of deliberations worth noting.

143 Lanse Minkler, “Economic Rights and Political Decision Making” (2009) 31 Human Rights Quarterly 2 368-393, 382

144 Paul O’Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences*, (2012) Routledge 181

145 *Ibid*, 6

146 Ellen Wiles, “Aspirational Principles or Enforceable Rights – The Future for Socio-Economic Rights in National Law” (2006) 22 American University International Law Review 35-64, 64

147 *Ibid*

148 Robinson (n 91) 418

149 Simeon McIntosh, *Caribbean Constitutional Reform: Rethinking West Indian Polity*, (2003) The Caribbean Law Publishing Company, 227

150 Jamaica Charter (2011) s 13(3)(l)

151 Jamaica Charter (2011) s 13(3)(k)(ii)

152 Joint Select Committee, “A Report on the Deliberations on the Bill Entitled An Act to Amend the Constitution of Jamaica to provide for a Charter of Rights and For Connected Matters.”

Firstly, a discussion around the rights of the child which focused on a right to education reveals a nuanced conversation on the topic of ESCR that offers some insight into the limited recognition of this particular class of rights. The Joint Select Committee in advancing the work of the Constitutional Commission, recognized that the right to free primary education is an ESCR, which at minimum, ought to be accepted as a state obligation.¹⁵³

However, further discussions on the substance of the right yielded a conservative and arguably sceptical position which suggested that any imposition of an obligation on the State to have complete responsibility for the education of an individual beyond the primary level, would have serious resource implications and inherently open up a philosophical question as to whether rights to such matters as housing, health and employment should also be constitutionally guaranteed.

In substantiating this discussion around the right to education, it should be noted that the Committee examined a number of Constitutions in order to ascertain the best approach at reconciling the challenges with recognizing such a category of rights. In referring to the Constitution of Zambia which contained what were known as “directive principles of state policy,” the position obtained was that such is intended to guide the executive, the legislature and the judiciary but are not justiciable or by themselves, legally enforceable in any court, tribunal or administrative entity.¹⁵⁴ This position, arguably favored by the Committee, yielded a notion that “the Constitution should refer to certain social and economic aspirations which should not be included as part of the enforceable fundamental rights.”

Against this, the relative progression afforded to modern constitutionalization exhibited in certain jurisdictions such as South Africa suggested to the Joint Select Committee that there was in fact room to grow beyond restriction rights to political rights and civil liberties. However, despite these references, it was argued that “the philosophy behind the independence constitution and which, to a large extent, permeated the proposed the new Charter, is one which focused on civil and political liberties and avoided what are regarded as ESCR.”¹⁵⁵ It appears clear that there was a lingering cynicism towards ESCR as the Committee, in navigating the scope of the right to education, feared that it would open up the philosophical question whether rights to such matters as housing, health and employment should also be constitutionally guaranteed – a conversation they were not prepared to entertain.

Furthermore, the philosophical consideration, consistent with earlier arguments pertaining the nature and scope of ESCR, revealed a contention that was preoccupied with resource limitations, an issue which arguably restricted the goal of ensuring that more ESCR were constitutionally guaranteed.

In referencing the deliberations stemming from the Committee, it was clear that the consensus that was achieved regarding ESCR, albeit relative, saw them merely as aspirations to be mentioned within the Constitution but mostly excluded from being a part of those fundamental rights deemed enforceable.

Beyond the constitutional reform process, there arguably exists another mechanism which has sought to provide citizens with some level of relief despite the limited recognition of ESCR within the Charter. The equality provisions enumerated within the Charter are instructive and therefore provides some guidance. Section 13(3)(g) provides for the general right of equality before the law while Section 13(3)(h) provides for the general right to equitable and humane treatment by any public authority in the exercise of any function.

The scope of section 13(3)(g) arguably applies both to legislation as well as administrative acts of officials and is not confined to a list of specified grounds.¹⁵⁶ However, a question which remains to be answered is which method should be employed to determine whether the law has treated a person unfairly particularly where the Constitution does not provide a list of grounds upon which to frame such a consideration. Some have sought to explore the scope of this provision by examining positions emanating from the

153 Ibid, 36

154 Ibid, 40

155 Ibid, 41 156 LJ Williams v Smith and AG (1980) 32 WIR 395

156 LJ Williams v Smith and AG (1980) 32 WIR 395

common law which has yielded a number of considerable approaches such as identifying comparators, requiring proof that the differentiation identified was rationally related to a legitimate state interest or examining the question of stereotypes.¹⁵⁷ However, a position that has been argued suggests that an amalgamation of the approaches which establish the ground of discrimination and which interrogates the effect of the law may, as a fortified alternate, prove useful.

In assessing the scope of the section 13(3)(h) it is worth noting that the Joint Select Committee in its report highlighted that their intention was not to make the requirement of equality but rather a requirement in which fairness would be delivered as the circumstances dictated. As suggested by the common law “the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct...is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety.”¹⁵⁸

Beyond the challenges which have been presented above, there are other gaps in the utility of both provisions, especially within a ESCR framework, worth noting. Firstly, the guarantee associated with Section 13(3)(h) can arguably only be breached by a public authority thereby excluding culpable acts carried out by private persons. Secondly, the guarantee associated with Section 13(3)(g) suggests that any form of unequal treatment only becomes actionable if such treatment is within the remit of law. The effect of this is that it arguably excludes experiences sanctioned under policies and/or programmes with no supporting legislative structure.

State Reporting and Treaty Obligations

Having highlighted the conceptual challenges with realizing ESCR through a process of constitutionalization, there is now a demand to examine the process of state reporting as required under the treaty-based mechanism to further contextualize this analysis.

As articulated, “States parties to the ICESCR undertake to report regularly on their implementation of the treaty.”¹⁵⁹ Generally, states are required to submit a treaty specific document to the Committee on Economic, Social and Cultural Rights setting out the legal, administrative and judicial measures taken to give effect to the treaty provisions¹⁶⁰ and any difficulties encountered in implementing the rights.¹⁶¹

The preparation embarked upon at the state level provides an opportunity for states to undertake a comprehensive review of measures that they have taken to harmonize national laws and policies with provisions of the ICESCR, monitor the progress made in the enjoyment of the rights enumerated, identify shortcomings and problems with the domestic implementation and evaluate future needs.

In unlocking a dimension beyond the constitutional recognition of ESCR within the Jamaican context, this Chapter will now assess a number of core documents integral to Jamaica’s reporting obligations as required by the Covenant. By examining the list of issues, the state’s response to the list of issues, the concluding observations drafted by the Committee and where available, the follow-up to those concluding observations, the status of state compliance with treaty obligations can be relatively determined. Given the particular limits of this desk review and legal analysis, the most recent documentation will be referenced.

In 2012, the Committee produced a list of issues¹⁶² in connection with the consideration of the third and fourth periodic reports of Jamaica concerning articles 1 to 15 of the ICESCR. Given the focus of this particular analysis, a concise yet comprehensive overview of the thematic areas identified in conceptualizing this study will be subsequently explored.

157 *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497

158 *Waste Management Inc v Mexico* ICSID Case No. ARB(AF)/98/2

159 Moeckli (n 24) 389

160 ICESCR, Article 16

161 *Ibid.*, Article 17

162 UNCESCR, List of Issues in connection with the consideration of the combined third and fourth periodic reports of Jamaica concerning articles 1 to 15 of the ICESCR (E/C.12/JAM/3-4), E/C.12/JAM/Q/3-4

The Committee in its list of issues raised two general critical foundational concerns. Firstly, it required information on “whether Jamaica was in the process of establishing a national human rights institution in accordance with the Paris Principles relating to the status of national institutions for the promotion and protection of human rights.”¹⁶³ Secondly, it also sought information on the status of the ICESCR within Jamaica’s domestic legal system. In so doing, it required information on “whether the rights contained in the Covenant have been invoked before or by the national courts either as grounds for a case or as interpretative guidance for legal norms.”¹⁶⁴

In Jamaica’s response to these general issues, some guidance was provided. As it relates to the national human rights institution, “there is no single institution in Jamaica, other than the courts, responsible for supervising and enforcing the implementation of human rights in the State.”¹⁶⁵ Any progress regarding the establishment of such an institute remains under consideration and falls within the immediate purview of the Ministry of Justice. However, it identified a number institutions with roles and responsibilities which are designed to enhance the promotion and protection of human rights such as the Office of the Public Defender, the Independent Commission of Investigations, the Child Development Agency, now known as the Child Protection and Family Services Agency and the Office of the Children’s Advocate.

The Committee, in its concluding observations expressed regret that the government had not yet established a national human rights institution with a comprehensive mandate including ESCR. As such, the committee, while welcoming the intention to establish such an institution, **recommended that the government take effective measures to establish such in accordance with the principles relating to the status of national human rights institutions for the promotion and protection of human rights.**

With respect to the issue of the domestic status of the Convention,¹⁶⁶ the government of Jamaica referenced the dualist approach practiced in common law countries whereby a treaty only becomes enforceable in a local court after that treaty has been incorporated. It highlighted that where a treaty is not incorporated, it may not be directly invoked in a domestic court and within the remit of Jamaica, there is no single piece of legislation incorporating the ICESCR. Some provisions such as those discussed above are enumerated within the Charter of Fundamental Rights and Freedom and can be enforced and invoked before domestic courts where there exists a constitutional claim alleging a breach of the rights contained within. Despite this, it has been noted that although unincorporated treaties such as the ICESCR may not be invoked directly in domestic courts, there remains a general presumption in the common law that such treaties can be construed to give meaning to ambiguous words within primary and secondary legislation. This presumption is arguably grounded in the belief that Parliament could not have intended to legislate contrary to that which is provided for in international law unless there exists a clear and express intention to the contrary.

Nevertheless, the Committee in its concluding observations has **encouraged the government to take all appropriate steps to ensure that all provisions of the Covenant be given full effect in the domestic legal order and can be invoked before the Courts.**

While these general issues have been identified by the Committee, the government of Jamaica was also required to address a number of substantive issues related to each core right within the ICESCR.

As has been established, article 2(2) of the ICESCR sets out the provision with respect to non-discrimination. The Committee, in probing Jamaica’s compliance with its obligations laid out by the Covenant, questioned whether the non-discrimination provision within the Constitution would be amended to include “sexual orientation, health and other status” as prohibited grounds for discrimination. Furthermore, the Committee requested information on whether the Offenses against the Persons Act would be amended to decriminalize same sex sexual relationships between consenting adults. Following the broad theme of non-discrimination, the Committee also inquired about the steps taken by the government of Jamaica to combat and prevent stigma and discrimination against disadvantaged and marginalized individuals and groups, including people living with HIV (PLHIV), persons with disabilities and LGBT persons.

163 Ibid, para 1

164 Ibid, para 2

165 UNCESCR, Replies of Jamaica to the List of Issues, E/C.12/JAM/Q/3-4/Add.1, para 1

166 Ibid, para 7, 9

The government of Jamaica, in responding to the concerns of the Committee, articulated in its reports that “there is no intention, at that particular juncture, to amend either the Constitution or the Offences against the Persons Act in relation to sexual orientation.”¹⁶⁷ As it relates to the issue concerning stigma and discrimination, the government highlighted a number of sensitization and training efforts to combat the issue directly. However, such efforts remain the only critical measures referenced.

In response to this, the Committee in its concluding observations on the combined third and fourth periodic reports of Jamaica,¹⁶⁸ adopted in 2013 expressed a number of calls to actions and recommendations. The Committee **“called upon the government of Jamaica to amend its laws to adopt a comprehensive anti-discrimination framework law, in accordance with the parameters identified and established by the Covenant.”**¹⁶⁹ It went further to express its concern about the continuous criminalization of same-sex relations which perpetuates discrimination all spheres of their life, including their enjoyment of ESCR. Accordingly, it **recommended that the government decriminalize same-sex relations between consenting adults, take concrete, deliberate and targeted measures to eliminate discrimination on the grounds of sexual orientation and send a clear public message that any form of discrimination, harassment or violence against individuals for their sexual orientation is not tolerated, and swiftly and effectively investigate, prosecute and sanction individuals for such acts.**

This particular observation is one that will be analysed more extensively in Chapter 3 which examines the ESCR of LGBT Jamaicans.

In respect of Article 3, the Committee in its list of issues required that the government provide information on whether the State party has implemented or plans to implement effective measures, including media campaigns and education in all levels, to eliminate negative gender-based stereotypes and practices that discriminate against girls and women in the State party. In furnishing a response, the government reinforced its commitment to the principle of enabling women to achieve their full potential as participants in Jamaica’s social, cultural and economic development and highlighted that measures have been taken to promote gender balance and prevent discrimination between women and men. Such measure recognizes the creation and adoption of a National Policy on Gender Equality.

The Committee, in its concluding observations whilst taking note of the various policies and programmes adopted to provide equal opportunities for men and women, nevertheless called on the government to strengthen its efforts to promote gender equality. Accordingly, the Committee **recommended that the government adopt effective monitoring and implementation mechanisms to ensure the effectiveness and sustainability of programmes and policies aimed at promoting gender equality.**

Article 6 provides that everyone has a right to work. The Committee in its list of issues required that the government provide information on the impact of the measures taken to increase the access of women to employment in the formal economy. In its response, the government conceded that the Ministry of Labour and Social Security does not have an employment programme which specifically targets women. Moreover, while not outlined in the list of issues, a close examination of the concluding observations reveals a number of other challenges. The Committee, in its formulation, is deeply concerned that despite the higher educational attainment of women in Jamaica, their unemployment rate remains more than twice that of men. Furthermore, the Committee is even more disgruntled by the fact that youth unemployment is three times higher than that of adults due to inadequacies in education and skills training, particularly in rural areas.¹⁷⁰

Accordingly, it appears reasonable that the Committee would recommend that the government **adopt “employment strategies and policies aimed specifically at women”¹⁷¹ and “long term policies and strategies with an effective monitoring and evaluation mechanism to address the root causes of youth unemployment, while continuing to provide training and vocational skills training for youth.”¹⁷²**

¹⁶⁷ Ibid, para 12

¹⁶⁸ UNCESCR, Concluding observations on the combined third and fourth periodic reports of Jamaica, adopted by the Committee at its fiftieth session, (2013) E/C.12/JAM/CO/3-4

¹⁶⁹ Ibid, para 8

¹⁷⁰ Ibid para 13

¹⁷¹ Ibid

¹⁷² Ibid

Article 9 of the ICESCR sets out a right to social security and the Committee in framing its issue requested that the state provide information on the “reform of the current National Insurance Scheme to address the challenges due to the wide coverage gap and the existence of a large informal economy.”¹⁷³ The government, in response articulated that “there are no barriers to entry under the National Insurance Act that prevents the participation of any employed person in the National Insurance Scheme.”¹⁷⁴ Moreover, the government has expressed that in order to reduce the wide coverage gap and the existence of a large informal economy, there needs to be improved public education on the benefits to be gained by participating in the scheme and a unified approach to tackling the challenges presented by the informal economy.

However, regardless of this iteration, the Committee in its concluding observations expressed that the social security scheme in Jamaica does not provide universal coverage, that no time frame has been established to introduce a universal social security scheme and that a considerable portion of the disadvantaged and marginalized groups in society reportedly remain without social security.¹⁷⁵ Accordingly, the Committee reiterated its recommendation that **the government of Jamaica should strive for universal coverage of the social security system, giving priority to disadvantaged and marginalized groups in society.**

Under Article 10, which recognizes the protection of the family, the Committee in its list of issues requested information on two areas. Firstly, it required the government to provide updated information on the number of registered cases of domestic violence including marital rape and sexual abuse of women and children in the family and the sanctions imposed on perpetrators.¹⁷⁶ Secondly, it requested that the government indicate what measures have been taken to eliminate corporal punishment of children, in particular in schools, alternative care setting and the home.¹⁷⁷

The government in responding, highlighted that despite the existence the data on sexual offences, such was not disaggregated according to marital rape and sexual abuse of women and children in the family and therefore could not present a clear picture in compliance with the request made by the Committee.¹⁷⁸ In any event, the government reported that efforts continue to be made to eliminate gender-based violence.¹⁷⁹

In respect of the issue surrounding corporal punishment, the government indicated that policy and legislative measures have been taken to eliminate corporal punishment in settings outside the home¹⁸⁰ but as it relates to the matter of prohibition within the home, that has been scheduled for review.¹⁸¹

The Committee, in its concluding observations recognized that despite the efforts to address violence against women and girls, there is concern about the high rates of domestic and sexual violence and the lack of a comprehensive strategy to address the phenomenon. Accordingly, **the Committee urged the government to intensify its efforts to combat high levels of violence against women and girls in Jamaica and stressed the importance of organizing public campaigns and trainings targeted at men, with a view to combatting attitudes and behaviour that perpetrate violence against women in all forms.**

In respect of the use of corporal punishment in the home and in schools, **the Committee urged the government to eradicate all forms of violence against children, including through the assistance of relevant UN agencies, namely UNICEF, to prohibit all forms of corporal punishment in all settings, including within the family.**

Article 11 recognizes a right to an adequate standard of living. As defined earlier, the scope of this particular consideration will be relatively confined to housing. In its list of issues, the Committee requested that the government indicate the specific measures implemented to address the acute housing situation and the measure implemented to provide adequate housing for disadvantaged and marginalized individuals and groups¹⁸².

173 E/C.12/JAM/Q/3-4 para 15

174 E/C.12/JAM/Q/3-4 Add.1 para 56

175 E/C.12/JAM/CO/3-4 para 18

176 E/C.12/JAM/Q/3-4 para 16

177 Ibid, para 17

178 E/C.12/JAM/Q/3-4/Add 1 para 60

179 Ibid, para 63

180 Ibid, para 64

181 Ibid, para 65

182 E/C.12/JAM/Q/3-4 para 19

In response,¹⁸³ the government has highlighted a number of laws, policies and programmes geared towards tackling challenges related to housing and the reform required by each. However, the Committee,¹⁸⁴ resound in its position, expressed concern that regardless of these efforts, the reality is that there remains an acute housing situation in Jamaica which includes the fact that almost a quarter of the population live as squatters on land they neither own nor lease, as well as there is a rapid growth of squatter communities in urban areas in overcrowded, unsafe and dilapidated areas. The Committee also notes that there is an absence of data on the prevalence of homelessness in Jamaica coupled with the lack of effective programmes and policies to address the issue. Accordingly, the Committee has recommended that the government of Jamaica **adopt a comprehensive housing strategy with a view to ensuring access to adequate and affordable housing with legal security of tenure for everyone.**

Now, as it relates to Article 12 which sets out a right to physical and mental health, the Committee in its list of issues¹⁸⁵ requested that the government of Jamaica provide information on measures implemented to improve the situation of the chronic shortage of trained health professionals particularly in rural areas. It also requested information on whether the government intends to broaden the conditions on which basis abortion is allowed as a means of addressing the high levels of maternal mortality due to unsafe, clandestine and illegal abortions.

The government, in its response¹⁸⁶ to these specific issues, articulated its intention to conduct a systematic audit to determine the exact need whilst procuring partnerships regionally and locally that would fill some of these identifiable gaps. As it relates to the query on to abortion practices flagged within the state, it remained grounded in its position that unconditional access is illegal in Jamaica. While acknowledging that abortions do take place and sometimes result in complications, there is still no substantive step taken to alleviate such an issue. The draft Termination of Pregnancy Act which proposes conditions under which abortions can lawfully take place remains under review.

Despite these observations, the Committee¹⁸⁷ remained adamant in its position that **the government of Jamaica should take further measures to increase the availability of health-care services with qualified personnel particularly in rural areas and take further measures to increase the availability, accessibility and quality of health-care services, including persons with mental illnesses.**

Moreover, in referencing the work done by the state to reduce HIV related deaths and mother-to-child transmission of HIV and the efforts to combat stigma and discrimination, the Committee expressed concern that HIV continues to be one of the leading causes of death among adults, that HIV rates remain high among youth, men in same-sex relationships, sex workers, homeless persons and drug users whose behaviors are criminalized and/or considered immoral, that almost two thirds of HIV affected persons are unaware of their status and that stigma and discrimination against persons living with HIV/AIDS continue to persist, including in the workplace, particularly in relation to men in same-sex relationships and transgender persons, which not only prevents their access to essential medicines and treatment and their enjoyment of other ESCR but risks undermining efforts to eradicate HIV. Accordingly, the Committee called upon the government **to provide adequate human and financial resources to effectively implement the National HIV/STI Programme to ensure that progress achieved is not reversed.** Furthermore, it has also requested that the government prohibits discrimination against PLHIV by enacting legislation and by amending and repealing existing laws which stigmatize PLHIV and increase the vulnerability of those most at risk.

In relation to the issue of abortion, the Committee urged the government of Jamaica to ensure that its legislation helps women avoid unwanted pregnancies and facilitates access to professional services with a view to eliminating the practice of dangerous abortions that place the lives of women and girls at risk.

183 E/C.12/JAM/Q/3-4/Add.1 para 76-80

184 E/C.12/JAM/CO/3-4 para 25

185 E/C.12/JAM/Q/3-4 para 20-22

186 E/C.12/JAM/Q/3-4/Add.1 para 93-94

187 E/C.12/JAM/CO/3-4 para 27-29

Concerning the right to education, the Committee in its list of issues¹⁸⁸ requested information on the measures taken, as well as the progress achieved, to improve the overall quality of education, to increase the number of teachers, to ensure the availability of textbooks and other educational materials, as well as to improve the physical environment of schools. In its response,¹⁸⁹ the government of Jamaica articulated that it has focused its attention on strategic areas to increase access to quality education, improve teacher training, increase access to teaching via the use of media and ICT and providing better water and sanitation facilities.

In its concluding observations,¹⁹⁰ the Committee whilst acknowledging the current steps that have been taken by the government to improve the education system, it nevertheless raised concern about the **need for increased access to education for disadvantaged and marginalized groups**.

Stakeholder Assessment of ESCR Landscape

In an effort to solicit qualitative information on the nature and scope of ESCR and resolve any theoretical differences commonly considered when navigating issues related to the substance of ESCR, a number of critical stakeholders were engaged via key informant interviews. Through these sessions, primary information on the ESCR landscape domestically was documented and will now be presented to substantiate crucial aspects of this legal analysis.

The Interview Guidelines can be found at Annex I

There is limited inclusion of economic, social and cultural rights in the Charter of Fundamental Rights and Freedoms. Why do you believe this is so?

In sharing their insight into this particular question, respondents offered a variety of perspectives. All participants alluded to the constitutional reform process facilitated by a Joint Select Committee of Parliament in 2001 as a critical point in understanding why there is limited inclusion of ESCR in the 2011 Charter. Respondents shared that during that consultative process, parliamentarians viewed ESCR as being inherently positive and thereby requiring the State to spend money or expend resources on such rights, an obligation which it opposed. Respondents referenced the State's position on the inclusion of the right to health which according to one respondent, "would expose the State to indeterminate financial obligations." To decision to pursue protection of the right to health was debated and determined to be an unrealistic ask that made politicians "fearful of enforcing any obligation that would require them to spend money." Moreover, another respondent shared that parliamentarians were generally hesitant to include ESCR given the perceived economic impact if such rights were to be granted to the population at large, a thought which manifested itself amidst concerns about prospective lawsuits in relation to ESCR guarantee. This concern yielded another perspective where ESCR were seen as non-justiciable and therefore had no basis for inclusion within the Charter.

Beyond the concerns related to State resources, another participant raised the issue that there existed a gap between guaranteeing social and economic rights as opposed to cultural rights. The treatment of the cultural rights of Maroons by the Joint Select Committee whereby they dismissed it as "out of hand" highlighted one instance where the Committee was not keen to include cultural rights within the ESCR discourse.

Should the Charter guarantee more economic, social and cultural rights and if so, which rights, in your opinion, are absolutely necessary given our current socio-economic realities?

When asked this question, respondents immediately shared that selecting any one right would be a difficult ask as "virtually every ESCR enumerated in the Covenant is extremely important" but were able to furnish some comments regardless. As was shared

188 E/C.12/JAM/Q/3-4 paras 23-25

189 E/C.12/JAM/Q/3-4/Add.1 para 100

190 E/C.12/JAM/CO/3-4 para 30

by one respondent, the process of guaranteeing rights as he envisioned is not necessarily consistent with what parliamentarians had in mind -- guaranteeing rights creates a standard that they always have to achieve.

Accordingly, the respondent felt as though the right to health should have been included along with a right to work which places an obligation on the private sector to address things related to conditions of work which lends to the right to decent work as an ideal framing so that certain conditions are met. This, the respondent suggested, would have been especially useful given the uncertainty surrounding COVID-19 where conditions related to work are less than ideal. A properly framed right to work, as suggested, could create an obligation in which employers treat staff properly.

The right to employment was also mentioned by another respondent whose perspective on enumeration differed slightly but maintained that such a right should establish a framework which protects against unemployment while ensuring benefits such as life and health insurance which anticipatedly has the potential to go a long way in advancing the welfare of people in a modern society. An example was shared with respect to the experiences of Persons Living with HIV (PLHIV) who were not allowed to participate in certain insurance schemes despite medical advancements.

This respondent also believed that in guaranteeing rights which resonate linguistically and culturally with Jamaican citizens, certain rights and entitlements should be made directly implementable under a broader right framed as the right to an adequate standard of living. This allowed for several other considerations specific to other rights such as the right to social security and the right to housing.

As identified by one respondent, the right to social security is a necessary right because Jamaica already has so many social protection policies in place and even where the enumeration of such a right does not go as far as is required by the Covenant, at minimum, it should ensure that certain considerations are made especially in relation to issues concerning sickness, disability and poverty. Beyond this, another respondent referred to access to pension schemes irrespective of a person's situation and/or realities.

Moreover, another respondent shared that a more expansive right to education would be useful as there are already policies which state that every child can learn, and every child must learn"

How have economic, social and cultural rights enumerated in the international covenant on economic, social and cultural rights (ICESCR) been recognized and protected domestically?

In answering this question, all respondents alluded to the fact that irrespective of the limited guarantee of ESCR within the Charter, there are a number of domestic legislation which have some correlation to the list of rights enumerated within the Covenant, albeit limited.

As shared by one respondent, "there is some statutory recognition of some rights but certainly not consistent with the scope of the rights as guaranteed within the Covenant and to say that domestic legislation is a recognition of rights would be going too far." Furthermore, another respondent suggested that the legislative structure, in its current form does not go far enough as the substance of these laws, policies and programmes are not directly related to the obligations set out in the Covenant nor are they meeting the goals anticipated by the scope of the provisions within the Covenant." This, as has been suggested, is compounded in the fact that there is no anti-discrimination legislation to provide buttress and accordingly, there can be discrimination in who is able to access these programmes and how they are accordingly administered. This does nothing to address the vulnerability gaps created by the lack of economic stability and other socio-economic challenges.

Irrespective of this, of the laws which exist, respondents articulated that labour and employment laws seem to provide the most robust legislation framework in relation to ESCR. One respondent shared "generally, the strongest set of recognition would exist in employment legislation."

Moreover, respondents suggested that “employment is the place where there has been more of a rights focus which was not an accident. The role of the ILO in strengthening standards and legislative development is an important consideration. This includes the dispute resolution framework as being separate from the Court which is important given the current realities that recognize the limited opportunities to enforce the rights, even where they do exist.”

In contextualizing the experience regarding such legislative achievements, one respondent alluded to the 70s and considered it an important period for the development of social legislation where Jamaica welcomed the products of a Michael Manley-era which pursued socialism. As suggested, the development of social legislation was connected to a certain period and way of thinking and arguably Jamaica has not had any equivalent momentum in social legislation similar to that period, post-independence. While Jamaica was considered “a pioneer of social legislation in the 70s and onwards,” other Caribbean countries such as Trinidad and Barbados have since gone ahead of Jamaica and have been ahead for at least two decades. The kind of legislative framework which would support greater protection of ESCR has not been forthcoming and this decline has been linked to the fact that currently there is no sexual harassment in the workplace legislation and that legislators are still struggling with the issue of occupational health and safety and disabilities legislation.

In terms of how the other rights might be protected by domestic laws, policies and programmes, one participant commented on the fact that the Ministry of Labour and Social Security has a public assistance division which provides various non-contributory social assistance like the PATH Programme which are directed at vulnerable households. Another respondent shared that the health system was set up through a series of legislation and has a series of regulations. However, similar to that which has been suggested above is the challenge of legislation and standards not being written from a rights-based perspective and that the methodology employed in creating these laws have been “piecemeal and written to address different needs and challenges and while it provides some kind of protection, such protection is not universal.”

There has been a long-standing debate as to whether economic, social and cultural rights are better characterized as justiciable or state directives. In your opinion, how should they be interpreted by the state?

In answering this, respondents shared that “if ESCR remain in the realm of policy, there will arguably always be a situation where there are a certain set of people whose rights will never be protected.”

In fleshing out this perspective, one respondent articulated that the State is going to find it hard to overcome the financial considerations in making these rights justiciable. While there is no doubt that Jamaica is poor country, there is always going to be a question which asks “where would the states find resources to give effect to these rights if they were to be made justiciable?” This question overlooks an entire wealth of international jurisprudence and learning out of places like South Africa where constitutional courts have made it clear that if the right has been framed as a progressive right and the obligation on the State is only to take action within its available resources, even though the right is justiciable, there are those limiting factors which have been placed on the rights.

Therefore, the State ought not worry about whether it will have enough financial resources or whether making them justiciable will open the floodgates to litigation and bankrupt the country because there are many cases where the constitutional courts in other jurisdictions have ruled that if the right is framed to require that the State takes measures within its resources, then it would be arguably absolved of liability if it is able to demonstrate that it has met that threshold.

On the perspective of the constitutional courts, another respondent was inclined to take guidance from the jurisprudence emanating from South Africa where ESCR are justiciable on the basis that courts have worked carefully over the period of the new constitution to determine what that means. Their jurisdiction is exactly like the courts in the Caribbean that have sorted through the enforcement of these rights through the courts. The debate must invariably have a different tone given the decades of litigation in jurisdictions like Jamaica where issues related to justiciability are now being ventilated.

Beyond this, respondents also shared that there is a danger to ESCR residing exclusively in the realm of policy in so far as that presents limits for the timetable for implementation as it would always be set entirely and exclusively mindful of the future. Therefore, there would be no immediate or pressing need to act on it now nor would there be a commitment to do it. With this modus in mind, States will tend to delay which is a danger in and of itself; the action is never implementable and there is no urgency around it. There has been a short-sighted view on whether ESCR should be protected in law, the effects of which are prominent in today's society.

Another respondent, in his formulation, suggested that a legislative framework, at least, provides a stronger mechanism. While there are many policies around ESCR such as no-user fee in public fee, free primary education or the Students Loan Bureau (SLB) which enhances access to education and a number of programmes such as PATH, there is "something lost" by not having legislative framework. "Rule of law requires that States create legislation for the protection of ESCR and it is not enough to leave it to the whims of policy." Moreover, "at certain points, policy has to be transformed into law" and one example illustrated is the experience associated with the Occupational Safety and Health Policy. There exists a policy, a section of the Ministry that deals with this specific issue yet there is no legislation to strengthen the response and accordingly, people can choose whether to have safe workspaces or not beyond what exists within ordinary factory legislation which does not apply to everyone. The piecemeal nature of the protection of ESCR is a feature of not having a more legislative approach whereby you create a situation where if persons rights are violated, they cannot action it nor can they respond in the most effective way possible. "Legislation does provide a better response and empowers people."

Do you have any knowledge of or insight into any economic, social and cultural right litigation domestically?

No respondent was able to any domestic litigation specific to ESCR.

CHAPTER THREE

Examining the ESCR of LGBT People in Jamaica

“All human beings are born free and equal in dignity and rights.” As articulated in the preceding chapter, the nature of discrimination varies according to context and evolves over time and “the principle of non-discrimination is a fundamental one at the root of all human rights and is usually among the first principles mentioned in the core human rights instruments.”¹⁹¹ The content of the right to prohibition of discrimination, as examined earlier, is one which reflects a connection between an increased attention to the conceptual elements of discrimination and an increasingly systematic understanding of particular groups requiring specific attention.¹⁹²

However, despite the advances which have been made towards ensuring that people of all sexual orientations and gender identities can live with equal dignity globally, the issue of persons experiencing human rights violations and being targeted because of their actual or perceived sexual orientation or gender identity remain a global and entrenched pattern requiring serious concern.

These human rights violations take many forms, from denials in their right to life, freedom from torture and security of the person, to discrimination in accessing ESCR such as health, housing, education and the right to work, from non-recognition of personal and family relationships to pervasive interferences with personal dignity, suppression of diverse sexual identities, attempts to impose heterosexual norms and pressure to remain silent and invisible. Moreover, violence, harassment, discrimination, exclusion, stigmatization and prejudice are directed against persons in all regions of the world because of their sexual orientation or gender identity - experiences which are compounded by discrimination on grounds including gender, race, age, religion, disability, health and economic status, and which collectively seek to undermine the integrity and dignity of those subjected to abuses and weaken the sense of self-worth and belonging which lead many to conceal or suppress their identity and to live lives in fear and invisibility.

In localizing the context of these experiences, a reasonable starting point is one which acknowledges that “the prejudice against LGBT people is deeply embedded in Jamaican society.”¹⁹³ Sexual orientation and gender identity discrimination, together with the criminalization of male same-sex intercourse and the absence of comprehensive anti-discrimination legislation, hinders Jamaica’s economic growth and developmental prospects. As observed, homophobia, biphobia and transphobia in Jamaica has admittedly led to loss of employment, discrimination in the workplace or educational settings, poor health outcomes and poverty.

Discrimination against people because of their sexuality is widely documented in Jamaica. Such studies have consistently shown that LGBT persons face discrimination from schools, their own families, their communities and even the government and that they are thought to suffer disproportionately from unemployment, homelessness, abuse, physical and mental violence and are more prone than the general population to health problems like HIV and severe depression.¹⁹⁴

Between 2011 and June 2017, JFLAG, the foremost human rights and social justice organization in Jamaica which advocates for the rights of LGBT people, reported 261 incidents of human rights violations based on a person’s LGBT status, a portion of which concerned violations more specifically related to ESCR. While these numbers are not likely to capture the number of violations actually perpetuated against LGBT persons, they nevertheless remain instructive and useful to this overall legal analysis.

191 Barbara Wilson, “The Principle of Non-Discrimination in the International Covenant on Economic, Social and Cultural Rights” in Kalin Walter and others International Law, Conflict and Development (2010) Martinus Nijhoff Publishers, 211

192 Ibid, 114

193 Caribbean Policy Research Institute (CAPRI), The Economic and Societal Costs of Sexuality-based Discrimination in Jamaica, (2019) The University of the West Indies

194 Ibid 15

Discrimination

As identified in Chapter 2, Jamaica does not have any specific legislation prohibiting discrimination due to sexual orientation or gender identity, nor does it have any comprehensive anti-discrimination legislation. Instead, legislation retains colonial era provisions which criminalize sexual intercourse and interactions interpreted as any kind of physical intimacy between men which only serve to exacerbate the levels of discrimination.

As such, it is apparent that the law provides a legal framework to discriminate against LGBT people. While respecting the limits of this particular paper, a number of key examples will be highlighted to clearly demonstrate the point.

Firstly, as has been stated, Jamaica in 2011 adopted a new Charter of Fundamental Rights and Freedoms which expanded the prohibited grounds for discriminatory treatment. However, discrimination based on sexual orientation or gender identity was explicitly excluded. According to Section 13(3)(i) of the Charter, a citizen has the right to freedom from discrimination on the grounds of being male or female. The decision to frame the provision in such a manner instead of sex or gender as is seen in other bills of rights across the world, reasonably suggests that failure to prohibit discrimination on the basis of sexual orientation was deliberate. In the alternate, sections 13(3)(g) and 13(3)(h), as explored in the preceding Chapter, arguably have the most potential to cover sexual orientation and gender identity discrimination, but not without the demonstrated limits.

Secondly, the criminalization of buggery in the Offences against the Persons Act (OAPA) between consenting males is “a severe limitation of a gay man’s right to equality in relation to sexual orientation and their right to privacy, dignity and freedom.”¹⁹⁵ As has been noted, “the harm caused by the provision can, and often does, affect his ability to achieve self-identification and self-fulfilment and it gives rise to a wide variety of other discriminations, which collectively unfairly prevent a fair distribution of social goods and services.”

Accordingly, the law in its current state makes LGBT people in Jamaica extremely vulnerable to discrimination, abuse, violence and extortion. The fear of potential arrest and further victimization prevents LGBT persons as victims from seeking protection from the State.

Gender Equality

As outlined within the National Policy on Gender Equality (NPGE), the law and the legal environment in the Jamaican judicial system is itself characterized by gender inequality. This inequality exists as a result of the unequal gender dynamics, rules, norms, values and the prevalence of patriarchy that govern the broader social and institutional context within which the system operates.

As a result, some legal issues are viewed only from the male perspective (for example, only females can be victims of some types sexual assault); the problems of women are trivialised or over-simplified (for example, domestic violence cases); and women are not given the same credibility as men (for example, rape cases). Similarly, domestic violence and sexual harassment against men by women is often trivialised; alimony for men is still disparaged and there are no legal provisions for paternity leave. Furthermore, same sex partners in Jamaica cannot appeal to the Domestic Violence Act for recourse or remedy in violent domestic disputes but are able to utilize the Offences Against the Person Act or Common law for offenses such as assault of unlawful wounding.

While some of these issues will be explored under the “Protection of Family” sub-section, alternative perspectives will be presented here to capture the concerns more specific to gender equality.

¹⁹⁵ The National Coalition for Gay and Lesbian Equality and Another v The Minister of Justice [1998] ZACC 15 and Others per Ackermann J

Firstly, the 2009 Sexual Offences Act provides a limited definition of sexual intercourse, a limited scope of application in relation to the offence of rape and ultimately lacks gender neutrality in its language. These limitations inherently restrict the level of protection afforded to men and boys who are also victims of various forms of sexual abuse. To illustrate, by requiring male victims of forced anal sex to resort to section 76 of the OAPA which broadly criminalizes “buggery” and for which offence consent is irrelevant, the law “minimalizes the magnitude” of what is in fact “rape” against males implying that it is somehow less heinous than the rape of girls or women” and in so doing creates a “fallacious and discriminatory distinction between genders”.

A Joint Select Committee of Parliament tasked with reviewing the Sexual Offences Act and the OAPA, in its report articulated that the definition of sexual intercourse, the definition of rape should remain unchanged. No suggested amendment was proffered in respect of the gender neutrality of the legislation.

Secondly, the Domestic Violence Act provides some protection, albeit limited, against physical and mental injury caused by intimate partners and family members. However, the Act does not cover sexual, psychological or financial abuse. This means that a woman cannot seek protection orders where she has been sexually, psychologically or financially abused by her partner. Her only recourse is through the use of the criminal law and the punishment for breaching a protection order has little punitive force and is disproportionate to the violence that women are likely to experience.

Similar to above, a Joint Select Committee of Parliament tasked with reviewing the Domestic Violence Act, made recommendations that the forms of abuse be expanded to include physical, sexual and psychological abuse. However, no further steps have been taken to amend the law accordingly. Moreover, as highlighted by the report of the Committee, the submission to include financial abuse was left unresolved on the basis that members of the Committee were uncertain about whether it could be clearly established as a form of domestic violence, particularly in the context where there was one breadwinner in a household and spending activities had to be prioritize.

Thirdly, the Sexual Harassment Bill which seeks to protect women and men from unwanted sexual advances, requests for sexual favours, and crude sexual behaviours that affect quality of life by creating an intimidating, hostile or offensive environment has been drafted and has been tabled before Parliament but has not been adopted or made enforceable. This delay is despite years of lobbying at the local and international levels where a need for such legislation was clearly presented.

Employment

There is no legislation which speaks to the protection of all workers from discrimination in terms of access to employment, retaining jobs, promotions, or protection from harassment at work. While steps have been taken to have policies, which address the protection of vulnerable groups such as persons living with HIV, sexual orientation and gender identity discrimination in the workplace is not all together prohibited.

In Jamaica, the only legal protection against employment discrimination on the basis of sexual orientation or gender identity is the 2004 staff orders, which prohibits discrimination in the civil service. There is no similar protection for workers in the private sector save for a handful of companies who have voluntarily referred to discrimination based on sexual orientation in their workplace policies. However, there may be room to consider what avenues exist to treat discriminatory practices within the private sector and one such avenue is that of unfair dismissals.

The term “unfair dismissal” includes any distinction, execution or preferences made on the basis of nullifying or impairing equality of opportunity or treatment in employment or occupation. Fundamentally, the principle underpinning this concept is that unless a worker’s dismissal is for a potentially fair reason as set out in law and is procedurally correct the dismissal is unfair. Under English law, there are some reasons which have been classified as automatically unfair reasons and this includes dismissal for asserting a statutory right which extends to unlawful discrimination on the basis of one of the protected characteristics¹⁹⁶ – gender, race, sexual orientation.

¹⁹⁶ Equality Act (2010) United Kingdom

However, in Jamaica, there is no right not to be unfairly dismissed with all the commensurate procedures similar to that in the UK. Instead, the Labour Relations and Industrial Disputes Act, provides some guidance by equipping the Industrial Disputes Tribunal with the powers to award remedies to workers adjudged ‘unjustifiably dismissed’ and has been noted, the words ‘unjustifiable’ and ‘unfair’ are synonymous¹⁹⁷. This approach confines itself to that of compensation and *prima facie* provides no insight into the applicable scope of unjustifiable dismissal and the extent to which it could be expanded judicially to incorporate the concept upheld in UK laws.

Outside of the remit of legislation, it should now be noted that while there is no representative study of LGBT discrimination in the employment sector to produce a clear and actual picture of the situation in Jamaica, there are a number of small scaled studies which can nevertheless provide a glimmer into the realities. In a 2016 study on the developmental cost of Homophobia, one in six of those who participated did not have a job in the 12 months leading to investigation and when asked if they were ever denied a job because of their LGBT identity, 7% responded yes. In a 2019 study commissioned by JFLAG, 34.2% of the respondents indicated that they have had negative experiences in the workplace because of their LGBT identity.

Social Security

While there are a number of legislation specific to social protection schemes such as the Pensions Act and the National Insurance Act, LGBT persons in same-sex relationships do not fall within the rubric of these schemes. This lack of recognition suggests that Jamaica does not have social benefits targeting the specific challenges faced by vulnerable and marginalized communities.

As observed, “in documenting the barriers and challenges which exist in the delivery of social protection services by the Government, a J-FLAG commissioned paper noted that there was little or no information being disseminated by social protection service providers...and accordingly, those persons who are vulnerable are not aware of the support that they could receive¹⁹⁸.”

Additionally, while programmes such as PATH remains a critical measure in achieving general poverty reduction, the budgetary allocation remains insufficient to tackle the broader issue of poverty within the general population and also does not recognize LGBT persons who are impoverished as a specific demographic group in need of social security intervention. This position is reflective of the 2014 Social Protection Strategy created by the Government of Jamaica which fails to mention sexual orientation or gender identity as forms of vulnerability which may exacerbate one’s experience of poverty¹⁹⁹.

Protection of Family

As documented, “Section 18 of the Charter recognizes heterosexual unions (by protecting legislation related to marriage and other unions) and outlaws the recognition of other unions. This has far reaching implications throughout several Jamaican laws but its direct impact falls within the rubric of family law such as the Property (Rights of Spouses) Act, the Maintenance Act and the Domestic Violence Act.²⁰⁰”

197 R v Minister of Labour and Employment, The Industrial Disputes Tribunal, Devon Barrett, Lionel Henry and Lloyd Dawkins Ex-parte West Indies Yeast Co Ltd (1985) 22 JLR 407

198 JFLAG, The Gay Agenda (2018) 20

199 Ibid, 21

200 JFLAG, “Diversifying LGBT Rights Advocacy – A Legal Review” (2017) 31

Property (Rights of Spouses) Act and the Maintenance Act

The Property (Rights of Spouses) Act, 2005 and the Maintenance Act, 2005 have changed the laws related to disputes over property and maintenance that occur after relationships end, whether married or unmarried couples. Such legislation did this by broadening the definition of spouse to include:

- (a) a single woman who has cohabited with a single man as if she were in law his wife for a period of not less than five years²⁰¹;
- (b) a single man who has cohabited with a single woman as if he were in law her husband for a period of not less than five years.

This broadening of “spouse” has recognized so called common-law relationships that are prevalent within Jamaican society.

Section 6 of Property (Rights of Spouses) Act has given spouses one-half share in the family home, unless the circumstances dictate otherwise. This was put in place to prevent women from being dispossessed after marriage or long years of unmarried cohabitation but also provides the possibility for men who are not breadwinners and/or homeowners from benefitting. Section 11 enables the Court to look at other property, outside of the family home, that each partner might have an equitable interest in, although there is no one-half share entitlement.

Section 4 of the Maintenance Act places an obligation on a spouse, so far as she/he is capable to maintain the other spouse insofar he/she is practically unable to meet the whole or any part of his/her needs. This maintenance ceases if that person remarries or cohabits with another person²⁰². Cohabiting has been defined as being in a conjugal relationship outside of marriage²⁰³.

While these Acts have made special provisions for legal remedies to relevant spouses, they undoubtedly possess heteronormative and cis-normative ideologies. Homosexual relationships are excluded and as such, the same rights and privileges afforded to heterosexual couples under these acts are non-existent for homosexual ones. Therefore, any interest in a family home or other property will have to be decided by strictly trust law principles. The possibility of maintenance is non-existent. The same rules that apply to trans persons in the Marriage Acts apply here. They can form certain types of unions that may be recognized.

Domestic Violence Act

By virtue of the Domestic Violence Act, 2004 only persons in certain family or romantic relationships may seek protection and occupation orders in instances of violence or threats of violence. These persons are spouses, partners in visiting relationships, dependants, children or members of the household. To be considered a spouse or in a visiting relationship, that relationship must be heterosexual. The analysis then follows that trans persons in limited relationships may be considered spouses or in a visiting relationship for example a trans man and a cisgender man. For same-sex unions or unions deemed same-sex by law (like a trans woman and a cisgender man) there is only recourse where the parties are living together as then the victim of domestic violence can apply as a member of the household. This erases the romantic nature of their relationship.

Moreover, non-cohabiting persons in “same-sex” unions cannot obtain the protection, occupation or auxiliary orders where they are facing abuse at the hands of their partners. Their only options remain in having their abuser charged criminally. This requires greater evidence in Court and the couple loses the benefit of speedy relief that comes with coming under the Domestic Violence Act as well as the benefit of the aforementioned orders which can give them the right to remain in the household²⁰⁴, to use the furniture therein²⁰⁵ and protection from being stalked or otherwise harassed²⁰⁶.

201 Property (Rights of Spouses) Act, (2005) s. 2(1)

202 Maintenance Act 2005, s. 7(1)

203 Ibid, s. 2

204 Occupation Orders per s. 7(1) of the Domestic Violence Act

205 Ancillary Orders per s. 12(1) of the Domestic Violence Act

206 Protection Orders per s. 4(1) of the Domestic Violence Act

Furthermore, having acknowledged that women have always been more affected by domestic violence it should come as no surprise that the situation is therefore worse for lesbian, bisexual and trans women who lack protection under the Domestic Violence Act and are dissuaded from reporting for reasons stated above. The 2011 Shadow Report notes:

“Gender discrimination is entrenched in Jamaican culture, and as a result, domestic violence, violence committed by a family member, is often ignored by the police. Over 50% of violent crimes committed against women occur in the home. The problem of domestic violence is exacerbated for lesbian women, who not only face societal discrimination but experience violence and discrimination within their own families²⁰⁷.”

Housing

As framed in a relatively recent report on LGBT homelessness in Jamaica, “LGBT identity in Jamaica is shaped and colored by displacement. Whether physically or mentally, displacement from family, community and sometimes country is a defining marker of the lived experiences of LGBT people.”²⁰⁸ Reports made to JFLAG inside that homelessness among LGBT persons is arguably almost always as a result of discrimination or violence.

From a legislative perspective, there appears to be no law which protects LGBT persons from homelessness nor are there any specific state coordinated responses/programmes which target persons who have been made homeless as result sexual orientation-based discrimination.

LGBT individuals have experienced discrimination by landlords and landladies who refuse to rent to them or force them out of their home because of their sexual orientation or gender identity. Anecdotally, a young man had rented two separate rooms in St. Catherine in 2014 for himself and his partner, telling the landlady that the other man was his cousin. They did not actually need two rooms, but they paid the extra money to rent a second room to maintain the fiction that they were living separately. But his landlady watched them, suspecting they were gay. The men moved out when their landlady, accompanied by someone with a gun, threatened the men and told them they had to get out.²⁰⁹

In framing this issue, the scope of the Rent Restriction Act should be considered. As articulated, the 1994 Rent Restriction Act which was crafted to protect tenants from landlords acting unreasonably and oppressively arguably offers no support for LGBT tenants thereby reducing their access to channels through which they can access adequate redress. The Rent Restriction Act makes provision for a landlord to evict tenants on the basis that their conduct is deemed to be a nuisance or annoyance to adjoining occupiers or the tenant is using the premises for an immoral purpose. Within the Jamaican context and considering the rampancy of experiences related to stigma and discrimination, a landlord may seek protection under the Act by stating that homosexuality is immoral and that tenants are using the house to engage in homosexual acts. The vagueness in the provision therefore arguably creates a space in which discrimination can occur and has been noted, the lack of anti-discrimination legislation or protections under the Charter serve only to exacerbate the challenges faced by LGBT people.

Beyond the legal protection, it is worth noting that there is limited representational data on the challenges faced by LGBT persons in enjoying a right to housing save for a few targeted small scaled studies. In a 2019 JFLAG study, 20.9% of the respondents had been homeless or displaced at some point in their life, of which 48.2% indicated that they were put out by their families because of their LGBT identity. In sharing some of the reasons for displacement, respondents shared that they were “forced out of rented houses, being targeted because they were seen with persons who were openly gay, being asked to leave because a parent’s partner had a crush on the respondent, leaving the community after being threatened with death, having their house burned down and staying in various homes while job hunting.” These experiences serve as a reminder of the reform that is needed in order to ameliorate LGBT persons from these conditions.

207 Human Rights Violations of LGBT people in Jamaica: A Shadow Report submitted for consideration at the 103rd Session of the Human Rights Committee (2011) 13

208 JFLAG, “(Re)presenting and Redressing LGBT Homelessness in Jamaica: Towards a Multifaceted Approach to Addressing Anti-Gay Related Displacement” (2014)

209 Human Rights Violations Against Lesbian, Gay, Bisexual, and Transgender (LGBT) People in Jamaica: A Shadow Report Submitted for consideration at the 118th Session of the Human Rights Committee October (2016) Geneva

Health

In Jamaica, despite the numerous interventions in relation to the HIV epidemic, stigma and discrimination remain and continues to be a major roadblock in the HIV response. As identified, “some LGBT individuals face barriers when seeking healthcare as very few healthcare professionals in public health facilities are aware of the needs of the LGBT community and some of them refuse the provision of service. In some instances, LGBT persons face stigma and discrimination from health care professionals and their rights to confidentiality are often breached, particular in relation to their HIV status and general sexual and reproductive health.”

Beyond this, there is another dimension of health where the experiences must be considered. As observed, “LGBT people suffer more from mental health illnesses as compared to their non-LGBT counterparts, due to a range of stressors that heterosexuals do not have to contend with.”²¹⁰ It has been suggested that this higher prevalence is a result of stigma, prejudice and discrimination which create a hostile and stressful social environment that causes mental health problems.

These barriers are promulgated by the lack of legal protection under formal law. To illustrate, the Jamaican Constitution, as examined earlier, while designed to protect the rights of all Jamaicans and guarantee equality under the law, does not provide adequate protection as it fails to take account of discrimination on the basis of health status. Moreover, beyond the constitutional remit of these findings, there is also no comprehensive legislation which makes particular reference to the needs of LGBT persons within the public health care sector.

In a 2019 study conducted by JFLAG, respondents, despite the majority indicating that they usually have access to health care facilities, articulated that they were most likely to be uncomfortable discussing their sexual orientation regardless of facility type (public, private or NGO/CSO). Beyond this, 81.8% of respondents also indicated that they had not accessed mental health services in the last 30 days.

Beyond adequate access to health care, there exists another issue which relates to the lack of knowledge about safe same-sex practices amongst young LGBT people. As articulated, “while there are general obstacles faced by the youth and adolescent population including legal barriers and discrepancies with laws and policies around the age of consent and parental consent, the lack of capacity, unwillingness and discomfort exhibited by educators in sufficiently delivering the Health and Family Life Education (HFLE) curriculum, LGBT youth face a number of additional issues most of which are connected to the criminalization and stigmatization of same sex intimacy.

As highlighted, “despite the fact that many adolescents are sexually active, the HFLE curriculum does not provide sexually active adolescents with adequate information about sexuality.”²¹¹ LGBT youth, in particular are left without any education at all about their sexuality.

This reality is further complicated by the CCPA which identifies guidance counsellors, teachers and other persons charged with the care and protection of children as prescribed persons. Section 6(3) then requires them to report abuse as well as when the Act deems children to be “in need of care and protection.” Section 8(1) (c) includes a child in respect of whom certain offences have been committed. The offences to which the section relates are listed in the Second Schedule of the Act, and the schedule includes buggery and offending public decency.

The implication of the statute then is that if, for example, a 15-year-old male adolescent shares with a teacher or guidance counsellor that he has a partner of the same age and they are intimately or sexually involved, that teacher or guidance counsellor has a statutory duty to report this. Though it is true that minors who engage in heterosexual intercourse are in the same situation, the offence of offending public decency particularly creates a space in which gay male students are less likely to confide in and receive sex education from persons who can empower them to make wise choices. It does this by deeming a boy who engage in any form of male-to-male intimacy as one in need of care and protection.

210 CAPRI (n 193) 23

211 Ibid 31

Education

There are a limited number of laws dealing quite specifically with education in Jamaica, and of those that do, the Education Act and its accompanying regulations provides some guidance. The Education Regulations of 1980 in providing that a student shall obey the rules of the school he is attending arguably empowers the institution to make and enforce particular rules on students which have the potential to limit the enjoyment of certain rights and freedoms. As observed, “this creates a problem for LGBT students, especially those who as a result of their gender expression do not conform to specific institutional dress codes and regulations.” Accordingly, practices of this nature arguably supplement and reinforces an environment within which bullying of LGBT students is normalized with little to no interventions to address such issues. Furthermore, the persistence of discriminatory policies adopted by schools and the absence of or failure to implement and enforce anti-bullying policies that directly acknowledges and ensures the protection of LGBT youth amplify the harm experienced by these students and strips them of any protection that enables their full and unsuppressed existence within institutional safe spaces.

Furthermore, as has been demonstrated, LGBT persons suffer disproportionately from bullying in schools and are often left to deal with it by themselves. While there is no quantitative study done in Jamaica on the extent of school bullying or drop-out rates of LGBT youth, qualitative research has shown that these students are often targets of bullying and discrimination. In response to this, the government in 2015 indicated that it would revise its School Security and Safety Policy Guidelines in order to combat bullying in schools but the revised version, as noted, does not mention bullying of LGBT students nor are they included in the list of descriptions of typical victims.²¹²

212 CAPRI (n 176) 36

CHAPTER FOUR

Gaps within the Economic, Social and Cultural Rights Landscape

As articulated, “the concepts of implementation and monitoring are deeply entrenched in the core international human rights instruments covering economic, social and cultural rights.” As understood, implementation refers to the act of putting into effect a decision or providing practical means to accomplish something and as it relates to the context of international human rights law, implementation means moving from a legal commitment to realization by the adoption of the appropriate measures. This ensures the ultimate enjoyment of all the rights contained within the relevant treaties. The process of monitoring, on the other hand, concerns an assessment of State compliance with its human rights obligations.

In conducting this gap analysis, a variety of approaches have been considered in order to determine the most efficient way to present such an analysis. By referencing materials such as a report from the Economic and Social Council on the implementation of ESCR and a guide on human rights indicators, this chapter will outline the challenges and the gaps in protecting ESCR.

In creating a framework from which this gap analysis can be done, a methodology ordinarily employed in determining human rights indicators has been adapted to support the categorization of gaps based on the analysis conducted.

As has been noted, a “human rights indicator is specific information on the state of condition of an object, event, activity or outcome that can be related to human rights norms and standards; that addresses and reflects human rights principles; and that can be used to assess and monitor the promotion and implementation of human rights.”²¹³

The configuration of indicators that have been categorized as structural, process and outcome bring to the fore an assessment of the steps taken by the State Parties to meet their obligations, be it that of respecting, protecting or fulfilling a human right. Adapting this approach arguably proves useful in the identification and analysis of gaps which are specific to the socio-economic rights landscape in Jamaica.

Furthermore, this methodology has been reinforced by a set of monitoring approaches and methods deemed integral and indispensable aspects of a State party’s obligations under the Covenant. Conveniently, the three thematic approaches utilized in monitoring ESCR compliance corresponds with the three-tiered categorization identified above. Accordingly, it has been noted that the structural categorization encompasses monitoring legislation and normative institutional frameworks, the process categorization contemplates monitoring the realization of ESCR and the outcome categorization considers monitoring violations of ESCR.

Each category and its relationship with a monitoring approach has been condensed and presented below in an effort to provide some insight into the utility of this mixed method approach and some guidance on what to expect from each classification.

Structural:

Structural indicators reflect the ratification and adoption of legal instruments and the existence as well as the creation of basic institutional mechanisms deemed necessary for the promotion and protection of human rights. These indicators help in capturing the acceptance, intent and commitment of the State to undertake measures keeping with its human rights obligations.

213 United Nations, “Human Rights Indicators: A Guide to Measurement and Implementation,” (2012)

As it relates to the monitoring component, this structural category recognizes the crucial role of legislative measures in ensuring the enjoyment of different rights. Legislative measures are considered in the Covenant as being particularly appropriate for giving effect to ESCR and has been considered a fundamental aspect of the rule of law. While not limited to such measures, it also lends itself to normative measures which put into practice ESCR via policies, plans of action and programmes. Monitoring legislation and normative frameworks therefore requires that two questions be considered:

1. whether legislative and other necessary normative measures have been adopted; and
2. if such measures have been adopted, whether they comply with international human rights standards.

Process:

Process indicators measure duty bearers' ongoing efforts to transform their human rights commitments into the desired results. Unlike with structural indicators, this involves indicators that continuously assess the policies and specific measures taken by the duty bearer to implement its commitments on the ground. Process indicators help in assessing a States' efforts, through its implementation of policy measures and programmes of action, to transform its human rights commitments into the desired results.

In supplying additional context, it has been argued that the adoption of legislation, regulations, policies, plans and programmes does not necessarily amount to the realization of ESCR automatically. Monitoring realization is a feat which requires tools that are capable of measuring results and progress over time. Some of these tools include human rights impact assessments, use of indicators and benchmarks for monitoring and budget analysis.

Outcome:

Outcome indicators capture individual and collective attainments that reflect the state of enjoyment of human rights in a given context. An outcome indicator consolidates over time the impact of various underlying processes. They help in assessing the results of State efforts in furthering the enjoyment of human rights.

In determining the results of these efforts, it has been suggested that by monitoring violations, one has to consider that as with any other human rights, ESCR create legal obligations for States and failure to comply amounts to a serious violation.

Based on these aforementioned classifications, the gaps identified are as follows:

Structural

1. The Government of Jamaica is yet to establish a National Human Rights Institute which enjoys an important degree of autonomy from the executive and the legislature, takes full account of international human rights standards which are applicable to the country, and which is mandated to perform various activities designed to promote and protect human rights.
2. The International Covenant of ESCR, despite being ratified by the government of Jamaica in 1975, has not been incorporated into the domestic legal order and accordingly cannot be invoked before the domestic courts.
3. Government has not ratified the Optional Protocol to the ICESCR which allows for victims of violations of ESCR to present complaints at the international level.
4. There is limited Civil Society Organization (CSO) involvement in and mobilization around treaty-based reporting. CSOs have not capitalized on the formal opportunity to submit shadow reports which analyze and often challenge the content of the State party's report.

5. There is limited knowledge among policy makers about the nature and scope of ESCR and key jurisprudential developments. Policy makers are still confined by the idea that the implementation of ESCR is exclusively dependent on the governments availability of resources and that their obligations, as duty bearers, remain exclusively positive.
6. The 2011 Charter of Fundamental Rights and Freedoms does not guarantee a right to work, a right to social security, a right to an adequate standard of living inclusive of a right to housing and a right to health. Instead, it only recognizes a right to publicly funded tuition in a public educational institution at the pre-primary and primary levels which is a limited construction of the right to education and a right to a healthy and productive environment.
7. The 2011 Charter does not provide any protection for people suffering from underemployment; low remuneration; poor working conditions; exploitation, discrimination, and violation of associated rights; lack of representation and dialogue; lack of work security and professional mobility; lack of access (physical, technological, and informational); and lack of social security provisions. Further, the Government has taken no action or instituted any program to assist persons with disabilities to gain access to the workplace.
8. There is limited domestic jurisprudence on the scope and applicability of the equality provisions contained within the 2011 Charter. While it may be supposed, as discussed above, that sections 13(3)(g) and 13(3)(h) in the 2011 Charter protect against discrimination regardless of status since these sections have no closed list of categories, there is a lot of uncertainty as to whether this will be the approach taken by local courts.
9. The prohibited grounds of discrimination in the 2011 Charter of Fundamental Rights and Freedoms are limited and restrictive. The Charter presents an exhaustive list of grounds determinable by the absence of the ground “other status” and does not explicitly include age, language, health status, disability nor sexual orientation. Accordingly, allegations of discrimination on any of these grounds are not afforded constitutional protection.
10. There is no comprehensive legislation providing protection against discrimination in its various forms.
11. There are no legal provisions prohibiting corporal punishment in all schools or domestic spheres.
12. There are no state laws or policies which explicitly address homophobic and transphobic bullying and harassment in schools and the workplace.
13. There is no law or policy prohibiting non-discrimination in life and health insurance coverage and in pensions based on HIV status.
14. Unconditional access to abortions remain illegal in Jamaica.
15. There is a limited enabling legislative environment to reinforce the policy and programmatic scope of socio-economic interventions coordinated by the State.

Process

1. There are limited and outdated nationally representational studies conducted on the socio-economic realities of marginalized and vulnerable groups which restricts the ability of stakeholders to plan and coordinate effective measures which ensures the enjoyment of ESCR.
2. There appears to be no coverage for LGBT persons under a number of policies and programmes because the legislative framework in its current form allows for the discrimination against and continued exclusion of this particular population.
3. Social security in Jamaica does not provide for universal coverage and excludes a considerable portion of the disadvantaged and marginalized groups in society, including older persons, single parents and persons with disabilities.

Outcome

1. The legislative framework in its current form perpetuates discrimination against LGBT persons who have been relegated to second class citizens with limited access to basic constitutional protections.
2. Where policy and programmatic frameworks which address the needs of key and vulnerable populations exist, there are delays in the implementation of measures because of its progressive nature.

Legislative Gaps (Specific)

Disabilities Act

The Disabilities Act was enacted in 2014, a progressive step towards guaranteeing equality to persons with disabilities and to protect them from discrimination. However, to date, the Disabilities Act has not been enforced, the commencement date has not been pronounced and Jamaica is yet to fully implement a sustained programme of protection for people living with disabilities. Moreover, basic rights of access and equal protection are routinely violated and many persons with disabilities are unaware of how the Act will protect them.

Sexual Offences Act

The Act provides a limited definition of sexual intercourse, a limited scope of application in relation to the offence of rape and ultimately lacks gender neutrality in its language.

Employment (Termination and Redundancy Payments) Act

The Act currently does not provide a right not be unfairly or unjustifiably dismissed which potentially deprives key and marginalized populations of substantive avenues to seek redress.

Property (Rights of Spouses) Act

The Act, while making special provisions for legal remedies to relevant spouses, excludes homosexual relationships and therefore denies them the same rights and privileges afforded to heterosexual couples.

Domestic Violence Act

The Act has a limited definition of spouses which only recognize heterosexual unions. Therefore, non-cohabiting persons in “same-sex” unions cannot obtain protection, occupation or ancillary orders where they are facing abuse at the hands of their partners.

Child Care and Protection Act

Currently, corporal punishment of children in Jamaica is unlawful in the penal system, alternative care settings and early childhood institutions, but is not prohibited in schools nor the family setting.

Rent Restriction Act

Under this Act, a landlord, having evicted a LGBT person without reasonable cause, may seek protection under the by stating that homosexuality is immoral and that tenants are using the house to engage in homosexual acts.

Sexual Harassment Bill

As of May 2020, there is no legislation which addresses sexual harassment in Jamaica. The draft bill which was presented in 2015 and later revised in 2019, despite being tabled before parliament, has not been adopted nor made enforceable.

Occupational Safety and Health Bill

As of May 2020, there is no legislation which address employment-related discrimination faced by PLHIV. While there exists a National Policy on HIV in the Workplace, it lacks the force of law, and depends in large part on the voluntary support of various private and public actors. Importantly, without the force of law, accountability for breaches remains elusive, which necessarily undercuts the normalization efforts. Moreover, the government is yet to adopt the proposed Occupational Safety and Health Bill which would codify existing policy-level workplace protections related to HIV.

Recommendations and Opportunities

Having conducted a comprehensive legal analysis and having identified and considered the structural, process and outcome gaps that exist, it is abundantly clear that there is an opportunity to provide practical guidance on the development of ESCR within the context of Jamaica. Accordingly, the recommendations are as follows:

1. conduct capacity building sessions with policy makers/legislators and critical government stakeholders with a view towards sensitizing them about the nature, scope and applicability of ESCR within a modern world in order to challenge their previously held perceptions, if any, and to debunk misconceptions about how such rights are to be implemented;
2. conduct capacity building sessions with CSOs/NGOs to increase their knowledge and awareness about ESCR in order to empower them to become social justice advocates with a specific mandate in mind – to lead legal and policy reformation on the need to protect ESCR, especially as it relates to disadvantaged and marginalized communities. This includes increasing their knowledge and capacity about the state reporting process and their role at CSOs/NGOs at the regional and international levels;
3. conduct capacity building sessions with community leaders to introduce them to ESCR in an effort to empower them to become social justice champions who will lead conversations around the importance of these rights within their respective communities;
4. conduct a national public education campaign on ESCR in an effort to transform the county-wide thinking about human rights and to increase the knowledge and awareness of the importance of these rights among the Jamaican population;
5. lobby decision-makers to amend the 2011 Charter of Fundamental Rights and Freedoms to constitutionally protect and guarantee ALL the rights enumerated in the ICESCR;
6. conduct nationally representational research on the socio-economic realities faced by vulnerable Jamaicans. Such research should focus specifically on employment, social security, housing/homelessness, health and education.
7. lobby decision-makers to improve the country's strategy to address displacement and homelessness, including increasing the number of shelters and temporary housing facilities and ensuring that staff and other persons living at the facility are sensitized to enable them to foster an LGBT-friendly environment.
8. lobby decision-makers to create robust legislative frameworks to codify socio-economic policies and programmes which already exist as a means of complementing the implementation of social measures.
 - i. lobby decision-makers to strengthen the National HIV/AIDS Workplace Policy to, inter-alia, give it the force of law for which formal redress for breaches can be provided
 - ii. lobby decision-makers to amend laws to prohibit discrimination faced by key population groups in accessing life and health insurance
 - iii. lobby decision-makers to enact comprehensive social protection legislation which assists in overcoming discrimination, physical impediments and biases in the society that engender exclusion of marginalized and vulnerable groups from human capital development, employment and inclusion in social security programmes. Legislation will offer a means of redress, solidarity and social justice to the most vulnerable among the citizenry, guaranteeing provision of certain basic social services that enhance the quality of life

iv. lobby decision-makers to draft and adopt legislation which underpins, reinforces, validates and guides a new paradigm and the development of the national capacity needed for the efficient and effective implementation of a number of social assistance programmes such as the PATH program

9. lobby decision-makers to amend existing socio-economic and cultural legislation to ensure that they reflect relevant and adequate human rights standards

i. lobby decision-makers to enact comprehensive anti-discrimination legislation to prohibit all forms of discrimination, inclusive of discrimination on the basis of sexual orientation and gender identity. This legislation should prohibit discrimination at the hands state and non-state actors in all areas of life, including but not limited to housing, employment, education and provisions of services. Additionally, this legislation should establish a body to receive and investigate complaints and conduct hearings where necessary.

ii. lobby decision-makers to amend laws such as the Property (Rights of Spouses) Act, the Maintenance Act, the Domestic Violence Act which exclude, fail to equally protect and/or discriminate against LGBT persons so as to eradicate legal and policy barriers which prevent LGBT Jamaicans from fully participating in all areas of public life on an equal footing with cisgender heterosexual Jamaicans.

iii. lobby decision-makers to amend the Employment (Termination and Redundancy Payments) Act to provide for unfair dismissal which recognizes that employees should not be dismissed on certain specified bases which are manifestly illegitimate and do not constitute a valid or good and sufficient reason for dismissal or disciplinary action, once proved.

iv. lobby decision-makers to adopt and enforce the Sexual Harassment Bill which seeks to provide a framework for addressing the issues of sexual harassment in Jamaica and to protect women and men from unwanted sexual advances, requests for sexual favours and crude sexual behaviour.

v. lobby decision-makers to enforce and implement the Disabilities Act and the accompanying regulations and codes so as to ensure equality to persons with disabilities and to protect them from discrimination.

vi. lobby decision-makers to Repeal the relevant sections of the Offences Against the Persons Act, concerning the prohibition of abortion and substitute it with civil legislation, titled "Termination of Pregnancy Act" which would outline the conditions under which medical termination of pregnancy would be lawful.

vii. lobby decision-makers to adopt the Occupation Safety and Health Bill

viii. lobby decision-makers to act expeditiously in amending the Sexual Offences Act, the Offences against the Persons Act, the Child Care and Protection Act and the Domestic Violence Act to provide greater protection for some of the most vulnerable in society, particularly women and girls and LGBT persons.

10. lobby decision-makers and policy makers to shift from their over-reliance on policy creation and implementation which is absent of any enforceability mechanism to creating legislation which provides citizens with protection before the courts and access to multiple avenues for redress.

Beyond these recommendations, this Chapter will also explore the recommendations generated by the Committee on ESCR and presented in its concluding observations. As is posited, the issuance of concluding observations is arguably the “single most important activity of human rights treaty bodies. It provides an opportunity for the delivery of an authoritative overview of the state of human rights in a country and for the delivery of forms of advice which can stimulate systematic improvements²¹⁴.”

With that said, the Committee has recommended that the government of Jamaica:

1. take all appropriate steps...to ensure that all provisions of the Covenant are given full effect in the domestic legal order and can be invoked before Courts;
2. take effective measures to establish a national human rights institution in accordance with the principles relating to the status of national human rights institutions for the promotion and protection of human rights;
3. amend its laws to adopt a comprehensive anti-discrimination framework law - the State must take all necessary steps to safeguard the rights, dignity and access to justice for LGBT Jamaicans.
4. decriminalize same-sex discrimination between consenting adults through necessary legislative amendments;
5. take concrete, deliberate and targeted measures to eliminate discrimination on the grounds of sexual orientation;
6. send a clear public message that any form of discrimination, harassment or violence against individuals for their sexual orientation is not tolerated, and swiftly and effectively investigate, prosecute and sanction individuals for such acts;
7. strive for universal coverage of the social security system giving priority to disadvantaged and marginalized groups in society;
8. adopt a comprehensive national housing strategy with a view to ensuring access to adequate and affordable housing with legal security of tenure for everyone; and
9. provide adequate human and financial resources to effectively implement the National HIV/STI Programme to ensure that any progress achieved so far is not reversed
10. ensure that its legislation helps women avoid unwanted pregnancies and facilitates access to professional services with a view to eliminating the practice of dangerous abortions that place the lives of women and girls at risk.

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Legal Analysis of ESCR in Jamaica

Key Informant Interview Guidelines

Background

Over the course of the next three years, J-FLAG will be implementing an EU-funded project entitled “**Promoting the Economic, Social and Cultural (ESC) Rights of LGBT Jamaicans**”. This project seeks to address the gaps that exist in protecting economic, social and cultural rights in existing laws and policies by raising awareness about these particular gaps and the potential opportunities for reform among key decision-makers. Accordingly, a baseline will be established for the existing legal and policy framework and the extent to which it secures economic, social and cultural rights.

In achieving this baseline, a legal analysis will be conducted to determine the extent to which Jamaica’s laws and policies actually protect economic, social and cultural rights (ESCR) and the opportunities for their improvement.

Through this legal analysis, a number of relevant and critical stakeholders will be engaged through key informant interviews in an effort to document their informed perspectives on the economic, social and cultural rights landscape internationally and domestically. The information collected will be used primarily to substantiate crucial aspects of this legal analysis.

Objectives

In conducting these key informant interviews, the consultant will:

1. Solicit qualitative information on the nature and scope of economic, social and cultural rights
2. Resolve any theoretical differences commonly considered when navigating issues related to the substance of economic, social and cultural rights
3. Identify challenges and solutions associated with realizing economic, social and cultural rights in Jamaica

Questions:

1. There is limited inclusion of economic, social and cultural rights in the Charter of Fundamental Rights and Freedoms. Why do you believe this is so?
2. Should the Charter guarantee more economic, social and cultural rights and if so, which rights, in your opinion, are absolutely necessary given our current socio-economic realities?
3. How have economic, social and cultural rights enumerated in the international covenant on economic, social and cultural rights (ICESCR) been recognized and protected domestically?
4. There has been a long-standing debate as to whether economic, social and cultural rights are better characterized as justiciable or state directives. In your opinion, how should they be interpreted by the state?

(a) Do you believe economic, social and cultural rights are capable of being justiciable?

5. Do you have any knowledge of or insight into any economic, social and cultural right litigation domestically?

6. Can you identify any gaps within the economic, social and cultural rights landscape?

7. In pursuing legal reform with respect to economic, social and cultural rights, are there any recommendations that you would like to propose concerning the strengthening of the rights landscape?

Annex II

Map of Socio-Economic Legislation in Jamaica

Non-Discrimination

- **Disabilities Act 2014**

An Act to promote full and equal enjoyment by persons with disabilities, of privileges, interests, benefits and treatment, on equal basis as others and to establish the Jamaica Council for Persons with Disabilities. It is designed to give added strength and legislative support to the National Policy for Persons with Disabilities. The main objectives of the legislation include reinforcing, promoting and seeking acceptance that persons with disabilities have the same fundamental rights as any other person in Jamaica. The Act also deals with employment of persons with disabilities and includes non-discrimination provisions and an obligation on the employer to make adjustments to the workplace to ensure that the employee is not at a disadvantage.

Equal Rights of Men and Women

- **Employment (Equal Pay for Men and Women) Act 1975**

An Act which prohibits discrimination on grounds of sex in respect of remuneration and other terms and conditions of employment.

- **Sexual Offences Act 2009**

An Act which protects persons against various forms of sexual violence and seeks to offer redress for harms experienced.

- **Offences against the Persons**

Act 1864 An Act which sets out provisions related to a number of offences ranging from homicide to unnatural crimes.

Right to Work

- **Maternity Leave Act 1979**

An act to provide for the right of female workers to be granted maternity leave by their employers and to be paid maternity pay in some cases.

- **Labour Relations & Industrial Disputes Act 1975**

An Act to provide for the regulations of relations between employers and workers, to establish an Industrial Disputes Tribunal for the settlement of industrial disputes, to provide for boards of inquiry to enquire into industrial disputes and matters connected with labour relations or economic conditions.

- **Holiday with Pay Act 1974**

An Act which sets out the conditions under which workers are entitled to holidays and sick leave with pay or such gratuities and benefits as may be determined.

- **The Employment (Termination and Redundancy) Payments Act 1974**

An Act which provides a legal prescription for redundancy payments and to establish a basis for the determination of redundancy and compensation for Jamaican workers for the loss of their jobs. The Act makes sure that an employee can receive some forewarning before the realities of a dismissal from employment kicks in, or at the very least, helps them financially to ease the burden based on entitlements.

- **Minimum Wage Act 1938**

This Act relates to the protection of workers in relation to the payment of wages. It restricts the circumstances in which an employer may make reductions from wages.

- **Trade Union Act 1919**

This Act provides for the registration of trade unions, legal proceedings, membership of minors, dissolution of the Union and the procedure for conducting disputes.

Right to Social Security

- **Pensions (Public Service) Act 2017**

An Act to establish a contributory pension scheme for the public service to be known as the Public Service Pension Scheme from which payment of pensions, gratuities and other allowances are to be paid in respect of the service of pensionable officers, and to provide for other related matters.

- **National Insurance Act 1965**

This Act provides for the establishment of a national insurance providing pecuniary payments scheme for old age, old age benefit, widows' or widowers' benefit, orphans' benefit, special child's benefit, funeral grants, maternity benefit and benefit in relation to incapacity, disablement or death arising from injury in employment and providing for matters connected with or incidental thereto.

- **Jamaica Social Welfare Commission Act 1958**

An Act which provides for the constitution, incorporation and procedures of the Social Welfare Commission as well as the appointment of officers, functions, powers of the Minister to give directions, protection of the Commission and its members, its accounts and reporting.

- **Pensions Act 1947**

This Act provides for the circumstances in which pensions may be granted to public civil servants. It regulates issues such as the maximum pension, the liability of pensioners, suspension of pensions on re-employment, gratuity where an officer dies in service, pensions to dependants when an officer dies as a result of an injury or a disease contracted during his duty and death or injury owing to war conditions.

- **Workmen's Compensation Act 1938**

This Act provides for compensation, conditions of compensation, alternate remedies, bankruptcy of employer, application to special classes of persons, the procedure to apply for compensation and regulations.

- **Fatal Accidents Act 1845**

An Act which provides that an action may be brought against a person who caused the death of another person through wrongful act, neglect or default. It sets out the mode, manner commencement of the action and assessment of damages for such fault.

Right to Adequate Standard of Living

- **Rent Restriction Act 1944**

An Act which governs the relationship between landlords and their tenants.

- **Housing Act 1969**

The Housing Act governs the building of houses with regard to location. It also provides the Housing Minister with the power to decide which areas are fit for development, redevelopment, clearance, among others.

- **National Housing Trust Act 1979**

An act to repeal part VII of the National Insurance Act, and to make new provisions in respect of National Housing Trust contributions and related matters

Protection of Family

- **Property (Rights of Spouses) Act, 2004**

An act to make provision for the division of property belonging to spouses and to provide for matters incidental thereto or connected therewith. Outlines cases in which the family home is legally registered in one party's name, noting that it nonetheless belongs to both partners of the relationship. Both partners are required to give permission for property transactions, regardless of whether the property is only registered in one person's name.

- **Maintenance Act**

The Act makes provisions for maintenance within the family and confers equal rights and obligations on spouses with respect to the support of each other and their children. This Act is a companion to the Property (Rights of Spouses) Act where "spouse" is similarly defined to include a de facto (common law) spouse.

- **Domestic Violence Act**

The Act provides for enhanced protection for victims of domestic violence and abuse and applies to both spouses and de facto (common law) spouses. The Act also now makes provision for persons in visiting relationships. This Act allows for Occupation and Ancillary Orders, giving the victim exclusive use of a home, furnishings and personal effects. It also allows for the Courts to issue Protection Orders, keeping the accused away from the home, work or school of the victim. Orders can be made on behalf of men, women or children affected by violence within the home.

- **Child Care and Protection Act**

An Act which promoting the best interests, safety and well-being of children across Jamaica. It is legislation which seeks to strengthen protection for children and promote their rights.

Right to Education

- **National Council on Education Act 1993**

An Act which establishes the National Council on Education, provides for its functions, powers, financing and establishes a National Education Trust Fund.

- **Human Employment and Resource Training Act 1982**

An Act to establish a scheme for financing and implementing the training of persons with a view to employment and to provide for matters connected therewith or incidental thereto. It establishes a Human Employment and Resource Training Trust the functions of which are:

- (a) to develop, encourage, monitor and provide finance for, training schemes for employment of trainees;
- (b) to provide employment opportunities for trainees; c) to direct or assist in the placement of persons seeking employment in Jamaica; and
- (c) to promote employment projects.

- **Education Act, 1965**

An Act to provide for a co-ordinated system of public education, the registration and inspection of independent schools and the registration of teachers, and for purposes incidental to or connected with the matters aforesaid

- **Education Regulations, 1980**

This was an act providing for the establishment and maintenance of an integrated system of education. In accordance with Section 2, this act shall apply to and govern both formal and non- formal system in public and private schools in all levels of the entire educational system.

Right to Health

- **Mental Health Act 2013**

An Act to make new provisions with respect to the treatment and care of mentally disordered persons and with respect to their property and affair.

- **National Health Fund Act 2003**

An Act to provide for the introduction of a contributory health insurance system to be called the National Health Fund, for the benefit of all residents of Jamaica and to provide further for the financing of the Fund and for connected matters.

- **National Health Services Act 1997**

An Act to provide for the establishment of regional health authorities to administer the nation's health services and facilities and for matters connected therewith or incidental thereto.

- **Public Health Act 1985**

An act to make provision for promoting the public health and for preventing the spread of communicable and epidemic diseases.



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Rainbow House, PO Box 1152, Kingston 8, Jamaica W.I.
876-667-6202 | 876-875-2328 | www.equalityjamaica.org

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