

**CENTRE FOR HUMAN RIGHTS  
FACULTY OF LAW  
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Beyond court victories:  
Using strategic litigation to stimulate social change in favour of lesbian, gay  
and bisexual persons in Common Law Africa

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## DEDICATION

This work is dedicated to LGB activists in Uganda who consistently employ strategic litigation as a tool for social change within a hostile environment without relenting.

It is also dedicated to my son Addison Jjuuko Ssimbwa who, at one year old, became my writing mate as he never left my lap during the times I was home working on this thesis.

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Human Rights Awareness and Promotion Forum (HRAPF), the organisation that I work for, authorised me to pursue this LLD as I continued to do my work as Executive Director. My



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## ABSTRACT

The use of strategic litigation (SL) to stimulate social change in Common Law Africa in respect of the manifestly controversial issue of equality for lesbian, gay, and bisexual (LGB) persons in countries that experience active homophobia is on the rise. In this thesis, the desired social change is understood as bringing about a situation where both the law and the general public treat LGB persons in the same way as heterosexuals. In the past two decades (1998-2018) there have been 26 cases litigating on LGB rights in Botswana, Kenya, South Africa, and Uganda, the four selected Common Law African study countries. Of these, at least 17 have been successful in court. These victories have seen legal change taking place in favour of LGB persons, especially in South Africa. However, these legal changes have so far not led to significant social change. There is also active backlash, counter mobilisation, and relatively high levels of violence against LGB persons in all the different countries. There has also been a trend in the selected Common Law countries in Africa towards expanded criminalisation of same-sex relations and constitutionalised prohibitions of same-sex marriages. However, experiences from the selected Common Law countries outside Africa – Belize, Canada, Nepal and the United States of America (USA) – show that social change is possible – even in situations of active homophobia. While LGB SL in Canada has achieved significant social change, and has in the USA led to meaningful progress, LGB persons in Nepal and Belize are more or less in the same position as their counterparts in the selected Common Law African countries. These similarities and differences point to the role of a diversity of factors that determine the extent to which LGB SL is likely to lead to significant social change, and refute claims of African exceptionalism. The study finds that exogenous factors (contextual circumstances outside the control of litigants), in particular the state of democracy, the level of judicial independence, the nature of the economic system, the level of economic development, and the social-religious conditions in the country are better predictors of social change through LGB SL than endogenous factors (issues related to the particular litigated cases). The study posits that activists in Common Law Africa have to design LGB SL in a way that fits with the exogenous conditions in their countries if SL is to spur social change. It concludes by identifying the key factors that need to be taken into account as LGB litigation strategies are being designed and developed.

## LIST OF ACRONYMS

ACA	The Patient Protection and Affordable Care Act, 2010
ACHPR	African Charter on Human and Peoples' Rights
ACLU	American Civil Liberties Union
AHA	Anti-Homosexuality Act
AHB	Anti-Homosexuality Bill
AIDS	Human Immune Deficiency Syndrome
ANC	African National Congress
APRM	African Peer Review Mechanism
BONELA	Botswana Network on Ethics, Law and HIV/AIDS
CA	Constituent Assembly
CADA	Colorado's Anti-Discrimination Act
CAL	Coalition of African Lesbians
CASHRA	Canadian Association of Statutory Human Rights Agencies
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CCR	Center for Constitutional Rights
CSCHRCL	Civil Society Coalition on Human Rights and Constitutional Law
CSE	Comprehensive Sexuality Education
DADT	Do not Ask Do not Tell
DITSWANELO	The Botswana Centre for Human Rights
DOMA	Defence of Marriage Act
EACJ	East African Court of Justice
EACLJ	The East African Center for Law and Justice
EGALE- Canada	Equality for Gays and Lesbians Everywhere – Canada
EHAHRDP	East and Horn of Africa Human Rights Defenders Project
EOC	Equal Opportunities Commission
FLA	Family Law Act
FBI	Federal Bureau of Investigations
GALCK	The Gay and Lesbian Coalition of Kenya
HDI Rwanda	Health Development Initiative Rwanda
HHS	US Department of Health and Human Services

HIV	human immunodeficiency virus
HRAPF	Human Rights Awareness and Promotion Forum
HRBA	human rights-based approach
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Commission of Jurists
ICRH	Kenya - International Center for Reproductive Health
IDAHOT	International Day against Homophobia and Transphobia
ILO	International Labour Organisation
IRCU	Inter Religious Council of Uganda
ISLA	Initiative for Strategic Litigation in Africa
KCPF	Kenya Christian Professionals Forum
KEMNAC	Kenya Muslim National Advisory Council
KHRC	Kenya Human Rights Commission
KIPE	Kisumu Initiative for Positive Empowerment
KNHRC	Kenya National Human Rights Commission
LEAF	Women's Legal Education and Action Fund
LEGABIBO	Lesbians, Gays and Bisexuals of Botswana
LGB	lesbian, gay, and bisexual
LGBTI	lesbian, gay, bisexual, transgender and intersex
LGEP	Lesbian and Gay Equality Project
LGLA	Lesbian/Gay Lawyers Association of Los Angeles
MARPI	Most at Risk Populations Initiative
MCC	Metropolitan Community Church
MP	Member of Parliament
MSM	men who have sex with men
NCAHSAU	National Coalition Against Homosexuality and Sexual Abuses in Uganda
NCGLE	National Coalition for Gay and Lesbian Equality
NEPAD	New Partnership for African Development
NGLHRC	National Gay and Lesbian Human Rights Commission
NODPSP	National Objectives and Directive Principles of State Policy
NSP	National Strategic Plan
NTT	National Task Team on LGBTI and Gender-based Violence
OAS	Organisation of American States
OSISA	Open Society Institute for Southern Africa

PIL	public interest litigation
PQD	political question doctrine
RDC	Resident District Commissioner
SADC	Southern African Development Cooperation
SAHRC	South African Human Rights Commission
SALC	Southern African Litigation Centre
SANBS	South African National Blood Service
SANDF	South African National Defence Force
SCA	Supreme Court of Appeal
SL	strategic litigation
SMUG	Sexual Minorities Uganda
SOGI	sexual orientation and gender identity
SWEAT	Sex Worker Education and Advocacy Task Force
UDHR	Universal Declaration of Human Rights
UHAI-EASHRI	The East African Sexual and Health Rights Initiative
UHRC	Uganda Human Rights Commission
UK	United Kingdom of Great Britain and Northern Ireland
US Supreme Court	Supreme Court of the United States of America
USA	United States of America
UN	United Nations
UNAIDS	Joint United Nations Programme on HIV/ AIDS
UNDP	United Nations Development Programme
UNIBAM	United Belize Advocacy Movement
UPR	Universal Periodic Review
URSB	Uganda Registration Services Bureau
USAID	United States Agency for International Development
WHO	World Health Organization
WJP	World Justice Project

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## CHAPTER 1

### INTRODUCTION

#### 1.1 Introduction

The use of strategic litigation (SL) to stimulate social change in Common Law Africa in respect of the manifestly controversial issue of equality for lesbian, gay, and bisexual (LGB) persons is on the rise. LGB activists have over the past two decades (1998-2008) brought 29 cases before the courts of law in Botswana, Kenya, Malawi, Nigeria, South Africa, and Uganda. Similarly, several cases have been filed in the federal courts in the United States of America, and the regional East African Court of Justice (EACJ). By the end of 2015, four of these countries- Botswana, Kenya, South Africa and Uganda- had at least one courtroom victory, and these were selected as the study countries. At the formal level, these victories resulted in formal equality for LGB persons at different levels in the different countries. This thesis examines the use of LGB SL with respect to the four selected countries, and how this has been able to act as a catalyst for social change.

At the level of substantive equality, the victories in court have been barely able to transform into enduring legal protections for LGB people and neither have they spurred broad acceptance by the state and the community. South Africa has so far made the most progress towards social change, followed by Botswana, and then Kenya, while Uganda is largely stagnating. LGB people in all these countries face violations of their rights especially from non-state actors, which violations are rarely addressed by the state. Despite the differing levels of success in the courts of law, there is active backlash and counter-mobilisation with new laws being passed or mooted. This makes it clear that LGB SL has so far not contributed to the desired social change in a substantive way.

Experiences from elsewhere in countries that apply the Common Law system and where there have been courtroom victories—specifically Belize, Canada, Nepal and the United States of America (USA) - amply demonstrate that LGB SL can actually spur significant social change. Canada can be said to have achieved significant social change; the USA is well on its way to doing so; and Nepal and Belize are steadily moving in the right direction. The different stages of

social change in countries that have had successful LGB SL point to different factors that determine the extent to which successful LGB SL can stimulate significant social change, despite active homophobia. This study therefore seeks to identify these factors and formulate conditions that are necessary for successful LGB SL to lead to social change and make recommendations for the four selected Common Law African countries. Belize, Canada, Nepal and the USA, the selected countries outside Common Law Africa are used as comparators for the study.

## 1.2 Background to the study

SL is increasingly being used as a strategy to influence social change in Africa,<sup>1</sup> as it is in many other parts of the world.<sup>2</sup> This is notwithstanding the common criticism that courts are incapable of bringing about social change.<sup>3</sup> The power of the judiciary lies in the fact that court decisions are usually binding on all parties. The courts are also much less likely to be swayed by public opinion than the executive or the legislature. This is because they are comparative 'outsiders in the political system,' are not subjected to elections and members of the bench enjoy security of tenure.<sup>4</sup> This power appeals more to unpopular and marginalised groups that may not be able to successfully appeal to public opinion.<sup>5</sup>

However, the fact that court decisions are binding and yet they are made by a small group of elites, who may have their own entrenched interests and who were not subjected to a popular election, makes it a problematic strategy.<sup>6</sup> This problem is highlighted where controversial and divisive decisions are made in favour of the protection of a small, unpopular marginalised group and contrary to the wishes of both the government and the majority of the population. Usually, the victory is a pyrrhic one as the positive but unpopular decision is likely to go

<sup>1</sup> JO Onyango 'Human rights and public interest litigation in East Africa: A bird's eye view' (2015) 47 *The George Washington International Law Review* 763, 763-764.

<sup>2</sup> See for example H Hershkoff & A McCutcheon 'Public interest litigation: An international perspective' in M McClymont & S Golub (eds) *Many roads to justice* (2000) 283 and S Gloppen 'Public interest litigation: Social rights and social policy' in AA Anis & A de Haan *Inclusive states: Social policy and structural inequalities, new frontiers of social policy* (2008) 343, 343-344.

<sup>3</sup> See for example generally GN Rosenberg *The hollow hope: Can courts bring about social change?* (2008).

<sup>4</sup> JH Ely *Democracy and distrust: A theory of judicial review* (1980) 88.

<sup>5</sup> E Zackin 'Popular constitutionalism's hard when you're not very popular: Why the ACLU turned to courts' (2008) 42 *Law & Society Review* 367, 368-369.

<sup>6</sup> This is the well-known 'counter-majoritarian difficulty' first formulated by Alexander Bickel in his book, *The least dangerous branch*. It criticises the power of unelected judges to decide on popular or unpopular issues. See AM Bickel *The least dangerous branch: The Supreme Court at the bar of politics* (1986) 16-17. Also see S Holmes 'Recommitment and the paradox of democracy' in J Elster and R Slagstad (eds) *Constitutionalism and democracy* (1988) 195.

unenforced by the executive,<sup>7</sup> or could even be reversed by the legislature. Such decisions also create the likelihood that the majority could take the law into their own hands and commit acts of violence against the small, marginalised community.<sup>8</sup> According to Klarman, this is what happened in the aftermath of the United States (US) Supreme Court's decision of *Brown v Board of Education of Topeka*,<sup>9</sup> where the Court declared racial segregation in the education system to be unconstitutional. The majority white population in many states – especially in the South of the USA – passed laws countering the decision, abandoned desegregated schools and resorted to violence to enforce segregation.

In Common Law Africa, SL on LGB rights does not have a long history, being traceable to 1997 when the case challenging the criminalisation of consensual same-sex relations in South Africa was filed.<sup>10</sup> Nevertheless, it has been quite successful as a strategy if court victories alone are to be considered. In South Africa, SL has met resounding success, with ten out of eleven cases decided in the last twenty years (1998-2008) being successful. Litigation has led to the decriminalisation of consensual same-sex relations;<sup>11</sup> allowed immigration for partners of same-sex persons;<sup>12</sup> led to adoption of children by unmarried persons;<sup>13</sup> established the same age of consent to same-sex sexual relations with that for heterosexuals;<sup>14</sup> affirmed inheritance in case a same-sex partner dies intestate;<sup>15</sup> and ensured same-sex marriages.<sup>16</sup> In Uganda, LGB rights activists have had the repressive Anti-Homosexuality Act, 2014 nullified;<sup>17</sup> secured access to the Equal Opportunities Commission;<sup>18</sup> succeeded in obtaining two High Court declarations that

<sup>7</sup> Gloppen (n 2 above), 355-359. Also see Rosenberg (n 3 above), 15.

<sup>8</sup> See generally MJ Klarman 'How Brown changed race relations: The backlash thesis' (1994) 81 *The Journal of American History* 1.

<sup>9</sup> 347 US 483 (1954).

<sup>10</sup> Due to the decision in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC), sodomy laws were struck off the law books, and references to the sodomy laws were removed in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007, which also introduced the same age of consent to homosexual and heterosexual sex.

<sup>11</sup> Above.

<sup>12</sup> This was in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*, 2000 1 BCLR 39 (2 December 1999) – (*Immigration* case). In 2002, the Aliens Control Act was replaced by the Immigration Act, which removed the discriminatory aspects.

<sup>13</sup> This was in *Du Toit & Another v Minister for Welfare and Population Development & Others* 2002 ZACC 20, and in June 2006, the Child Care Act, 74 of 1983 and the Guardianship Act, 192 of 1993, were replaced by the Children's Act which provided for adoption by same-sex partners.

<sup>14</sup> This was in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007), which was as a result of the comments made about the inequality in the *sodomy* case. The case of *Geldenhuys v National Director of Public Prosecutions & Others* 2009 5 BCLR 435 (CC) did away with convictions that arose due to the inequality.

<sup>15</sup> This was in *Gory v Kolver NO & Others* 2007 3 BCLR 249 (CC).

<sup>16</sup> This was in *Minister of Home Affairs and Another v Fourie and Another; and Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* (Fourie case) 2005 ZACC 19. The decision led to the enactment of the Civil Unions Act 17 of 2006, which introduced civil unions for both same-sex couples and heterosexual couples, which are akin to marriage.

<sup>17</sup> *Prof. Oloka-Onyango & 9 Others v Attorney General* Constitutional Petition No. 008 of 2014.

<sup>18</sup> *Adrian Jjuuko v Attorney General* Constitutional Petition No. 1 of 2009.

the rights to dignity and privacy apply to all persons, including those that belong to the LGB umbrella.<sup>19</sup> These cases made it clear that the inherent rights belonging to LGB persons protect them from having their houses forced open or their bodies touched, as well as from hate speech.<sup>20</sup> In Kenya, the High Court has declared that LGB organisations can be registered, as freedom of association applies to LGB persons too.<sup>21</sup> The courts also found unlawful an order subjecting two men to forced anal examinations after they had been charged for ‘having carnal knowledge against the order of nature’ since the Penal Code does not provide for such an order.<sup>22</sup> In Botswana, LGB organisations have been allowed to register based on the constitutional guarantee of freedom of association.<sup>23</sup>

However, LGB SL has not all been rosy as there have been some serious losses in the courts. The country with the highest number of losses so far is Uganda. Most recently, the High Court decided in June 2018 that the Uganda Registration Services Bureau (URSB) was justified to deny an LGB organisation, ‘Sexual Minorities Uganda,’ registration since same-sex marriages are prohibited and same-sex relations criminalised in the country.<sup>24</sup> Earlier in June 2014, the same court had held that the law criminalising same-sex conduct presented a limitation on freedom of assembly and association of LGB persons and thus LGB persons could be prevented from holding a skills training workshop.<sup>25</sup> The East African Court of Justice (EACJ) refused to address the issues arising from the case challenging the Anti-Homosexuality Act 2014, ruling that the case was moot as the Act had been nullified by the Constitutional Court of Uganda.<sup>26</sup> The US District Court in Springfield, Massachusetts, while mincing no words in condemning the actions of US anti-gay evangelist Scott Lively in promoting the Anti-Homosexuality Act in Uganda as amounting to persecution as defined in international law, did not find sufficient activity carried out on US soil by the pastor to invoke the court’s jurisdiction under the Alien Tort Statute.<sup>27</sup> However, the subsequent appeal by Scott Lively against the criticism of his actions by the judge was thrown out in August 2018 as it was found that the words were *obiter*

<sup>19</sup> *Victor Mukasa & Yvonne Oyoo v Attorney General* (2008) AHRLR 248 (*Victor Mukasa case*).

<sup>20</sup> *Kasha Jacqueline, David Kato Kisuule & Pepe Julian Onziema v The Rollingstone Newspaper* Miscellaneous Cause No. 163 of 2010 (*Rollingstone case*).

<sup>21</sup> *Eric Gitari v Attorney General & Another* Petition 440 of 2013 [2015] eKLR (*Eric Gitari case*).

<sup>22</sup> *COL & GMN v Resident Magistrate Kwale Court & 4 Others* Civil Appeal 56 of 2016 (2018) e KLR (*COL case*).

<sup>23</sup> *Attorney General v Thuto Rammoge & 19 Others* (2014) CACGB-128-14 (CA) (*LEGABIBO Registration case*).

<sup>24</sup> *Frank Mugisha, Dennis Wamala & Ssenfuka Warry Joanita v Uganda Registration Services Bureau*, Miscellaneous case No. 96 of 2016 (*SMUG Registration case*).

<sup>25</sup> This was in *Kasha Nabagesera & 3 Others v. The Attorney General and Hon. Rev. Fr Simon Lokodo*, High Court Miscellaneous Cause No. 33 of 2012 (*Lokodo case*).

<sup>26</sup> This was in *Human Rights Awareness and Promotion Forum v Attorney General of Uganda*, Reference 6 of 2014 (*HRAPF case*).

<sup>27</sup> *Sexual Minorities Uganda v Scott Lively* 254 F. Supp. 3d 262 (D. Mass. 2017) (*Scott Lively case*).

*dicta* and that a winning party had no right of appeal.<sup>28</sup> In Botswana, the Court of Appeal found the laws criminalising same-sex conduct to be constitutional.<sup>29</sup> In South Africa, the Constitutional Court refused to hear the human rights aspects of a case challenging the dismissal of a Methodist minister from her position due to her engagement to another woman. This was on the basis that these issues had not been raised in the courts below. It is only in Kenya where no case has ultimately been lost, as the *COL* case, which was lost at the High Court level,<sup>30</sup> was eventually won on appeal.<sup>31</sup>

The future, however, holds more promise with many pending cases brought by African activists before courts in Common Law Africa by the end of August 2018. In Uganda, the appeals in the *SMUG Registration* case<sup>32</sup> and the *Lokodo* case<sup>33</sup> were pending,<sup>34</sup> while in Kenya there were two pending challenges to the laws criminalising consensual same-sex relations.<sup>35</sup> In Botswana, a case challenging criminalisation of consensual same-sex relations was also pending.<sup>36</sup> In South Africa, a case challenging a decision of the Dutch Reformed Church not to allow its ministers to solemnise same-sex unions was also pending before the High Court.<sup>37</sup>

Despite the victories and the gains that have resulted therefrom, what has been achieved so far can hardly be described as significant social change. Significant social change happens when there is a change in societal attitudes, cultures, and practices,<sup>38</sup> to such an extent that irrelevant considerations, including sexual orientation, no longer matter in access to human rights.<sup>39</sup> Same-sex relations continue to be hugely controversial in Common Law Africa,<sup>40</sup> and there is active

<sup>28</sup> *Sexual Minorities Uganda v Scott Lively*, No. 17-1593 (United States Court of Appeals for the First Circuit) – The *Scott Lively* Appeal.

<sup>29</sup> *Kanane v The State* [2003] 2 BLR 67 (CA)- (*Kanane* case).

<sup>30</sup> *COL & GMN v Resident Magistrate Kwale Court & 4 Others* Petition No. 51 of 2015.

<sup>31</sup> *COL* case, n 22 above.

<sup>32</sup> n 24 above.

<sup>33</sup> n 25 above.

<sup>34</sup> These are *Frank Mugisha, Dennis Wamala & Ssenfuka Warry Joanita v Uganda Registration Services Bureau*, Civil Appeal No 223 of 2018 (SMUG Registration Appeal); and *Kasha Nabagesera & 3 Others v The Attorney General and Hon. Rev. Fr Simon Lokodo*, Civil Appeal No. 195 of 2014 (Lokodo Appeal) respectively.

<sup>35</sup> These are: *John Mathenge, Maureen Ochieng, Mary Akoth Ochieng, Yvonne Powers, Mark Odhiambo, Gay and Lesbian Coalition of Kenya, Nyanza Western and Right Valley Network and Kenya Human Rights Commission v Attorney General, v Attorney General*, Petition No. 234 of 2016 and *Eric Gitari v Attorney General*, Petition No. 50 of 2016 (*John Mathenge* petition).

<sup>36</sup> *LM v The Attorney General of Botswana*, MAHGB- 000591-61.

<sup>37</sup> *Gaum and Others v Dutch Reformed Church*, Case 40819/17 pending before the North Gauteng High Court.

<sup>38</sup> See T Stoddard 'Bleeding heart: Reflections on using law to make social change' (1997) 72 *New York University Law Review* 966, 972.

<sup>39</sup> Gloppen, n 2 above, 344.

<sup>40</sup> The Pew Research Centre found in 2013, that people in Africa and in Muslim majority countries were the most opposed to homosexuality. Uganda was at 96%, Kenya at 90%, and South Africa at 61%. See Pew Research Centre 'The global divide on homosexuality: Greater acceptance in more secular and affluent countries' (2013) 3 <http://www.pewglobal.org/files/2013/06/Pew-Global-Attitudes-Homosexuality-Report-FINAL->



counter-mobilisation against the LGB movement in Botswana,<sup>41</sup> Kenya,<sup>42</sup> South Africa,<sup>43</sup> and Uganda.<sup>44</sup> Despite legal protections in some cases, LGB people face discrimination and violations in everyday life in Uganda,<sup>45</sup> and Kenya.<sup>46</sup> In South Africa, cases of 'corrective rape' and violence and discrimination are very common, especially among poor LGB persons, and particularly women.<sup>47</sup> In Botswana, although there are fewer reported violations against LGB persons, LGB persons are barely acknowledged<sup>48</sup> and the government had refused to register the umbrella organisation LEGABIBO until the courts forced them to.<sup>49</sup> This state of affairs paints a gloomy picture for the possibility of significant social change in Common Law Africa through LGB SL.

The situation in other Common Law countries that have had successes in LGB SL in the past two decades, and have almost the same social-economic conditions as the selected Common Law African countries, is almost the same. Of the four selected Common Law countries outside Africa, Belize and Nepal - which have almost the same political, social and economic conditions as most of the selected Common Law African countries - stand out. LGB persons there still face

[JUNE-4-2013.pdf](#) (accessed 15 June 2017). For Botswana, the AfroBarometer survey published in March 2016 on the acceptance of homosexuality in Africa found that the level of intolerance for homosexuality was at 57%. See AfroBarometer 'Good neighbours? Africans express high levels of tolerance for many, but not for all' Afrobarometer Dispatch No. 74, 12.

<sup>41</sup> For example, the Evangelical Fellowship of Botswana actively lobbied the government to appeal the High Court decision that allowed Lesbians, Gays and Bisexuals of Botswana (LEGABIBO) to be registered. See 'Churches welcome appeal against LEGABIBO' *Weekend Post* 26 January 2015.

<http://www.weekendpost.co.bw/wp-news-details.php?nid=429> (accessed 12 March 2017).

<sup>42</sup> For example, Kenyan Members of Parliament were mooting a bill based on Uganda's Anti-Homosexuality Act. See 'After Uganda, Kenya gears up for anti-gay law' *Kenya News 247* <http://www.kenyanews247.com/news/after-uganda-kenya-gears-up-for-gay-rights-debate#.U1wnFMduH9I> (accessed 12 March 2017).

<sup>43</sup> The House of Traditional Leaders for example called upon the ruling African National Congress party to remove constitutional protection for LGBT people. See 'Stop protecting gays: Traditional leaders tell the ANC' *City Press* 5 May 2012 <http://www.citypress.co.za/news/stop-protecting-gays-traditional-leaders-tell-anc-20120505/>

<sup>44</sup> Immediately after the nullification of the Anti-Homosexuality Act by the Constitutional Court, Members of Parliament started collecting signatures to have the Bill re-tabled in parliament. See 'MPs start process to re-table gay bill' *The Daily Monitor* 3 September 2014.

<sup>45</sup> See for example Consortium on Monitoring Violations Based on Sex Determination, Gender Identity and Sexual Orientation 'Uganda report of violations based on sexual orientation and gender identity' (2016) <http://hrapf.org/?mdocs-file=9267&mdocs-url=false> (accessed 12 March 2017).

<sup>46</sup> See for example 'Kenya's anti-gay laws are leaving LGBT community at the mercy of the mob' *The Guardian* 8 October 2015 <https://www.theguardian.com/global-development/2015/oct/08/kenya-anti-gay-laws-lgbt-community-mercy-of-mob> (accessed 12 March 2017).

<sup>47</sup> See for example Human Rights Watch 'We will show you you're a woman: Violence and discrimination against black lesbians and transgender men in South Africa' <https://www.hrw.org/sites/default/files/reports/southafrica1211.pdf> (accessed 12 March 2017).

<sup>48</sup> See generally, M Tabengwa & N Nicol 'The development of sexual rights and the LGBT movement in Botswana' in C Lennox & M Waites (eds.) *Human rights, sexual orientation and gender identity in the Commonwealth: Struggles for decriminalisation and change* (2013) 340.

<sup>49</sup> *The LEGABIBO Registration case* (n 23 above).

violence and violations, and these go largely without redress despite recent court victories.<sup>50</sup> However, experiences in the other two countries, Canada and the USA, which are also relatively similar in terms of political, social and economic conditions, show that LGB SL can be useful in stimulating social change in situations of active homophobia. Canada stands out in this regard as it can be said to have achieved significant social change in the last two decades.<sup>51</sup> As for the USA, there has been significant progress made towards achieving social change.<sup>52</sup> As such, besides how the particular court cases are formulated and pursued, there must be other factors that influence the ability of LGB SL to stimulate social change. Identifying all the factors will help to formulate conditions necessary for LGB SL to stimulate social change in favour of LGB persons. These are the factors and conditions that this study explores.

### 1.3 Research problem

Despite a number of important court victories achieved through LGB SL within the past two decades, LGB persons in the selected Common Law African countries – Botswana, Kenya, South Africa and Uganda - still face significant violations of their rights, with reports of criminal arrests, assaults, hate speech, ‘corrective’ rapes, exclusion from the health system and new repressive laws being proposed or introduced. Same-sex relations are still controversial and usually elicit active hostility from the community and the governments. In this context, the court victories registered remain largely unenforced with the exception of South Africa, and Botswana, but even there, there are some traces of counter-mobilisation and backlash. This points to the failure of LGB SL to effectively influence the move beyond formal protection to substantive equality for LGB people in the selected Common Law African countries. This has also been the case in a number of other Common Law countries outside Africa particularly Belize and Nepal. However, there are also some Common Law countries outside Africa where SL has been able to secure both formal and substantive equality for LGB people, and also contribute to a change in the attitudes of people and governments regarding LGB equality. Canada stands out in this regard, and the USA follows at a respectable distance. This points to certain conditions that must be in place for SL to lead to social change where there is active

<sup>50</sup> For the situation in Belize, see United Belize Advocacy Movement (UNIBAM) and the Sexual Rights Initiative (SRI) ‘Stakeholder submission on lesbian, gay, bisexual and transgender (LGBT) rights in Belize for the 17th session of the Universal Periodic Review’ October 2013

<https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=180&file=EnglishTranslation> (accessed 17 April 2017), while for that in Nepal, see United Nations Development Programme (UNDP) & United States Agency for International Development (USAID) ‘Being LGBT in Asia: Nepal country report’ (2014) 29.

<sup>51</sup> See C Davies ‘Canadian same-sex marriage litigation: Individual rights, community strategy’ (2008) 66 *University of Toronto Faculty of Law Review* 101, 134.

<sup>52</sup> See TM Keck ‘Beyond backlash: Assessing the impact of judicial decisions on LGBT rights’ (2009) 43 *Law and Society Review* 151, 156–57.

homophobia and hostility from the people and governments. These are the conditions that this study seeks to interrogate. Therefore, the main question for this study is: under what conditions can LGB SL stimulate social change in situations of active homophobia?

#### 1.4 Assumptions

The study relies on different assumptions that underlie the research problem. These assumptions are:

Homosexuality in Common Law Africa is indeed as unpopular as the statistics demonstrate. Studies show that Common Law Africa has some of the highest levels of homophobia in the world.<sup>53</sup> This therefore explains the high levels of hostility from government officials and ordinary citizens in many African countries towards LGB persons.

SL is an important strategy for the protection of marginalised groups and in stimulating social change. The courts are usually the only avenue open to marginalised groups to assert their rights within the state framework, and they can be a good base for political mobilisation and pushback. Court decisions help to shape behaviour and courts cannot be completely ignored even in repressive regimes.

The success of SL in stimulating social change where the issue litigated upon is controversial and is met with hostility is dependent upon many other factors beyond the litigation strategy adopted by the activists and lawyers.

Even in the worst circumstances, SL cannot be excluded from the struggle for LGB rights in Common Law Africa, and as such, activists and lawyers can only seek for better ways of doing it or use other strategies to complement it. In many cases, the courts are the only available avenue for recourse for LGB persons since they are not assured of political representation in situations of active homophobia. The benefits that SL has borne in countries like Canada and the USA and even South Africa cannot be ignored. SL serves as a focal point for advocacy in favour of LGB rights.

<sup>53</sup> The AfroBarometer survey on the acceptance of homosexuality in Africa found that 21% of all citizens across the 33 African countries surveyed would like or would not mind having homosexual neighbours. Of these, however, some of the countries where successful LGB SL has taken place had the highest intolerance percentages, with Uganda at 95%, Malawi at 54%, Kenya at 86%, South Africa at 33%, and Botswana at 57%. See AfroBarometer, n 40 above.



## 1.5 Research questions

The main research question that the study seeks to answer is: Under what conditions can LGB SL stimulate social change in situations of active homophobia?

The specific research questions are:

- i) How does LGB SL stimulate social change in situations of homophobia and active hostility?
- ii) What are the trends of LGB SL in Common Law Africa, and how do they differ from those in Common Law jurisdictions outside Africa?
- iii) What is the contribution of LGB SL to social change on the issue of LGB equality in Common Law Africa?
- iv) Under what conditions can LGB SL meaningfully stimulate social change in situations of active homophobia?
- v) How can LGB SL be employed to play a more effective role in stimulating social change on LGB equality in Common Law Africa and what other strategies can complement it?

## 1.6 Definition of key terms

The key terms used throughout the study are defined as follows:

### *a) Strategic litigation*

SL is a type of public interest litigation where cases are filed before courts of law as part of a defined, organised and long-term strategy, backed up by other legal and non-legal approaches and aimed at creating change in laws and policies and creating legal precedents, thereby enabling change in the lives of a specific group of people or the public as a whole.<sup>54</sup>

### *b) Social change*

Social change refers to 'any substantial shift in a political, economic, or social system.'<sup>55</sup> However, the extent of social change that this study considers is significant social change. This

<sup>54</sup> See detailed discussion in Chapter 2, section 2.1.2 below.

<sup>55</sup> R Goodwin *Changing relations: Achieving intimacy in a time of social transition* (2009) 2.

within the discourses on inequality happens when there are changes in societal attitudes and perceptions that go beyond changes in the law, to changes in power relations and inequalities in such a way that irrelevant considerations such as gender, race or sexual orientation no longer matter in access to human rights.<sup>56</sup>

### *c) Common Law Africa*

Common Law Africa refers to all African countries that apply the Common Law legal system. The Common Law legal system is a system of law developed in England, which has judicial decisions at the centre, with decisions of higher courts binding those of lower courts. The system however also relies on statutes passed by legislatures and interpreted by the courts, and it is the process of interpreting the statutes rather than applying the codes that makes the system distinct from the Civil Law system.<sup>57</sup> Most of these countries are formerly British colonies, while others have simply chosen to follow that system. There are about 19 Common Law countries in Africa: Botswana, Ghana, the Gambia, Kenya, Lesotho, Liberia, Malawi, Mauritius, Namibia, Nigeria, Rwanda, Sierra Leone, South Africa, Swaziland, South Sudan, Tanzania, Uganda, Zambia, and Zimbabwe.

### *d) Homophobia*

Homophobia refers to prejudice and negative attitudes against people who are, or who are perceived to be homosexuals. For this study, the term is used as an umbrella word also covering biphobia and lesbophobia, which respectively refer to prejudice and negative attitudes against lesbian women and bisexual persons.

## **1.7 Significance of the study**

Democracy, which is grounded in the liberal and neoliberal ideologies that emerged in Europe and the USA during the industrial revolution, has become the dominant, or at least, the ideal political system in the world today.<sup>58</sup> Democracy facilitates people's participation in their own governance. The judiciary is one of the three traditional arms of government.<sup>59</sup> Ensuring judicial

<sup>56</sup> Gloppen (n 2 above) 344.

<sup>57</sup> SF Joireman 'Inherited legal systems and effective rule of law: Africa and the colonial legacy' (2001) 39(4) *Journal of Modern African Studies* 571, 573.

<sup>58</sup> See generally, C Hobson *The rise of democracy: Revolution, war and transformations in international politics since 1776* (2015).

<sup>59</sup> B de Montesquieu *The spirit of laws* trans TG Nugent (1748) 221.

independence is a traditional hallmark of democratic governance.<sup>60</sup> As constitutionalism has grown in popularity as a tenet of democratic governance, courts have been given greater authority to exercise checks and balances over other branches of government.<sup>61</sup> Although unelected, the judiciary in certain respects has powers to reverse and overturn decisions of the elected legislature and the executive.<sup>62</sup> This quasi-dictatorial power is meant to be a built-in safeguard for minorities against the 'tyranny of the majority'<sup>63</sup> and has opened opportunities for minorities to seek for equality and protection.

In situations where the issue being litigated upon is controversial and faces great hostility from the government and the citizens, this becomes the only avenue open to marginalised groups. This is because the courts, even if they wanted to, cannot block the cases from being brought before them, and they are duty-bound to hear and determine them based upon prior agreed principles.<sup>64</sup> Usually, on the basis of constitutional provisions, such cases are bound to succeed. However, when a controversial case succeeds, there is usually backlash against the group represented by the applicants, and even against the courts themselves.<sup>65</sup> In countries, where the rule of law has not taken root, however, and where the courts may be neither legitimate nor respected, the courts usually make decisions based on their own biases and political calculations and may refrain from making decisions with far-reaching implications. Even when they do make such decisions, their decisions may not matter much for the government and the population as they can easily be overridden or ignored.<sup>66</sup> In countries where the courts lack legitimacy, decisions become merely academic and cannot be a basis for social change. There is thus need to consider the legitimacy of the judiciary in the design of cases that are brought to courts, and also in terms of timing, and seizing opportunities. This is an issue that has not been

<sup>60</sup> See for example JB Diescho 'The paradigm of an independent judiciary: Its history, implications and limitations in Africa' [http://www.kas.de/upload/auslandshomepages/namibia/Independence\\_Judiciary/diescho.pdf](http://www.kas.de/upload/auslandshomepages/namibia/Independence_Judiciary/diescho.pdf) (accessed 25 March 2016).

<sup>61</sup> See R Bellamy & D Castiglione 'Constitutionalism and democracy: Political theory and the American Constitution' (1997) 27 *British Journal of Political Science* 595.

<sup>62</sup> This is especially for the constitutional courts, which are constitutionally given express powers to declare statutes passed by elected legislatures unconstitutional, for example, the South African Constitutional Court and the Ugandan Constitutional Court.

<sup>63</sup> John Stuart Mill identified the need to protect individuals against the 'tyranny of the prevailing opinion and feeling, against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them; to fetter the development and, if possible, prevent the formation of any individuality not in harmony with its ways, and compel all characters to fashion themselves upon the model of its own'. JS Mill *On liberty* (1956) 7.

<sup>64</sup> R Fuller & KI Winston 'The forms and limits of adjudication' (1978) 92 *Harvard Law Review* 353, 373.

<sup>65</sup> See Klarman (n 8) above.

<sup>66</sup> For example, J Oloka-Onyango notes that the significant *Victor Mukasa case* in Uganda (n 19 above) was largely ignored by the media, the government, and the general public, with very limited discussion. This is despite the fact that it received considerable attention internationally. J Oloka-Onyango 'Debating love, human rights and identity politics in East Africa: The case of Uganda and Kenya' (2015) 15 *African Human Rights Law Journal* 28, 37.

adequately interrogated in the current literature and therefore bringing it to the fore makes this study of significance to both lawyers and activists working in areas where the rule of law has not taken root.

SL has its origins in neo-liberal, individualistic approaches, and so it has to be considered how such a strategy applies in African societies that are formally neo-liberal and individualistic but where the majority of the population nevertheless live in communal ways. The economic model that a country follows, be it capitalism or communitarianism also matters as this determines the broader approach to the law that the people follow. Equally important is the level of economic development, as individual rights have been found to be more earnestly pursued in economically developed countries.<sup>67</sup> All these have an effect on the courts and the decisions they make and how relevant such decisions become. Human rights are indeed universal as declared by the Universal Declaration of Human Rights (UDHR)<sup>68</sup> but they are also applied differently in different circumstances. Not all rights have the same value and respect everywhere. Each region or country needs to articulate its own approaches, which are homegrown and proven to work. Therefore, the study will be significant in as far as it helps African activists in countries where public opinion is overwhelmingly against same-sex relations and where communal ideologies still abound. The study will provide a basis for these activists to rethink and fine-tune how they do SL and also guide them in devising new and more practical approaches of creating social change.

## 1.8 Literature review

SL as a strategy for realising human rights has been the subject of a number of studies and writings worldwide. It is a subset of public interest litigation (PIL), where the aim of the case is to change the law, or create awareness for the benefit of a specific group of people or to achieve a very specific goal other than the personal benefit of the individual bringing it.<sup>69</sup> PIL has on the other hand been defined in the same terms but it is usually for the benefit of the public as a whole rather than a specific group of people.<sup>70</sup>

<sup>67</sup> This is the post-materialist thesis forwarded by Inglehart. See generally R Inglehart *The silent revolution: Political change among western publics* 1977.

<sup>68</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III) <http://www.refworld.org/docid/3ae6b3712c.html> (accessed 17 March 2017).

<sup>69</sup> The Mental Disability Action Centre (MDAC) 'strategic litigation' [http://mdac.org/en/what-we-do/strategic\\_litigation](http://mdac.org/en/what-we-do/strategic_litigation) (accessed 17 March 2017).

<sup>70</sup> C Mbazira 'Public interest litigation and judicial activism in Uganda: Improving the enforcement of economic, social and cultural rights' (2009) 24 *Human Rights and Peace Centre Working Paper* 14-17.

SL/PIL has been recognised as an important strategy in the realisation of human rights. This is because of the nature of judicial decisions, which bind every party to the case, even if it is the state. It is a way of defining the content of rights and after that, it becomes easier for these rights to be realised.<sup>71</sup> Jjuuko illustrates its power to ‘conscientize and mobilise people to recognize and actively fight for their rights and interests’ as it brings people together around a common cause.<sup>72</sup> SL also helps to stimulate debate.<sup>73</sup> Oloka-Onyango also recognises the power of PIL to change the law and that this has ramifications for a wider section of society.<sup>74</sup>

For groups working on controversial issues and facing active hostility, which usually have no other avenue to stimulate social change, SL becomes a very important tool, and perhaps the only realistic tool to stimulate social change.<sup>75</sup> This is because the courts are bound to receive the case and hear it, and even to rule on rational grounds as laid down by a higher authority (such as the Constitution), precedent or agreement of the parties.<sup>76</sup> This makes it a real possibility that a case can succeed even within a context of hostility. Ely expressed the idea that courts are bound to protect unpopular minorities using constitutional principles.<sup>77</sup>

Stoddard considers social change to occur when there are changes in societal attitudes and perceptions, and not merely changes in the law.<sup>78</sup> For social change to happen to a significant level, there must be social transformation. Social transformation requires a change in power relations and inequalities in such a way that irrelevant considerations such as gender, race or sexual orientation no longer matter in access to human rights.<sup>79</sup> According to Gloppen, courts can influence social change both directly and indirectly.<sup>80</sup>

Success in litigation is not easy to measure. For some, it is all about victory in the courtroom. It is only when cases are won that immediate protection can be claimed since the court

<sup>71</sup> See generally, V Jaichand ‘Public interest litigation strategies for advancing human rights in domestic systems of law’ (2004) 1 *Sur Revista Internacional de Derechos Humanos* 127.

<sup>72</sup> FW Jjuuko ‘Law and access to justice and the legal system in contemporary Uganda’ (2004) 76 *Law and Access to Justice in East Africa* 102.

<sup>73</sup> M Nassali *Beating the human rights drum: Applying human rights standards to NGOs governance* (2015).

<sup>74</sup> Oloka-Onyango (n 1 above) 766.

<sup>75</sup> Zackin (n 5 above); JF Handler *Social movements and the legal system: A theory of law reform and social change* (1978) 22.

<sup>76</sup> The principle of rationality as a requirement of adjudication was formulated by Fuller & Winston. See Fuller & Winston (n 64 above).

<sup>77</sup> Ely (n 4 above).

<sup>78</sup> Stoddard, n 38 above.

<sup>79</sup> Gloppen (n 2 above) 344.

<sup>80</sup> Above, 356-7.

decision will be binding.<sup>81</sup> However, others acknowledge the need for victories but also add that losses in the courtroom can influence social change. NeJaime regards loss as a way of winning especially where it can be used to show that the system including the courts, unfairly take the majoritarian view, and thus convince the powers that be to make the necessary changes. Loss can also be used to galvanise the community more for the task ahead as it has the effect of awakening activists to the reality of losing the cause, and thus reuniting and reinvigorating them for the bigger fight.<sup>82</sup> Others go beyond winning or losing and look at the effects of the court process. Galanter introduced the centrifugal approach, which considers other subtler aspects of the court process, like procedure and the message communicated through the workings of the judiciary, which all influence society.<sup>83</sup> In terms of this approach, courts have both general effects and special effects. Special effects apply to the individuals who are the subject of the court decision while general effects affect the population at large and all these affect the community differently, and may thus radiate into social change.<sup>84</sup> McMann & Silverstein look at how decisions shape social meaning, and how they therefore influence the way individuals and groups behave.<sup>85</sup> Therefore, court action has many ways of influencing social change besides a direct win.

For groups that work on controversial issues in situations where there is active hostility, the process of social change through court action becomes more complicated depending on whether they win or lose. The first reason for this is the counter-majoritarian difficulty. Bickel argued that unelected judges should not have the power to overturn statutes passed by an elected legislature. This is because the courts are not answerable to the people, and the people are thus powerless to overturn the court's decision.<sup>86</sup> Tushnet believed that elected legislatures are the proper avenues for protection of even unpopular minorities.<sup>87</sup> Counter-arguments to this point out that the power to nullify statutes cannot be undemocratic since it is an inbuilt feature within democracy, intended to protect against the 'tyranny of the

<sup>81</sup> See for example Handler (n 75 above) detailing how various social movements relied on success in the courtroom to effect social change. Also see Keck (n 52 above) where he argues that the backlash argument is overrated and even where there is backlash, the gains of a win in court cannot be understated.

<sup>82</sup> See generally, D NeJaime 'Winning through losing' (2011) 96 *Iowa Law Review* 941.

<sup>83</sup> M Galanter 'The radiating effects of courts' in K Boyum & L Mather (eds) *Empirical theories about courts* (1983) 117, 125-26.

<sup>84</sup> Above, 121.

<sup>85</sup> M McCann & H Silverstein 'Rethinking law's "allurements": A relational analysis of social movement lawyers in the United States' in A Surat & SA Scheingold (eds) *Cause lawyering: Political commitments and professional responsibilities* (1998) 269.

<sup>86</sup> AM Bickel (n 6 above) 17.

<sup>87</sup> See generally M Tushnet *Taking the Constitution away from the courts* (1999).



majority.<sup>88</sup> It is therefore legitimate and democratic since democracy itself has to have such inbuilt protections in order to serve everyone.<sup>89</sup> Scholars discussing countries that have detailed constitutions that have given the highest courts express powers to review statutes and executive action do not raise the counter-majoritarian argument as a big issue. For example Daniels & Brickhill show that this argument does not arise much within the context of South Africa.<sup>90</sup> The second reason for is based on the view that courts do not have the capacity to craft and implement complicated and far-reaching changes in social policy. According to Handler, courts almost become impotent when confronted with difficult problems of enforcement, and therefore have to rely on the bureaucracy to implement their decisions.<sup>91</sup> The counter-argument to this has been that courts in practice only make decisions that they can follow up, and so this boils down to the parties to ask for what can be enforced and to the courts to give remedies that can actually be readily implemented.<sup>92</sup> The third reason is about SL deflecting social movement energy and also causing backlash. Galanter sees SL is an elitist approach that favours the haves - those who have the capacity and resources to build and pursue a sustained long-term litigation - leaving the 'one-shotters' - those who do not have the resources to pursue protracted litigation, from using the system.<sup>93</sup> Scheingold warned against the 'myth of rights,' which diverts attention from the political roots of social problems and simply narrows them down as rights claims.<sup>94</sup> NeJaime however sees elites as crucial for social mobilisation since it is they that convert social concerns into claims that can stand the constitutional test.<sup>95</sup> This is in line with Balkin's observation that these are people with special influence and authority.<sup>96</sup> On the backlash aspect, Klarman, considering the USA case of *Brown v Board of Education* and the same-sex marriage campaign in the USA, sees litigation as having harmful backlash.<sup>97</sup> Rosenberg illustrates in the case of same-sex marriages that during the decade 1993 to 2003, same-sex marriage activists won three important cases but each was met with backlash in

<sup>88</sup> The term tyranny of the majority was popularised by Tocqueville in his book, *Democracy in America*, where it was the title of a section. See A Tocqueville *Democracy in America: Historical-critical edition of De la démocratie en Amérique* trans J Schleifer (2010) 427-450. Mill (n 63 above).

<sup>89</sup> Ely (n 4 above).

<sup>90</sup> RN Daniels & J Brickhill 'The counter-majoritarian difficulty and the South African Constitutional Court' (2006) 25 *Penn State International Law Review* 371.

<sup>91</sup> Handler (n 75 above) 18-19.

<sup>92</sup> Handler (n 75 above).

<sup>93</sup> M Galanter 'Why haves come out ahead: Speculations on the limits of social change' (1974) 9 *Law and Society Review* 1.

<sup>94</sup> SA Scheingold *The politics of rights: Lawyers, public policy, and political change* (1974) 3-10.

<sup>95</sup> D NeJaime 'Constitutional change, courts and social movements' (2012) 111 *Michigan Law review* 897.

<sup>96</sup> JM Balkin *Constitutional redemption: Political faith in an unjust world* (2011) 182.

<sup>97</sup> Klarman (n 8 above); and MJ Klarman *From Jim Crow to civil rights: The Supreme Court and the struggle for racial equality* (2006); MJ Klarman 'Brown and Lawrence (and Goodridge)' (2005) 104 *Michigan Law Review* 431-89, 482.

the form of legislative amendments and electoral upsets.<sup>98</sup> NeJaime, however, sees backlash as part of the 'push and pull' forces that characterise the constitutional process.<sup>99</sup> Keck sees backlash as part of the sacrifice that had to be made for the gains.<sup>100</sup> Cummings & Rhode state that whereas most of the arguments against SL on the basis of its shortcomings are true, this does not mean that political mobilisation as an alternative is free from the same defects.<sup>101</sup> Hunter recommends that the choice to use litigation or the legislative process when both are available depends on time and opportunity, and so a prescriptive approach should be avoided.<sup>102</sup>

One of the unpopular groups that has been actively using litigation while facing active hostility are LGB persons. In the case of the USA, Leachman identifies litigation as the most visible strategy in the US LGB movement's struggle for equality.<sup>103</sup> Litigation received the most news coverage and organisations that used litigation had better chances of survival. In the end, the LGB movement was centred around litigation as a strategy. Eskeridge states that in the context of marriage equality, litigation has been a resounding success in the USA, though the issue of backlash has to be heeded.<sup>104</sup> Keck too considers LGB litigation in the USA to have been a success despite the backlash and he re-examines the concept of backlash to show that it is indeed overrated.<sup>105</sup> Epp describes the victories of litigation in the USA, including that on LGB rights, in the recent past as the 'rights revolution'.<sup>106</sup>

In Common Law Africa, although litigation has been highly successful in South Africa, it has only partially achieved social change there. Marcus et al describe the cases and note that this as perhaps 'the most ambitious and extensive public litigation programme embarked on by a particular interest group in South Africa.'<sup>107</sup> However, they go on to explain that there is 'a massive gulf between this legal recognition and the attitude of many ordinary South Africans', and regrettably note that in terms of social change, since 2008, although none of

<sup>98</sup> Rosenberg (n 3 above).

<sup>99</sup> NeJaime (n 95 above).

<sup>100</sup> Keck (n 52 above).

<sup>101</sup> See generally SL Cummings & DL Rhode 'Public interest litigation: Insights from theory and practice' (2008) 36 *Fordham Urban Law Journal* 603.

<sup>102</sup> N Hunter 'Lawyering for social justice' (1997) 72 *New York University Law Review*, 1009.

<sup>103</sup> See GMM Leachman 'From protest to Perry: How litigation shaped the LGBTI movement's agenda' 47 *University of California, Davis Law Review* 1667.

<sup>104</sup> WN Eskeridge Jr. 'Backlash politics: How constitutional litigation has advanced marriage equality in the US' (2013) 93 *Boston University Law Review* 275-323.

<sup>105</sup> Keck (n 52 above).

<sup>106</sup> CR Epp *The rights revolution: Lawyers, activists, and supreme courts in comparative perspective* (1998) 344.

<sup>107</sup> G Marcus et al 'Public interest litigation and social change in South Africa: Strategies, tactics and lessons' (2014) *Atlantic Philanthropies*, 27.



the judgments has been overturned, the situation seems to be worsening.<sup>108</sup> For the other selected Common Law Africa countries that have carried out LGB SL: Botswana, Kenya, and Uganda, it has met with partial success in the courts and differing levels of social change. Oloka-Onyango discusses the use of litigation for LGB rights in the Kenyan and Ugandan courts and considers the various cases and their significance, but he does not go as far as to investigate the level of social change brought about by these decisions.<sup>109</sup> In Uganda, Jjuuko documents the struggle for LGB equality and shows the central role that litigation plays in the Ugandan LGB movement.<sup>110</sup> Despite the victories, the Consortium on Monitoring Violations Based on Sex Determination, Sexual Orientation and Gender Identity shows that violations still go on.<sup>111</sup>

The literature that currently exists on how LGB SL can stimulate social change does not fully explain why the social change that litigation on such issues has so far brought about in Common Law Africa has been so limited. The literature is largely dominated by American scholars discussing the American reality, which is quite different from the Common Law African reality. One of the factors that has however been identified as contributing to this state of affairs is the nature of social mobilisation behind the struggles. In the context of South Africa, Oswin observes that the National Coalition for Gay and Lesbian Equality, (NCGLE) which led the litigation efforts, was elitist and was disconnected from the reality of the people it was serving despite its rhetoric to the contrary.<sup>112</sup> The political climate also plays a role. Fritz argues that in Southern Africa it would not be wise for activists to simply bring cases to courts on issues where there is very strong public opinion countering the relief sought. Positive judgments in these cases may lead to backlash against the group sought to be protected and could even bring the court itself into disrepute if the judgment is disregarded.<sup>113</sup> Diescho makes the argument that judicial independence cannot exist in circumstances where the rule of law and democracy barely exist, which is the situation in most African countries.<sup>114</sup> In terms of ideology, Oswin sees the pursuance of a neo-liberal

<sup>108</sup> As above, 34.

<sup>109</sup> Oloka-Onyango (n 1 above).

<sup>110</sup> A Jjuuko 'The incremental approach: Uganda's struggle for the decriminalisation of homosexuality' in C Lennox & M Waites (eds) *Human rights, sexual orientation and gender identity in the Commonwealth: Struggles for decriminalisation and change* (2013) 381.

<sup>111</sup> See generally The Consortium on Monitoring Violations Based on Sex Determination, Sexual Orientation and Gender Identity 'The Uganda report of violations based on sexual orientation and gender identity' (2014).

<sup>112</sup> See generally N Oswin 'Producing homonormativity in neoliberal South Africa: Recognition, redistribution, and the equality project' (2007) *Signs: Journal of Women in Culture and Society* 32.3: 649.

<sup>113</sup> N Fritz 'Human rights litigation in Southern Africa: Not easily able to discount prevailing public opinion' (2014) *International Journal on Human Rights* 193-198.

<sup>114</sup> See generally Diescho (n 60 above).

ideology, which was not in line with the majority of the poor, black gays and lesbians in South Africa, as the reason why the NCGLE had to close down. However, she was not discussing SL but rather movement building. Madlingozi in the context of South Africa considers that the courts are seen as elitist, expensive, largely inaccessible to the poor and marginalised, and being unable to address issues that they face which arise from the neo-liberal approaches of the government, which the courts are certainly a part of.<sup>115</sup> Baxi brings in the concept of economic development and the status of the social relations in the community, especially the levels of poverty, in his argument that public interest litigation as applied in the USA cannot apply to India.<sup>116</sup> El Menyawi highlights the prevalence of strong conservative religious and cultural beliefs in many African countries, in respect of Egypt.<sup>117</sup> However, the link of these factors to the failure of LGB litigation to lead to social change where there is homophobia is yet to be well-established in the literature. This is another gap that this study seeks to fill.

As regards the way forward, El Menyawi proposes a new model of engaging on LGB rights in situations of active homophobia, which involves going 'back to the closet' and using the privacy discourse which Islam and many people in Egypt identify with and which would protect all including LGB persons.<sup>118</sup> Fritz argues for a re-evaluation on the use of SL when it can rattle politicians the wrong way as happened when the tribunal of the Southern African Development Cooperation (SADC) made a decision against Zimbabwe that the heads of state did not like, and the tribunal was practically closed down.<sup>119</sup> Thiruvengadam suggests that activists should not turn away from PIL but rather approach it differently, asking less of the courts, and focusing more on social mobilisation by involving the affected groups to build support.<sup>120</sup> For LGB activism, Devji proposes 'African' mechanisms, which in her opinion include more litigation, which should be coupled with visibility, seizing the political moments and using HIV/AIDS, based arguments.<sup>121</sup> She was not however specifically dealing with SL and she also did not specifically focus on Common Law Africa.

<sup>115</sup> Madlingozi T 'Social movements and the Constitutional Court of South Africa' in VO Vilhena, U Baxi, and F Viljoen (eds) *Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa* (2013), 532-579, 534-539.

<sup>116</sup> U Baxi, 'Judicial discourse: Dialectics of the face and the mask' (1993) 1 *Journal of the Indian Law Institute* 1, 7-12.

<sup>117</sup> H El Menyawi 'Activism from the closet: Gay rights strategising in Egypt' (2006) 7 *Melbourne Journal of International Law* 27, 49-51.

<sup>118</sup> Above.

<sup>119</sup> Fritz (n 113 above).

<sup>120</sup> AK Thiruvengadam 'Swallowing a bitter PIL? Reflections on progressive strategies for Public Interest Litigation in India' in VO Vilhena, U Baxi, and F Viljoen (eds) *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (2013), 519-531, 528-529.

<sup>121</sup> See generally ZZ Devji 'Forcing paths for the African queer: Is there "African" mechanisms for realising LGBTIQ rights?' (2016) 60 *Journal of African Law* 343.

There is thus need for a re-evaluation of LGB equality SL in ways that reflect the African reality. There is need to go beyond the litigation itself and look at the overarching issues that affect the effectiveness of such litigation, including the state of democracy and the rule of law, the extent of economic development in the country, and the social set up of these countries. There is also need to develop a comprehensive list of factors that affect LGB SL, and identify conditions under which SL for LGB equality can act as a catalyst for social change in a situation where there is active homophobia.

## 1.9 Methodology

### 1.9.1 Research design

The study is qualitative in nature. This is the type of research that seeks to interrogate the reasons for human behaviour and actions.<sup>122</sup> It employs the analytical research design under which the different variables are studied and critically evaluated to make evaluated deductions.<sup>123</sup> Information already available is analysed and conclusions drawn from it. In this case, available information on how SL has been used in Common Law countries is what is reviewed and analysed, and conclusions drawn therefrom.

### 1.9.2 Research methods

Qualitative research methods are employed in the study, mainly semi-structured interviews and document analysis.

Semi-structured interviews involve the researcher speaking to interviewees in a conversation guided by predetermined themes.<sup>124</sup> These were used to collect primary data on the trends of SL in Common Law Africa, as well as the perceptions on how SL on LGB equality has contributed to social change, and what other methods are being used beside SL. Lawyers, activists, ordinary LGB persons and judges, are targeted as key respondents for these interviews.

<sup>122</sup> CR Kothari *Research methodology: Methods and techniques* (2004) 3.

<sup>123</sup> As above.

<sup>124</sup> C Robson *Real World Research: A resource for users of social research methods in applied settings* (2011) 3<sup>rd</sup> ed, 280.

The study also employs document analysis as a research method. Document analysis is a quantitative research method that involves review, interpretation, and analysis of documents.<sup>125</sup> This is used mainly for secondary data collection. Secondary data sources used are: reports of organisations working on LGB issues in the selected countries, and scholarly writings on SL, democracy and the principle of separation of powers, the role of the judiciary, comparative studies in the USA and other countries, the use of public interest litigation generally, and other relevant aspects.

### 1.9.3 Sampling

Since there are quite a number of lawyers and activists working on LGB equality SL, as well as many other interested parties including judges and government officials, a small and manageable sample of interviewees is selected.

The interviewees are determined through purposive sampling, which involved the researcher making strategic choices about who to interview, and where to conduct research on particular points.<sup>126</sup> In this respect stakeholder sampling, which is based on who the main stakeholders involved in designing or implementing a cause or its primary beneficiaries,<sup>127</sup> is specifically employed. The key stakeholders identified in this study are: the activist/lawyers involved in designing the strategy; the activists who stand as plaintiffs in the cases; leaders of non-governmental organisations involved in SL; LGB persons who are in a position to know whether change has taken place; and judges who have decided LGB equality cases, as well as lawyers/activists who have played an active role in SL outside of Africa.

The sample size for this study is 48. In quantitative research, the main concern is not the extent to which the sample is capable of generalisation, but rather the adequacy of the selected sample to answer the research questions.<sup>128</sup> The interviewees are categorised as follows, with their details provided in Annexure A, which is the list of interviewees:

- i) Twelve lawyers/activists who have been key actors in planning and bringing cases before the courts in the selected Common Law African countries. One was from Botswana; five from Kenya; three from Uganda; and three from South Africa.

<sup>125</sup> See generally, GA Bowen, 'Document analysis as a qualitative research method' (2009) 9 *Qualitative Research Journal* 27.

<sup>126</sup> T Palys 'Purposive sampling' in LM Given (ed) *The sage encyclopedia of qualitative research methods* (2008) 697, 697-8.

<sup>127</sup> Above.

<sup>128</sup> MN Marshall 'Sampling for qualitative research' (1996) 13 *Family Practice* 522, 523.

- ii) Four lawyers who have handled cases in court, one from each of the selected Common Law African countries.
- iii) Four activists who have been petitioners in SL cases in each of the selected Common Law African countries.
- iv) Nine leaders of organisations working on LGB issues: Three from Botswana; three from Kenya; two from Uganda and one from South Africa.
- v) Seven LGB persons who do not work for Non Governmental Organisations but who are attuned to changes: two from each of Kenya; South Africa and Uganda, and one from Botswana.
- vi) Four judges from the study countries in Common Law Africa: two from Kenya and one from South Africa, and one from Uganda.
- vii) Four academics who have written about SL and constitutionalism in Africa as well as LGB equality: one from Botswana, two from South Africa and one from Uganda.
- viii) Four lawyers/activists from non-African Common Law countries considered: one from each of the four countries.

#### **1.9.4 Data collection**

Both primary and secondary data is collected. Primary data is obtained in the form of interviews with the stakeholders identified. Interview guides were used to collect the required information. These were arranged according to themes. Respondents were interviewed by the researcher in person or by a research assistant. Field notes were taken and recorders were used where possible. Consent forms were used to ensure that the informed consent of every person interviewed was recorded/obtained. Where a respondent refused to sign the informed consent forms but nevertheless gave consent, this was recorded on audio.

Secondary data sources that were relied on were mainly: reports of organisations working on LGB issues, reports from state institutions, laws and international instruments and resolutions, and scholarly writings on SL, democracy and the principle of separation of powers, the role of

the judiciary, comparative studies in the USA and other countries, the use of public interest litigation generally, and other relevant aspects.

### **1.9.5 Data analysis**

Qualitative data analysis techniques were employed. Data analysis was based on thematic issues. Codes were developed for each theme and the data classified accordingly.

Data cleaning was done through checking the notes for consistency and mistakes. The field notes were checked for consistency with the transcripts from the electronic recorders. A comprehensive analysis of the information received was then done, and deductions made.

### **1.9.6 Ethical issues**

Since the study involves human subjects, some of whom were vulnerable LGB persons, ethical clearance was obtained from the Research Ethics Committee of the Faculty of Law, University of Pretoria before undertaking interviews.

The researcher ensured that the respondents were well informed about the study, its aims, and how it could benefit or otherwise affect them. Interviews were entirely voluntary and no monetary incentive was given to the participants.

The consent of the respondents is sought before their names and affiliations are revealed in this study and for those who requested anonymity, their names have been left out, while those LGB persons who are not activists were not at all revealed, but pseudonyms are rather used.

### **1.10 Limitations of the study**

The study was limited in a number of ways:

Firstly, the study is limited to exploring social change brought about by SL in respect of lesbian, gay and bisexual persons. These three groups are often grouped with transgender and intersex persons under the 'LGBTI' umbrella. This study did not consider these two sub-

groups, the distinct situations, and challenges faced by each of these and how SL could be employed to bring about social change in situations where they experience prejudice and discrimination.

Secondly, only four African Common Law countries were selected for this study. These four countries are those that had had at least one courtroom victory by the end of the year 2015. Since then another country, Nigeria has joined these countries with a court victory in *Ifeanyi Orazulike v Inspector General of Police & Abuja Environmental Protection Board*.<sup>129</sup> Also, litigation is ongoing in Malawi, and contemplated in Mauritius and Zambia, all Common Law African countries. The study therefore was limited in terms of the Common Law African countries covered.

The third limitation is the fact that this study focuses on Common Law systems to the exclusion of Civil Law systems. It is not known whether the conclusions drawn and lessons learned will also ring true in African legal systems where court precedents are not strongly relied upon as a source of law and where the roles of judges and lawyers are vastly different from those in the Common Law system.<sup>130</sup>

Finally, the study did not cover the drivers for anti-gay groups' opposition of cases, and their use of legislatures to further criminalise same-sex relations. This is an aspect that is common in LGB litigation - fervent and determined opposition to LGB cases. Again, anti-gay groups barely use the courts to further their own agendas except by defending cases. They instead resort to the legislature as their avenue of choice. The political and legal opportunity structures that determine this choice were not covered.

### 1.11 Structure of the thesis

The chapters in the thesis are arranged as follows:

Chapter 1 gives an introduction to the study, then the background to the study, the research problem, the research questions, the motivation/rationale for the study, including a review of the literature, and the methodology.

<sup>129</sup> Suit No. FHC/ABJ/CS/799/2014

<sup>130</sup> Joireman (n 57 above) 8-9.



Chapter 2 defines SL and distinguishes it from other types of litigation. It discusses the origins of SL and its historical development. It then discusses the theory of social change and how it applies to situations of active homophobia and transphobia. It then delves into a discussion of the three concerns of SL – those of SL being illegitimate, courts being incapable of effecting social changes, and the negative effects of SL on community organising and on other strategies.

Chapter 3 focuses on the cases brought before courts in Common Law Africa on LGBT equality, and their outcomes. It also discusses the general characteristics of the cases and the arguments raised, and looks for common threads and strategies. It discusses the trends at each of the different stages of SL. It then compares these trends with those in other Common Law countries outside Africa. Cases from Belize, Canada, Nepal and the USA where SL on LGB equality has taken place outside Common Law Africa are also considered.

Chapter 4 critically examines the changes that have happened in the different countries in Africa where SL has taken place, comparing the period before SL and that after or during SL. It examines the role played by SL in those changes, and the role played by other strategies. It will then draw conclusions on the role of SL in effecting social change in situations of active homophobia.

Chapter 5 uses examples from Common Law countries where LGB equality SL has largely been successful and has contributed to social change despite active homophobia and transphobia, and formulates the conditions under which SL can succeed in creating social change. These factors are classified into those exogenous to the cases and those endogenous to the cases.

Chapter 6 discusses ways in which the exogenous and endogenous factors can be worked with to make SL successful in creating social change even with active homophobia, hostility, and the current social-political environment. Also, the concept of more ‘African’ ways of doing SL is explored. The chapter also discusses how LGB activists can engage the executive, the legislature, the judiciary and the general public on LGBT equality alongside the pursuance of SL.

Chapter 7 gives a summary of the main findings of the study and draws conclusions.



## CHAPTER 2

# STRATEGIC LITIGATION AND SOCIAL CHANGE IN SITUATIONS OF ACTIVE HOMOPHOBIA: A BACKGROUND

### 2.1 Introduction

This chapter provides background information on the main concepts discussed in the study. It starts with a discussion of the concept of strategic litigation (SL), linking it to public interest litigation (PIL). It then traces the origins of SL/PIL in the different Common Law jurisdictions considered in the study, and the current characteristics of SL in each of these jurisdictions. The chapter goes on to discuss the concept of social change, and the potential of SL to stimulate social change generally. It then concludes with a discussion of the potential of SL to stimulate particular social change in favour of LGB rights in situations of active homophobia.

### 2.2 Strategic litigation

#### 2.2.1 Strategic litigation defined

SL has been defined as ‘the use of litigation and other legal and non-legal methods to seek legal and social change.’<sup>1</sup> It has also been described as

[T]he carefully planned lawsuit... We think, then we act. The whole undertaking is centrally planned in advance of any legal activity.<sup>2</sup>

SL is employed in contexts where there is a situation of social marginalisation and there is a need for deliberate and careful planning aimed at long-term change that will improve the situation of marginalised groups. SL can however also be aimed at other outcomes besides social change, for example for vindicating particular rights and thus creating legal change, and

<sup>1</sup> CC Barber ‘Tackling the evaluation challenge in human rights: assessing the impact of SL organisations’ (2012) 16 *The International Journal of Human Rights* 411-435, 412.

<sup>2</sup> See A Koppelman ‘The limits of strategic litigation’ (2008) 17 *Law & Sexuality: A Review of Lesbian, Gay, Bisexual and Transgender Legal Issues* 1.

in a negative way to stifle rights through the creation of bad precedents, or simply for publicity.<sup>3</sup> This study is concerned with SL that is aimed at improving the conditions of marginalised groups over time (social change) and will be limited to only this aspect of SL.

This study defines SL as a type of PIL where cases are filed before courts of law as part of a defined, organised and long-term strategy and are backed up by other legal and non-legal approaches, usually aimed at creating change in laws and policies and creating legal precedents, thereby enabling change in the lives of a specific group of people or the public as a whole.<sup>4</sup>

### 2.2.2 Strategic litigation and public interest litigation

SL is a form of PIL. PIL refers to the use of court action with the aim of affecting the public as a whole or a significant section of it.<sup>5</sup> The term ‘public interest’ implies that the public in general has an interest in the matter, whether pecuniary or in some other way affecting their rights or liabilities.<sup>6</sup> PIL is one of the two major categories in civil litigation, with the other being private litigation.

Black’s Law Dictionary defines litigation as a ‘contest in a court of justice for purposes of enforcing a right.’<sup>7</sup> The major types of litigation are civil and criminal. Civil litigation concerns court processes that aim at redress/compensation, while criminal litigation refers to court processes that aim at the punishment of the offender.<sup>8</sup> This study is concerned with civil litigation, as it is about seeking redress/compensation through public interest litigation, which is also broadly concerned with law reform. Civil litigation is broader than a lawsuit and includes cases submitted to law courts for arbitration and those negotiated, mediated or settled under the supervision of the courts of law. It includes appeals and court processes brought for

<sup>3</sup> Misuse of PIL has been largely discussed within the Indian context. See for example S Deva ‘Public interest litigation in India: A critical review’ (2009) 1 *Civil Justice Quarterly* 19-40, 33-37.

<sup>4</sup> This definition is also inspired by the description of SL in respect of marriage equality in the US by Koppelman, n 2 above.

<sup>5</sup> For a detailed definition and discussion of what PIL is, see C Mbazira ‘Public interest litigation and judicial activism in Uganda: Improving the enforcement of economic, social and cultural rights (2009) 24 *Human Rights and Peace Centre Working Paper* 10-12.

<sup>6</sup> See discussion of ‘public interest’ in BL Wadhwa *Public interest litigation: A handbook* (2009) 44-45.

<sup>7</sup> HC Black *Black’s Law Dictionary: Definitions of the terms and phrases of American and English jurisprudence, ancient and modern* (1968) 1082.

<sup>8</sup> For the distinction between civil law and criminal law, see W Geldart *Introduction to English law* (1984) 9th ed 146.

the enforcement of court judgments.<sup>9</sup> It is thus a broad term encompassing the legal processes preceding the filing of a suit, the filing process itself, alternative dispute resolution, the hearing, and the post-judgment interventions, including appeals and execution processes.

PIL differs from private litigation in the sense that whereas private litigation is aimed at personal gain or personal redress,<sup>10</sup> PIL is primarily aimed at impacting the public as a whole or a section of it through raising constitutional or statutory issues. According to Justice Prof Tibatemwa-Ekirikubinza of the Supreme Court of Uganda,

[t]he salient ingredient of Public Interest Litigation is that the suit is brought for and in the interest of the Public. Such litigation is initiated only for redress of a public injury, enforcement of a public duty or vindicating interests of public nature.<sup>11</sup>

Justice Bhagwati of the Supreme Court of India on his part formulated the difference between private litigation and PIL in the following terms:

Public interest litigation is brought before the court, not for the purpose of enforcing the right of one individual against another as happens in the case of ordinary litigation, but it is intended to promote and vindicate public interest, which demands that violations of constitutional or legal rights of large numbers of people *who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed and un-redressed*.<sup>12</sup> [Emphasis added].

This does not imply that in all cases of PIL, the individual litigant should not be motivated at all by the possibility of deriving some personal benefit or redress, or that in all private litigation, the litigant should not at all be motivated by the possibility of impacting the broader public, but rather that such other consideration should not be the primary and overriding reason for bringing the case.<sup>13</sup> Therefore, the mere fact that a case benefits the public as a whole does not

<sup>9</sup> For the whole range of processes involved in civil litigation with regard to specific countries, see for example R Kelbrick *Civil procedure in South Africa* (2010); and M Ssekaana and SN Ssekaana *Civil procedure and practice in Uganda* (2007).

<sup>10</sup> For this reason, Chayes referred to it as being concerned with 'disputes between private parties about private rights'. See A Chayes 'The role of the judge in public law litigation' (1976) 89 *Harvard Law Review* 1284. In the South African context, O'Regan J referred to it as being 'concerned with the determination of a dispute between two individuals, in which relief will be specific and, often, retrospective, in that it applies to a set of past events' - *Ferreira v Levin* 1996 (1) SA 984 (CC), para 229.

<sup>11</sup> In *Muwanga Kivumbi v Attorney General* Constitutional Appeal No. 6 of 2011 Para 10. (*Muwanga Kivumbi* case).

<sup>12</sup> *People's Union for Democratic Rights (PUDR) and Others v Union of India & Others* AIR 1982 SC 1473 at 1476.

<sup>13</sup> B Kabumba 'The basics of strategic litigation' Presentation at the Human Rights Awareness and Promotion Forum (HRAPF) in-house strategic litigation training, Central Inn, Entebbe, 25 April 2017.

qualify it as a PIL case; but rather that it is the primary intention of the person bringing such a case to create broader change. *Tibatemwa – Ekirikubinza* JSC further contends that:

The mere fact that a court ruling in a case brought by an individual will benefit the public does not place the lawsuit in the category of Public Interest Litigation. The potential of a court decision in a privately pursued lawsuit to benefit a larger community or the public does not in itself situate the claim under the rubric of Public Interest Litigation.<sup>14</sup>

Another difference between private litigation and PIL lies in the nature of the actors. For private litigation, it is usually persons directly affected who file the cases as plaintiffs, while for PIL, it is usually a spirited individual or organisation who files the case raising constitutional or statutory issues that affect the public as a whole or a specific section of it. Justice O'Regan of the South African Constitutional Court explained this when she stated that private litigation, 'will generally not directly affect people who are not parties to the litigation,' while for public litigation, the outcome may affect a wide range of persons beyond the litigants.<sup>15</sup>

Therefore, SL falls squarely in the category of PIL and it is part of civil litigation. It is for this reason that criminal cases are excluded from this study's consideration of SL cases. The precise relationship between SL and PIL is that SL is only one of many manifestations of PIL. There are many other forms of PIL, and so it should be noted right from the start that not all PIL cases are SL cases. Only those that involve a 'strategic' component – brought as part of a broader strategy – would qualify as such. Many cases may be brought in the public interest, but not as part of a broader strategy to achieve social change, and so such cases would not qualify as SL cases.

Many other terms are used in reference to PIL including: 'public law litigation', 'impact litigation', 'test case litigation', 'social action litigation', or 'cause lawyering'. These are either synonyms for PIL, or descriptions of how PIL manifests (types of PIL). The different terms are defined/explained as follows:

Public law litigation is the earlier term for PIL, which was used in the context of the United States of America (USA) to describe the then emerging type of litigation that included providing legal representation to underrepresented groups and causes for the 'vindication of

<sup>14</sup> In the *Muwanga Kivumbi* case (n 11 above), para 25.

<sup>15</sup> In *Ferreira v Levin*, n 10 above.

constitutional or statutory policies'.<sup>16</sup> Impact litigation is another name for PIL. The Black's Law Dictionary defines it as 'a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have a pecuniary interest or some interest by which their legal rights or liabilities are affected.'<sup>17</sup> Test case litigation, on the other hand, is litigation brought in order to set a precedent in court or to challenge a particular law. It is different from SL in the sense that it does not have to be part of a planned strategy as a single case can suffice.<sup>18</sup> Social action litigation is a term used by some scholars in India to refer to their rather unique system of PIL, which is largely led by judges and thus involves a lot of judicial activism.<sup>19</sup> Finally, cause lawyering is where lawyers take the lead in using the law for purposes of creating social change, and in this regard, they specialise and avail their services usually *pro bono* for such causes.<sup>20</sup>

Although related, each of these terms has a specific meaning, which is determined by different factors. One of the factors is context, which concerns the country concerned and its unique attributes.<sup>21</sup> The other is time, which is about which term was popular in a specific period, for example in the USA, it was public law litigation at the time Chayes was writing in 1976<sup>22</sup> and yet now it is predominantly PIL,<sup>23</sup> with cause lawyering gaining currency specifically popularised by the work of Sarat & Scheingold.<sup>24</sup>

Another factor is the strategy adopted. This goes to whether there is a fixed long-term litigation strategy aimed at achieving a particular goal. Where litigation has a long-term aim that is part

<sup>16</sup> See Chayes (n 10 above). Also see generally, Council for Public Interest Law 'Balancing the scales of justice: Financing public interest law in America' (1976); and SM Jaffe 'Public interest law – five years later' (1976) 62 *American Bar Association Journal* 982.

<sup>17</sup> HC Black 'Black's Law Dictionary' 6th Ed, 2nd Reprint (1990), 1229. For a detailed discussion of what it entails see SD Kamga 'An assessment of the responsibilities for impact litigation in Francophone African countries' (2014) 14 *African Human Rights Law Journal* 449, 451-453.

<sup>18</sup> For a discussion of what it entails see SL Wasby *Race relations litigation in an age of complexity* (1995) 151.

<sup>19</sup> For the distinction from PIL, see U Baxi, 'Taking suffering seriously: Social action litigation in the Supreme Court of India' (1985) 4 *Third World Legal Studies*, 107, 108-111. For its main features in India, see generally PN Bhagwati 'Social Action Litigation: The Indian experience' in N Tiruchelvam & R Coomaraswamy (eds) *The role of the judiciary in plural societies* (1987) 21; C Baar, 'Social action litigation in India: the operation and limitations of the world's most active judiciary' (1990) 19 *Policy Studies Journal* 140, 142-143.

<sup>20</sup> See A Sarat & S Scheingold 'Cause lawyering and the reproduction of professional authority: An introduction' in A Sarat & S Scheingold (eds) *Cause lawyering: Political commitments and professional responsibilities* (1998) 261.

<sup>21</sup> For example, Baxi asserted that the term public interest litigation was more suited to the American context and not the Indian context where he preferred to use the term Social Action Litigation. See Baxi (n 19 above) 108-111.

<sup>22</sup> Chayes, n 10 above.

<sup>23</sup> See for example H Hershkoff & D Hollander 'Rights into action: Public interest litigation in the United States' in M McClymont & S Golub (eds) *Many roads to justice: The law related work of Ford Foundation grantees around the World* (2000) 89.

<sup>24</sup> For example generally Sarat & Scheingold, n 20 above; and A Sarat & S Scheingold, eds *Cause lawyering and the state in a global era* 2001; A Sarat & S Scheingold *The cultural lives of cause lawyers* (2008).

of a broader strategic campaign, this is usually described as 'SL', and more recently 'cause lawyering'. Where the case is a one-off, it is termed as 'test case litigation'. Finally, the persons taking the lead also matter in deciding which term to use. When it is lawyers taking the lead, this is usually defined as cause lawyering.<sup>25</sup> This study employs the term 'SL' as it is what best captures the type of PIL that is undertaken in Common Law countries for the realisation of the rights of LGB persons.

SL is one of those forms of PIL that have the most potential to stimulate social change. This is because of the deliberate, multi-suit, and long-term approach that is considered when doing SL. It is more so for groups that are unpopular, as it helps them to use the courts to gain legal equality while at the same time working towards social acceptance. This has made SL a popular avenue for vindicating the rights of marginalised or disadvantaged groups.<sup>26</sup> Worldwide, groups concerned with issues of gender, land, environment, health, and the rights of lesbian, gay, bisexual, transgender and intersex individuals have realised the importance of SL and used it to enforce and claim their rights.<sup>27</sup> For example, Herschkoff and MacCutcheon found that all Ford Foundation grantees doing SL in the two decades between 1980 and 2000 were using 'the courts to help produce systemic policy change in society on behalf of individuals who are members of groups that are underrepresented or disadvantaged.'<sup>28</sup> Oloka-Onyango has described PIL as 'court action that seeks to secure the human and constitutional rights of a significantly disadvantaged or marginalised individual or group'<sup>29</sup> and indeed SL would be the best type of PIL to achieve this goal.

### 2.2.3 The origins of strategic litigation/public interest litigation in the selected jurisdictions

PIL generally and SL, in particular, can be retraced to the rise of liberal democracy and constitutionalism. Democracy, which comes from the Greek word *demokratia*, combines the two Greek words, 'demo' (people) and 'kratos' (rule, power or strength), and refers to a system of

<sup>25</sup> D Nejaime 'Cause lawyers inside the state' (2012) 81 *Fordham Law Review* 649, 656.

<sup>26</sup> S Gloppen 'Public interest litigation: Social rights and social policy' in AA Anis & A de Haan *Inclusive States: Social policy and structural inequalities, new frontiers of social policy* (2008) 343, 343-344.

<sup>27</sup> Above.

<sup>28</sup> H Herschkoff & A McCutcheon 'Public interest litigation: An international perspective' in M McClymont & S Golub (eds) *Many roads to justice: The law related work of Ford Foundation grantees around the World* (2000) 283, 284.

<sup>29</sup> J Oloka-Onyango *When courts do politics: Public interest law and litigation in East Africa* (2017) 10.



government that is based on citizens' consent and participation in governance.<sup>30</sup> However, such a system of democracy, in its ideal form, is largely impractical, as in modern nation-states it is almost impossible to have everyone's consent and involvement in every decision. As such, the more practical approach is that of liberal democracy where the people elect their leaders who then make the necessary decisions, except in a few situations like referenda where the people can directly express their opinions. Although criticised for its flaws especially as regards the perpetuation of the 'tyranny of the majority',<sup>31</sup> it remains the most popular and the most desirable system of governance today.

One of the basics of a liberal democracy is a constitution, whether written or unwritten.<sup>32</sup> The Constitution is usually the supreme law in the land and in a few exceptional cases only trumped by the legislature.<sup>33</sup> Constitutionalism, therefore, denotes governance that follows constitutional principles.<sup>34</sup> All written constitutions in liberal democracies contain a Bill of Rights in which basic human rights are guaranteed and protected. As a way to temper the harshness of majority rule on minorities (the tyranny of the majority), minority rights are also protected. As such, amendment of the Bill of Rights or the Constitution itself usually requires a supermajority.<sup>35</sup> Also protected in the Constitution is the system of checks and balances, which allows the arms of government to check each other in order to avoid abuse of power by one branch. This principle gives rise to judicial review: the power of the judiciary to interpret statutes and require the executive and/or the legislature to do things they are supposed to be doing or to undo what

<sup>30</sup> The classical view of democracy was focused on elections as being at the centre of democracy. See for example J Schumpeter *Capitalism, socialism and democracy* (1942) 269. The modern liberal view of democracy goes beyond elections to 'popular control over decision making.' See D Beetham *Democracy and human rights* (1999) 90.

<sup>31</sup> The term is used to describe a situation when the majority deny minorities their rights using the sheer power of numbers. Tocqueville in his 'Democracy in America' used the term as the title of a section. See A Tocqueville *'Democracy in America'* Vol. 3, Historical-critical edition, Nolla, E (ed) trans Schleifer J (2010) 427-450. The term became more popular when John Stuart Mill used it in his 'On Liberty' where he identified the need to protect individuals against the 'tyranny of the prevailing opinion and feeling' which are not necessarily part of the then prevailing civil penalties.' See JS Mill *On liberty* (1859) 7.

<sup>32</sup> The Constitution must guarantee certain basic tenets, for example, separation of powers and an entrenched Bill of Rights, to be a constitution that is worthy of protection. See generally KC Wheare *Modern constitutions* (1951) 71.

<sup>33</sup> This is in countries where parliamentary supremacy reigns to some extent. For example under section 33 of the Canadian Charter of Rights and Freedoms (the Charter) – the notwithstanding clause - Parliament or provincial legislatures can override the Charter by declaring in an Act of Parliament or of the legislature that a law will remain in operation for five years notwithstanding its having been declared unconstitutional by a court of law for being contrary to the Charter. For a critique of the clause and notion *vis-a-vis* the concept of constitutionalism see JD Whyte 'Sometimes constitutions are made in the streets: The future of the charter's notwithstanding clause' (2007) 16:2 *Constitutional Forum Constitutionnel* 79.

<sup>34</sup> See D Fellman 'Constitutionalism' in PP Wiener (ed) *Dictionary of the history of ideas: Studies of selected pivotal ideas* (1973) Volume 1 485, 491-92.

<sup>35</sup> This applies even to those countries that subscribe to parliamentary supremacy. In Canada for example, section 38(1) of the 1982 Constitution Act, requires that the Act only be amended for the larger part with the consent of both the House of Commons and the Senate, and two-thirds of the provincial legislatures, and these must at least represent 50% of the population: the 7/50 rule. In some cases, amendment can only be done under section 41, which requires the unanimous consent of the provinces.



they have done that is contrary to the Constitution. This power was used in England to declare all slaves who set foot in England to be free men, on the basis that slavery was not recognised by statute or even by Common Law.<sup>36</sup> It was in the USA, however, that the interpretative power of the courts to declare what the law is was first clearly articulated in the case of *Marbury v Madison*.<sup>37</sup>

However, using this power of the court to realise the rights of marginalised persons or disadvantaged groups in the USA came a little later. Attorney and later Supreme Court justice, Louis Brandeis was among the earliest PIL advocates, long before the term PIL came into common usage, when he called upon lawyers to use 'their power for the protection of the people.'<sup>38</sup> He also went ahead and put his ideas into practice and thus brought and defended cases before courts on issues affecting marginalised groups, such as his defence of the State of Oregon's restriction on the working hours of women, in *Muller v Oregon*.<sup>39</sup> However, the cases that could be better regarded as the first 'strategic cases' came later, in the 1950s and 60s. Of these, *Brown v Board of Education of Topeka (Brown case)*,<sup>40</sup> which declared segregation in schools on the basis of race as unconstitutional, is the most significant. The case was part of a campaign for civil rights led by the National Association for the Advancement of Coloured Persons (NAACP).<sup>41</sup> Later, the litigation strategy was employed in various causes that were largely unpopular at the time including access to safe abortion services,<sup>42</sup> decriminalisation of sodomy<sup>43</sup> and, of recent, the recognition of same-sex marriages.<sup>44</sup> It was in 1976 that Chayes identified the then-emerging trend of PIL and referred to it as 'public law litigation', and he observed that this type of litigation was fundamentally different from private law litigation.<sup>45</sup> The term 'public interest litigation' later became popular over time, as with other variants like SL and impact litigation.

<sup>36</sup> *Somerset v Stewart* (1772) 98 ER 499. Harlow & Rawlings cite cases brought by the anti-slavery campaign in Britain as early as 1749 as the true origin of PIL. See C Harlow & R Rawlings *Pressure through law* (1992) 1.

<sup>37</sup> *Marbury v Madison* 5 US 137 (1803). Strictly speaking, this was not the first time that the power was used, but it was where it was first clearly articulated. The power had been used in *Hylton v United States* 3 US 171 (1796) in which the Supreme Court held that the Act of Congress of 6 June 1794, which laid a tax on carriages, was constitutional as it lay within the powers granted to Congress by the first article of the Constitution.

<sup>38</sup> For example in 1905, Brandeis called upon lawyers to use 'their power for the protection of the people.' See L Brandeis 'The opportunity in the law' (1905) 39 *American Law Review* 55-63.

<sup>39</sup> 2018 US 412 (1908).

<sup>40</sup> 347 US 483 (1954).

<sup>41</sup> On the legal strategy of the NAACP, see generally MV Tushnet *The NAACP's legal strategy against segregated education, 1925-1950* (1987).

<sup>42</sup> These efforts culminated into the case of *Roe v Wade* 410 US 113 (1973) at the Supreme Court of the US which recognised the constitutional right to obtain an abortion.

<sup>43</sup> Culminating into *Lawrence v Texas* 539 US 558 (2003) in which the Supreme Court declared the criminalisation of sodomy to be unconstitutional.

<sup>44</sup> Culminating in *Obergefell et al. v Hodges, Director, Ohio Department of Health, et al.* 576 US --- (2015) which declared same-sex marriages to be constitutional in the whole country.

<sup>45</sup> Chayes (n 10 above) 1281-1316.

It was from these American origins that PIL and SL in particular spread to other parts of the world, especially those that followed the Common Law system, with the necessary modifications and applications.<sup>46</sup>

For the selected Common Law African countries, PIL has historically manifested as follows:

In Botswana, the colonial period was characterised by a situation where the courts regarded 'administrative convenience' much more highly than individual rights, and every time a case came up against the protectorate government involving individual rights, it was bound to be dismissed against the individual.<sup>47</sup> After independence, section 18 of the Constitution still limited PIL as it granted standing to a person directly affected.<sup>48</sup> However, the courts have made it clear that cases in the public interest can be heard if the plaintiff is among those directly affected.<sup>49</sup> Strategic cases have thus been filed by persons directly affected concerning among other issues, the rights of women,<sup>50</sup> and LGB and transgender persons.<sup>51</sup>

In Kenya, the colonial courts were not interested in ensuring justice for the colonised people and were more focused on protecting the colonial state.<sup>52</sup> As such, even if theoretically people could challenge the actions of the state, the outcome was usually that the courts could not provide a remedy, rendering the efforts worthless. One of the earliest such cases is the 1912 case of *Ole Njogo & 7 Others v The Honourable Attorney General & 20 Others*,<sup>53</sup> which was brought to nullify treaties purportedly signed by the British and the Masai chiefs and which effectively handed over ancestral lands to the British. The Court ruled that both the people and their chief did not

<sup>46</sup> Indeed, for most jurisdictions that are now regarded as Common Law jurisdictions, legal principles and doctrines that were introduced were 'bastardised' versions of what prevailed in England, and the rule of law and protection of rights was not one of those. See Oloka-Onyango (n 29 above) 27. Also see RB Seidman 'The reception of English law in colonial Africa revisited' (1969) 2 *Eastern Africa Law Review* 45-85, 56.

<sup>47</sup> See for example *The King v Earl of Crewe: Ex parte Sekgome* [1910] 2 Kings Bench Division 576 where the right to habeas corpus was denied because the wrong person was named as the defendant. For a detailed examination of the constitutional cases during this period, see B Otlhogile 'A history of Botswana through case law' (1997) 11:1 *Pula Journal of African Studies* 82.

<sup>48</sup> See BR Dinokopila 'The justiciability of socio-economic rights in Botswana' (2013) 57 *Journal of African Law* 108.

<sup>49</sup> *Attorney General v Unity Dow* 1992 BLR 119 (CA) (*Unity Dow* case).

<sup>50</sup> For example, the *Unity Dow* case, above. For a detailed discussion of its impact on the constitutional protection of women in Botswana, see BR Dinokopila 'The Unity Dow case and the constitutional protection of women in Botswana' (2015) 3 *African Nazerene University Law Journal* 35.

<sup>51</sup> Through the cases of *Kanane v The State* 2003 (2) Botswana Law Review (BLR) 67 (CA) (*Kanane* case), in which the Court of Appeal upheld the sodomy laws as constitutional; *Thuto Ramogge & 19 Others v The Attorney General* Case MAHGB-000175-13 in which the High Court declared that LGB groups were entitled to registration and recognition under Botswana law; *Attorney General v Thuto Ramogge & 19 Others* (2014) CACGB-128-14 which upheld the High Court's ruling (*LEGABIBO* Registration case); and *ND v Attorney General & Registrar of National Registrations* HC MAHLB 000449 of 2015 which concerned change of gender markers for transgender persons.

<sup>52</sup> See J Oloka-Onyango 'Human rights and public interest litigation in East Africa: A bird's eye view' (2015) 47 *The George Washington International Law Review* 763, 772-774.

<sup>53</sup> Civil Case No. 91 of 1912 (5 EAL 70).

have standing to bring the suit, and in any case even if they did, and the case was successful, the courts did not have the powers to give a remedy. The immediate postcolonial governments did not fare much better either. The 1963 Constitution provided for some civil and political rights with various clawback clauses,<sup>54</sup> and narrowly defined who could seek for enforcement of rights. This was limited to those who alleged that a provision of the Bill of Rights had been infringed, was being infringed or was likely to be infringed in relation to them.<sup>55</sup> The courts largely took a strict approach and rarely allowed applications by persons other than those directly affected by an issue. In *Wangari Maathai v Kenya Times Media Trust Ltd*,<sup>56</sup> the court held that the applicant could not bring a representative suit on behalf of the public and in *El-Busaidy v Commissioner of Lands and 2 Others*,<sup>57</sup> it was emphasised that only the Attorney General could bring a suit in public interest. This was in line with the English Common Law position prevailing at the time as espoused in the English case of *Gouriet v Union of Post Office Workers and Others* (*Gouriet* case)<sup>58</sup> where the rule was emphasised that it was only the Attorney General who could enforce public rights and not private individuals. Indeed, the Constitution itself was treated as being equal to ordinary legislation.<sup>59</sup> This state of affairs is attributed to the courts being extremely loyal to the executive, especially during the Daniel Arap Moi regime (22 August 1978 – 30 December 2002).<sup>60</sup>

Judges however with time relaxed this rule. In *Niaz Mohamed Jan Mohamed v Commissioner of Lands and Others*<sup>61</sup> the High Court rejected the argument that only the Attorney General could enforce the public interest in respect to a registered piece of land. Finally, in *Albert Ruturi, JK Wanywela & Kenya Bankers Association v The Minister of Finance & The Attorney General and Central Bank of Kenya*,<sup>62</sup> the Kenyan High Court decided that a person could bring a case in the public interest if the person established ‘a minimal personal interest’ and there was no need to show that he/she suffered over and above other members of the general public. The Court emphatically rejected the position in the *Gouriet* case. The Constitution of the Republic of Kenya 2010 (the Kenyan Constitution) brought new changes, giving standing to anyone to bring cases

<sup>54</sup> See The Constitution of the Republic of Kenya, 1963, articles 70-86. Also see Kenya National Commission on Human Rights ‘Making the bill of rights operational: Policy, legal and administrative priorities and considerations’ *Occasional Report*, October 2011, 31-32.

<sup>55</sup> Article 84(1) of the Constitution of the Republic of Kenya, 1963.

<sup>56</sup> Civil Case no 5403 of 1989 (High Court of Kenya at Nairobi).

<sup>57</sup> (2002) 1 KLR.

<sup>58</sup> [1977] 3 All ER 70.

<sup>59</sup> For example in *Republic v El Mann* [1969] EA 357. For a detailed discussion of the judicial approach during this period see, Oloka-Onyango (n 29 above) 38.

<sup>60</sup> See Oloka-Onyango (n 29 above) 38-40; and A Migai & PK Mbote ‘Kenyan courts and the politics of the rule of law in the post-authoritarian state’ (2012) 18 *East African Journal of Peace & Human Rights*, 357, 357-358, 367-371.

<sup>61</sup> Civil Suit No. 423 of 1996 (High Court of Kenya at Mombasa).

<sup>62</sup> [2001] 1 EA 253 Nairobi High Court, Misc. Civil Application No.908 of 2001.

in the public interest in matters concerning violation of human rights and other violations of the Constitution. In article 165(3)(d), it gives powers to the High Court to interpret the Constitution and to declare statutes and any actions of any authority to be inconsistent with or in contravention of the Constitution. Article 22(2) and 258 allow for persons not directly affected to challenge violations. One of the outstanding SL cases in Kenya deals with housing rights. In this case, *Osman v Minister of State for Provincial Administration*,<sup>63</sup> the High Court found that the state's action of evicting thousands of families for the purposes of road construction without giving them notice or adequate compensation was unconstitutional. The court ordered the state to return the families to their land, rebuild their houses or give them alternative accommodation, and compensate them. In terms of LGB rights, four cases had been brought before the courts in Kenya by August 2018.<sup>64</sup> Therefore, PIL, and in essence SL, is alive and well in Kenya.<sup>65</sup>

In South Africa, PIL has a longer history than in many of the other African Common Law Countries. Although initially the English Common Law position requiring that only persons who had an interest over and above that of the general public could bring a case in the public interest<sup>66</sup> applied in South Africa,<sup>67</sup> this was departed from early on. This departure first arose in the case of *Dalrymple v Colonial Treasurer*,<sup>68</sup> where the court held that a person was only required to show that they had a 'direct personal interest' in the matter in order to bring a public interest case, and not that they had suffered more than other members of the public. In *Patz v Green & Co*,<sup>69</sup> the Court also allowed persons to sue for failure to implement a statute which was enacted in the public interest, provided they showed that it directly affected them. Using such exceptions to standing, PIL became one of the ways of opposing apartheid. In *Wood and Others v Ondangwa Tribal Authority and Another*,<sup>70</sup> a bishop whose church members had been tortured while in detention was able to successfully pursue a case

<sup>63</sup> High Court of Kenya Constitutional Petition No. 2 of 2011.

<sup>64</sup> *Eric Gitari v Attorney General & Another* Petition 440 of 2013 [2015] eKLR (*Eric Gitari* case) in which the Court ordered that the National Gay and Lesbian Human Rights Commission should be registered as an organisation; *COL & GMN v Resident Magistrate Kwale Court & 4 Others* Civil Appeal 56 of 2016 (*COL* case) in which the Court of Appeal declared an order for anal examinations against LGB persons made under a wrong law to be unconstitutional; the last two are *Eric Gitari v Attorney General* Petition 150 of 2016 (*Eric Gitari* decriminalisation case) and *John Mathenge & others v Attorney General*, Petition No. 234 of 2016 (*John Mathenge* case), which challenge the criminalisation of consensual same-sex relations.

<sup>65</sup> For a detailed discussion of PIL in Kenya, see Kenyans for Peace with Truth and Justice et al *A guide to public interest litigation in Kenya* (2014) 5-8.

<sup>66</sup> *R v Nicholson* 1899 2 QB 455.

<sup>67</sup> See for example *Bagnall v Colonial Government* 1907 24 SC 470 where the court insisted that the plaintiff could not bring the case where he had not suffered a direct injury.

<sup>68</sup> 1910 TS 372.

<sup>69</sup> 1907 TS 427.

<sup>70</sup> 1975 (2) SA 294 (A).

in court on their behalf. The court allowed this based on the fact that the persons affected could not bring the case themselves considering that they were tribesmen living far away from the courts, who had been subjected to torture. However, in subsequent cases, this exception was applied in only limited sets of circumstances, such as cases involving violations of life, liberty or physical integrity. For example in *Christian League of Southern Africa v Rall*,<sup>71</sup> Steyn J denied standing to the Christian League to represent the interests of an unborn child who was conceived out of rape.<sup>72</sup> At that time, there was no Bill of Rights in the Constitution, and the judiciary almost always followed the letter of the law.<sup>73</sup> The promulgation of the Constitution of the Republic of South Africa, 1993 (the Interim Constitution)<sup>74</sup> altered the position drastically. Section 7(4) granted standing to virtually any persons who wanted to bring a suit on violation of the Constitution. This was maintained in section 38 of the Constitution of the Republic of South Africa, 1997 (the Final Constitution).<sup>75</sup> This Constitution, which has been described as transformative, and revolutionary,<sup>76</sup> contains an extensive bill of rights and allows the judiciary to review legislation for its constitutionality and to question executive action.<sup>77</sup> The Constitutional Court was established as the apex court for constitutional matters<sup>78</sup> and activist judges were appointed to the court,<sup>79</sup> ushering in a new era that saw key legislation, including parts of the Interim Constitution, declared unconstitutional,<sup>80</sup> and important decisions on unpopular issues, such as abolishing the death penalty<sup>81</sup> and the decriminalisation of sodomy, being handed down.<sup>82</sup> PIL in South Africa, therefore, took hold based on the Constitution.<sup>83</sup>

<sup>71</sup> 1981 (2) SA 821 (O).

<sup>72</sup> For a more detailed discussion of standing during apartheid and before see, C Loots 'Access to the courts and justiciability' in S Woolman & Bishop, M (eds) (2008) *Constitutional law of South Africa* 2<sup>nd</sup> edition 8-I, 8-4-8-5. Also, see N Brennecke 'Facilitating public interest environmental litigation through locus standi requirements: A comparative analysis of South Africa and Germany' Unpublished Magister Legum in Public Law dissertation, University of Cape Town, 14.

<sup>73</sup> See G Marcus, S Budlender & N Ferreira *Public interest litigation and social change in South Africa: Strategies, tactics and lessons* (2014) 6-7.

<sup>74</sup> Act 200 of 1993.

<sup>75</sup> Act 108 of 1996.

<sup>76</sup> See KE Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal of Human Rights* 146. Also see I Currie & J de Waal 'The bill of rights handbook' 5<sup>th</sup> ed, 2005 2-7.

<sup>77</sup> Section 167(5).

<sup>78</sup> Section 166(a) and 167 of the Constitution.

<sup>79</sup> These include Justice Albie Sachs, a former fighter in the struggle against apartheid and a firm believer in equality.

<sup>80</sup> *Ex parte Chairperson of the Constitutional Assembly: Re Certification of the Constitution of the Republic of South Africa* 1996, 1996 (4) SA 744-(CC).

<sup>81</sup> *S v Makwanyane & Anor* 1995 3 SA 391 (CC) (*Makwanyane* case).

<sup>82</sup> *National Coalition for Gay and Lesbian Equality v the Minister of Justice* 1999 1 SA 6 (CC).

<sup>83</sup> For a detailed description of SL in South Africa, see A Klaasen 'The constitutional impact of strategic litigation in South Africa' LLD (Constitutional Law) Thesis, North-West University, October 2016, 18-174.



In Uganda, during the colonial period, PIL was restricted as violations by the state could effectively not be remedied,<sup>84</sup> and thus many cases challenging state actions were dismissed. Among these are *Mwenge v Migadde*<sup>85</sup> which was an unsuccessful challenge to the power of an individual to sell land that had hitherto been communal land before the 1900 Buganda agreement; *Mukwaba v Mukubira*<sup>86</sup> which was an unsuccessful challenge to the actions of the *Lukiiko* (the kingdom's legislature) to appoint its members, a power that was vested in the *Kabaka* (king); and *The Katikiro of Buganda v Attorney General of Uganda*,<sup>87</sup> which challenged the legality of the exiling of the *Kabaka*, in which the court declared that they could not question the actions of the crown. After independence, the Constitution of Uganda, 1962 (1962 Constitution) provided a Bill of Rights and allowed enforcement but only in case someone was personally affected by the impugned action or legislation.<sup>88</sup> This was maintained in the 1966 Constitution<sup>89</sup> and the 1967 'Pigeon Hole' Constitution.<sup>90</sup> The period between 1966 and 1971 was characterised by the civilian dictatorship of Milton Obote who, in 1966 as Prime Minister, ordered an attack on the Palace of the then President, *Kabaka* Mutesa II, forcing the latter into exile.<sup>91</sup> To contain the resulting unrest, a state of emergency was declared,<sup>92</sup> and although the courts were at first bold enough to nullify a repressive law,<sup>93</sup> they were cowed soon enough.<sup>94</sup> Perhaps the most significant case decided during this period was *Uganda v Commissioner of Prisons, Ex parte Matovu*,<sup>95</sup> which was an application for a writ of *habeas corpus* that involved a challenge to the unconstitutional takeover of power by the then President. The courts heard the application even though the documents upon which it was based were defective. They however upheld the new legal order basing on Kelsen's Pure Theory of law, which legalises unconstitutional changes of governments provided the new government has been effectively established.<sup>96</sup> This case so affected the judgments in later constitutional cases challenging unconstitutional takeovers of

<sup>84</sup> See J Oloka-Onyango, 'Judicial power and constitutionalism in Uganda' in J Oloka-Onyango & M Mamdani (eds) *Studies in living conditions, popular movements and constitutionalism* (1994) 463, 467-478.

<sup>85</sup> (1932-5) ULR 97.

<sup>86</sup> Civil case No 50 of 1954, 7 ULR 74.

<sup>87</sup> (1959) EA 382.

<sup>88</sup> Article 32(1) of the Constitution of Uganda, 1962.

<sup>89</sup> For a more detailed examination of this Constitution, see HF Morris 'The Uganda Constitution, April 1966' (1966) 10 *Journal of African Law* 112.

<sup>90</sup> This was the Constitution that made Uganda a centralised republican state. It was called the 'pigeon hole constitution' because it was debated and passed before the Members of Parliament had copies, and they were told to find copies in their pigeonholes.

<sup>91</sup> For a detailed discussion of the unrest and political clashes at the time, see PM Mutibwa *Uganda since independence: A story of unfulfilled hopes* (1992) 37-42.

<sup>92</sup> Above, 65.

<sup>93</sup> In the case of *Grace Stuart Ibingira & Others v Attorney General* [1966] EA 306, (Court of Appeal for East Africa) the Court struck down the colonial era Deportation Ordinance, Ch.46, Laws of Uganda, 1964 for contravening the Constitution.

<sup>94</sup> For a discussion of the courts and their reaction to executive power during this period, see Oloka-Onyango (n 84 above).

<sup>95</sup> [1966] EA 514.

<sup>96</sup> H Kelsen *The pure theory of law* 1970, 209.

state power,<sup>97</sup> that Oloka-Onyango famously described this phenomenon as the ‘ghost of Ex parte Matovu’.<sup>98</sup> The period 1971-1985 was characterised by the military dictatorship of Idi Amin, the efforts to remove him and the political and civil unrest following his defeat, including the eventual civil war that brought Museveni’s National Resistance Movement (NRM) to power. In 1972, the then Chief Justice, Benedicto Kiwanuka was dragged from his chambers at the High Court in Kampala, and was never seen again.<sup>99</sup> What followed was an exercise in judicial restraint. The constitutional cases that were decided during this period – *Opolot’s* case and *Kayira’s* case- all followed the precedent of *Ex Parte Matovu*.<sup>100</sup> With many expectations, Uganda promulgated a new Constitution in 1995.<sup>101</sup> The new constitution introduced the Constitutional Court and gave it powers to interpret the Constitution, and it can thus declare not only statutes but also acts of government unconstitutional.<sup>102</sup> It also gave a right to anyone whose rights were violated and those who would act in the public interest to go to courts for redress in Article 50(1) and 137(3). Article 50(4) requires parliament to pass a law for the enforcement of human rights. However, instead the Chief Justice passed the Judicature (Fundamental Rights and Freedoms) (Enforcement Procedures) Rules, 2008.<sup>103</sup> These were found to be unconstitutional in *Bukenya Church Ambrose v The Attorney General*,<sup>104</sup> since the powers to make such rules were the preserve of Parliament. Despite this setback, PIL cases were brought before courts on a continuous basis, but using the procedure of applications just like any other matter. PIL and SL have now become more or less entrenched and cases are filed on issues like women’s equality,<sup>105</sup> environmental rights,<sup>106</sup> and on unpopular matters like LGB rights.<sup>107</sup>

<sup>97</sup> These included: *Shaban Opolot v Attorney General* [1969] EA 631 (*Opolot’s* case), where the East African Court of Appeal held that the President had powers to hire and fire at will; *Andrew Kayira & Paulo Ssemwogerere v Edward Rugumayo, Omwoony Ojwok, Frederick Ssempebwa & 8 Others*, Constitutional Case No.1 of 1979 (*Kayira’s* case) which challenged the removal of President Yusuf Lule as unconstitutional, but nevertheless the removal was upheld.

<sup>98</sup> See J Oloka-Onyango ‘Expunging the ghost of Ex parte Matovu: Challenges facing the Ugandan judiciary in the 1995 Constitution’ 1996 *Makerere Law Journal* 141–150. Also see J Oloka-Onyango *Ghosts and the law* Professorial Inaugural Lecture Makerere University, 15 November 2016. <http://dx.doi.org/10.2139/ssrn.2691895> (accessed 5 November 2017).

<sup>99</sup> See Mutibwa, n 91 above, 100.

<sup>100</sup> n 95 above. See Oloka-Onyango (1996), n 98 above.

<sup>101</sup> The Constitution of the Republic of Uganda, 1995.

<sup>102</sup> Under article 137 of the Constitution.

<sup>103</sup> SI No. 55 of 2008.

<sup>104</sup> Constitutional Petition No 26 of 2010.

<sup>105</sup> For example *Law and Advocacy for Women in Uganda v Attorney General* Constitutional Petitions Nos. 13 /05 /& 05 /06 [2007] UGCC 1 – The Constitutional Court of Uganda declared provisions of the Succession Act and the Penal Code Act that did not treat women the same way as men as unconstitutional.

<sup>106</sup> Leading to decisions such as the ban on public smoking on the basis of the right to a clean and healthy environment in the case of *The Environmental Action Network Ltd v Attorney General & National Environmental Management Authority* Miscellaneous Application No 39 of 2001.

<sup>107</sup> These are: *Victor Mukasa & Yvonne Oyo v Attorney General* (2008) AHRLR 248 (*Victor Mukasa* case), where the High Court found a violation of the rights to privacy and dignity when the house of an LGBT activist was raided, and a visitor who was found there arrested and treated in an inhumane way; *Kasha Jacqueline, David Kato Kisuule & Pepe Julian Onziema v The Rolling stone Newspaper & Giles Muhame*, Miscellaneous Cause No. 163 of 2010 (*Rolling stone* case) which led to an injunction against a newspaper that had published pictures, addresses and



Outside Africa, the other jurisdictions included in the study, besides the USA whose history with PIL has already been discussed above, have also had their unique histories with PIL. Belize is an independent state with Queen Elizabeth II as head of state represented by a governor general. The Constitution of Belize, 1981 was adopted at Belize's independence from the United Kingdom of Great Britain and Northern Ireland (UK) and has been the operating supreme law ever since. Section 20(1) of the Constitution only allows persons directly affected to bring cases of violation of constitutional rights. It is only in case of a detained person that other persons can also apply for redress. This provision, as is in the constitutions of most commonwealth Caribbean countries, has restricted the proper development of PIL in those countries including Belize.<sup>108</sup> The fact that the courts can nullify laws and other government actions based on the constitution shows that PIL is alive in Belize, and only hindered by the rules on standing.

Canada has a different system from the rest of the countries as the principle of parliamentary supremacy still reigns. Its Constitution is both written and unwritten. Section 52(2) of the Constitution Act, 1982 defines the Canadian Constitution as including: the Canada Act, 1982, the first part of which is the Canadian Charter of Rights and Freedoms (Canadian Charter); and all acts and orders referred to in the schedule, which include the Constitution Act 1867, the British North America Act, 1867 and any amendments to these documents. The Supreme Court stated however that these are not exhaustive as it also includes pre-confederate documents and some unwritten aspects.<sup>109</sup> However, it is still regarded as the supreme law. The Supreme Court of Canada, although not established by the Constitution but by an Act of Parliament, is such an integral part of the Constitutional system that it is arguable that the legislature cannot abolish it through the repeal of its

details of LGBT persons and called for their hanging; *Kasha Jacqueline Nabagesera & 3 Others v The Attorney General and Hon Rev Fr Simon Lokodo* High Court Miscellaneous Cause No. 33 of 2012 (*Lokodo* case) in which the stopping of an LGB skills training workshop by a minister was upheld; *Prof. Oloka-Onyango & 9 Others v Attorney General* Constitutional Petition No. 008 of 2014 (*Anti-Homosexuality Act* case) in which the Constitutional Court declared the Anti-Homosexuality Act to be unconstitutional as it was passed without the constitutionally mandated quorum; and *Adrian Jjuuko v Attorney General* Constitutional Petition No. 1 of 2009 (*the Equal Opportunities Commission Act* case) in which section 15(6)(d) of the Equal Opportunities Commission Act, which stopped the Equal Opportunities Commission from investigating matters regarded as immoral or socially unacceptable, was held to be unconstitutional; and most recently *Frank Mugisha, Dennis Wamala & Ssenfuka Warry Joanita v Uganda Registration Services Bureau (URSB)* Miscellaneous Cause No. 96 of 2016 – High Court of Uganda (*SMUG Registration* case) in which the Court upheld the refusal to register Sexual Minorities Uganda (SMUG) as a company limited by guarantee on the basis that consensual same-sex relations are criminalised.

<sup>108</sup> For a detailed discussion of the limitation and how it can be overcome see generally, WRA James 'Redressing supremacy: challenging traditional notions of standing in the Commonwealth Caribbean Bills of Rights' (2013) 39:2 *Commonwealth Law Bulletin* 305.

<sup>109</sup> *New Brunswick Broadcasting Co. v Nova Scotia* 1 SCR 319.

enabling law.<sup>110</sup> It has powers to interpret the Constitution, but the difference is that in this case it advises Parliament on the interpretation and Parliament has the options to leave the law as it is, amend it, or amend the Constitution. In the case of a decision under the Canadian Charter of Rights and Freedoms (Canadian Charter), Parliament can only override the Supreme Court's decision for a period of five years at a time.<sup>111</sup> It is under the Canadian Charter that most PIL cases are brought. However, unlike many other countries, standing is not automatic for PIL cases. Section 24(1) of the Canadian Charter on Rights and Freedoms only allows persons whose rights have been violated to apply to the court for redress. Despite this, SL cases have traditionally been brought in Canada using persons who are directly affected but in such circumstances that the decisions affect more people than those directly affected. Decisions have been made by the Supreme Court in favour of marginalised groups including for LGB persons on same-sex marriages.<sup>112</sup>

Nepal was never colonised and therefore, unlike all the other countries, did not have to deal with a history of colonisation or an imposed judiciary. It was historically a monarchy with all powers concentrated in the hands of the King. Traditionally, the Common Law rules of standing applied, where only those directly affected could bring a case. But as early as 1965, the court started relaxing its approach and allowed a public interest application in *Banarasi Mahato v Election Officer of Dhanusha & Others*.<sup>113</sup> Tripathi regards the introduction of the Ninth Amendment to the National Civil Code (*Muluki Ain*) in 1986 as the moment that can be regarded as the beginning of PIL in Nepal.<sup>114</sup> It for the first time allowed an individual to file a suit in public interest, under section 10 of the Chapter on Court Procedure (*Adalti Bandobastako*). This was partly as a result of the influence of India, where PIL was becoming an important avenue of enforcing rights. Article 88(1) of the Constitution of the Kingdom of Nepal, 1990 (1990 Constitution) gave powers to every Nepalese citizen to file a petition in the Supreme Court to have any law declared invalid for being inconsistent with the Constitution in as far it violates human rights. The Court was given the final authority to interpret the Constitution, and this interpretation was binding on all. The Court was given broad powers, including the authority to interpret the Constitution, as a result of a political compromise following a long period of conflict. It used this power to handle different

<sup>110</sup> WJ Newman 'The constitutional status of the Supreme Court of Canada' (2009) 47 *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 15.

<sup>111</sup> See detailed discussion in n 33 above.

<sup>112</sup> Marriage equality was finally achieved across Canada in the case of *EGALE Canada Inc. v Canada (Attorney General)*, 2003 BCCA 251, and *Halpern et al. v Canada (Attorney General)* (2003) 65 OR (3rd) 161, 225 DLR (4th) 529.

<sup>113</sup> NKP 154 (SC 2022 BS).

<sup>114</sup> HB Tripathi 'Public interest litigation in comparative perspective' (2007) 49 *NJA Law Journal* 65.

political and public interest cases and thus became powerful.<sup>115</sup> The first case in which the Court addressed the matter of standing was that of *Radheshyam Adhikari v Secretariat of the Council of Ministers and Others*,<sup>116</sup> which concerned the appointment of ambassadors. The Court stated that access would only be given to those acting in the public interest and not mere busybodies with no 'meaningful relationship or substantial interest' in the case. However, soon after, partly due to the criticism of the courts' position by the legal profession,<sup>117</sup> the court started opening up more and relaxing the rules. Thus in *Bal Krishna Neupane v HMG, Ministry of Water and Power Resources*,<sup>118</sup> the Court allowed the petitioner standing to ask for information on issues concerning resources. In *Surya Prasad Dhungel v Godabari Marble Industries Pvt. Ltd. & Others*,<sup>119</sup> the Court extended the right to life to include the right to a clean and healthy environment. After that, the court was flooded with writs on various issues.<sup>120</sup>

The powers that the Court had under the 1990 Constitution were transferred without change into the new 2015 Republican Constitution,<sup>121</sup> by virtue of article 128.<sup>122</sup> It also gives the court powers to adjudicate any matter of public interest.<sup>123</sup> This power has led to the development of PIL in Nepal, with anyone having the right to file a case in the Supreme Court. As such decisions have been made on a number of issues, including stopping the building of a hydropower project due to environmental considerations;<sup>124</sup> nullifying a decision to lease out forest land;<sup>125</sup> ordering the state to provide for women's reproductive rights;<sup>126</sup> and - on a worrying note - refusing to impose an obligation on the state to provide food to starving families.<sup>127</sup> It has also made decisions regarding LGB rights.<sup>128</sup> PIL is, therefore, alive and well in Nepal.<sup>129</sup>

<sup>115</sup> R Stith 'Unconstitutional constitutional amendments: The extraordinary power of Nepal's Supreme Court' (1996) 11:1 *American University International Law Review* 47, 55.

<sup>116</sup> 33 NKP 810 (1991).

<sup>117</sup> Tripathi (n 114 above) 68.

<sup>118</sup> Supreme Court Bulletin (SCB) No 24 5 (1995).

<sup>119</sup> WP 35/1992 (1995).

<sup>120</sup> Tripathi (n 114 above) 69.

<sup>121</sup> Constitution of the Republic of Nepal, 2015.

<sup>122</sup> Above.

<sup>123</sup> 2015 Constitution, article 133(2).

<sup>124</sup> *Gopal Siwakoti v Ministry of Finance et al* NKP 255 (SC 1994).

<sup>125</sup> *Yogi Narahari Nath v. Prime Minister* Decision of 4 May 1996 (2053.1.17).

<sup>126</sup> *Prakash Mani Sharma and others v Cabinet Secretariat, H.M.G, Singh Durbar, and others* Writ 3027/2059 (2007.12.07).

<sup>127</sup> *Advocate Madhav Basnet v Cabinet Secretariat* WB 3341/055 (1998).

<sup>128</sup> *Sunil Babu Pant and Others v Nepal Government and Others*, (2008) 1 Writ No 917 2064 BS (2007 AD) 2NJALJ (2008) 261, stands out among LGB matters that the court has decided.

<sup>129</sup> For a recent discussion of PIL in Nepal see B Adikari 'The World Heritage Convention and human rights in Nepal: A review of legal norms and practices' in PB Larsen (ed) *World heritage and Human Rights: Lessons from the Asia Pacific and global arena*, 2018.

#### 2.2.4 Key features of PIL in the selected Common Law countries

Although PIL has evolved differently in different Common Law jurisdictions, a number of common trends can be discerned in all the different countries that are considered in this study. These include:

*a) Relaxed rules on standing*

The general rule in English Common Law is that only persons directly affected by the impugned actions or omissions have standing to bring cases before courts of law.<sup>130</sup> PIL is, however, one of the exceptions to this rule. In all the jurisdictions covered in this study, the rules on standing have been relaxed for PIL cases within certain variations. The rules have been relaxed to allow parties not directly affected to bring a case before the courts in the public interest, while they remain applicable to private litigation. This exception is usually as regards the enforcement of constitutional rights protected in the Bill of Rights and interpretation of the constitution generally. The exception is intended to make it easier to access the courts on human rights and constitutional interpretation matters, as these affect the public generally and not the specific individuals in their personal capacities.

All the African Common Law African countries studied, with the exception of Botswana, have provisions that allow persons who are not directly affected to bring cases in the public interest. In respect of Botswana, Section 18(1) of the Constitution only gives standing to persons directly affected. However, the Court of Appeal in *Attorney General v Unity Dow*<sup>131</sup> held that the Common Law rules on standing would not apply where the Constitution gave a right and so, if one was affected, one could bring a case to enforce one's rights and also do so in the public interest.

Article 22(1) of the Kenyan Constitution allows any person whose rights have been violated or threatened to file a petition for redress. Subsection (2) allows persons other than those directly affected, including those acting on behalf of someone who cannot do so themselves, those bringing representative suits, those acting in the public interest, and organisations acting on behalf of their members to file a case for redress in case of violation or threatened violation of rights. Perhaps most important for the case of PIL is section 285, which allows for petitions to be filed by anyone who claims that the Constitution has been contravened or

<sup>130</sup> See W Blackstone *Tracts, chiefly relating to the antiquities and laws of England* (1771) 15.

<sup>131</sup> *Unity Dow* case, n 49 above.

is threatened with contravention. The Chief Justice passed rules to guide PIL as required under Article 22(3) of the Constitution. These rules are the Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013.<sup>132</sup> They simplify the procedure for filing PIL cases by providing for oral applications too as well as removing fees for PIL applications and generally simplifying the procedure in order to enable all persons, including the poor, the illiterate and other such marginalised groups, to be able to take advantage of the process.<sup>133</sup> The courts have interpreted these provisions as effectively doing away with the requirement for standing in PIL cases.<sup>134</sup>

For South Africa, section 38(d) of the Constitution allows any persons acting on their own behalf, on behalf of others, those bringing representative suits, associations acting on behalf of their members and 'anyone acting in the public interest' to bring cases before the courts for enforcement of rights protected in Chapter 2 of the Constitution. This phrase allows both individuals and legal persons to bring cases before court, and Loots describes it as allowing 'apparently unrestricted public interest action[s]'.<sup>135</sup> In *Ferreira v Levin NO & Ors*,<sup>136</sup> Justice O'Regan recognised section 38(d) as the 'provision in which the expansion of the rules of standing are most obvious'.<sup>137</sup> She, however, stated that the applicant must show that they are genuinely acting in the public interest. She gave guidance as to what this would mean, including whether there was another way in which the matter could be resolved, what the relief sought was, the extent to which the case was of general or prospective application, the range of persons affected by the court's decision and whether such persons had a chance to appear and present evidence.<sup>138</sup> This expansive standing however only applies to enforcement of rights protected in chapter 2 and not everything else in the Constitution. This implies that the Common Law rules continue to apply in other areas of law.<sup>139</sup>

For Uganda, article 50(1) of the Constitution allows any person who claims a violation or threatened violation of a right under the Constitution to bring an action for enforcement. Article 50(2) allows any person or organisation to bring an action for the enforcement of the rights of another person. In *British American Tobacco Uganda Ltd v The Environmental Action*

<sup>132</sup> Legal Notice No 117 28th June 2013.

<sup>133</sup> Above, Rule 5.

<sup>134</sup> See for example *Mumo Matemu v Trusted Society of Human Rights Alliance & Others* [2013] eKLR.

<sup>135</sup> Loots (n 72 above) 8-8A.

<sup>136</sup> 1996 (1) SA 984 (CC).

<sup>137</sup> Above, para 233.

<sup>138</sup> Above, para 234.

<sup>139</sup> Brennecke (n 72 above) 19.

*Network*,<sup>140</sup> the High Court emphasised that article 50 introduced public interest litigation and therefore anyone could go to court to enforce the rights of another or the general public. Article 137(3) also allows anyone who claims that any law or act is in contravention of, or inconsistent with the Constitution to petition the Constitutional Court for interpretation.<sup>141</sup> In *Ismail Serugo v Kampala City Council & Attorney General*,<sup>142</sup> the Supreme Court emphasised that any person could go to the Constitutional Court for interpretation of the Constitution and not just the person affected. This has been done in cases including those involving LGB rights. In *Adrian Jjuuko v Attorney General*,<sup>143</sup> the Constitutional Court ruled that the petitioner could bring an action to challenge a law in the public interest without showing that he himself would be affected by the law, and this was justified both under articles 150 and 137 of the Constitution.<sup>144</sup>

For the countries outside of Common Law Africa, the rules vary depending on the jurisdiction.

In Belize, section 96 of the Constitution gives the Supreme Court powers to interpret the Constitution and to give redress. Section 20(1) however only allows persons who are directly affected to bring cases on enforcement of rights, with the exception of persons who are in detention, for whom applications can be brought by any other person.<sup>145</sup> The Supreme Court Rules, in Rule 56.2(2)(e) for the case of judicial review, allow a body that can prove that it is bringing the matter in the public interest, and that it has the relevant expertise as regards the subject matter of the case, to bring such a case before the Supreme Court. So far this is interpreted differently by the courts, with some courts strictly sticking to the literal interpretation and others adopting a liberal interpretation. In *Caleb Orozco, United Belize Advocacy Movement ('UNIBAM') v The Attorney General of Belize & Others (Caleb Orozco case)*<sup>146</sup> the Court ruled that an organisation, United Belize Advocacy Movement (UNIBAM) be struck out as an applicant as it was not directly affected since it was not capable of having anal intercourse. However, in *Maya Leaders Alliance v Attorney General of Belize*,<sup>147</sup> the

<sup>140</sup> High Court Misc. Application No. 27 of 2003 Arising from Misc. Application No. 70 of 2002.

<sup>141</sup> For a general discussion of the law on public interest litigation in Uganda see P Karugaba 'Public interest litigation in Uganda: Practice and procedure: Shipwrecks and seamarks' Paper presented at the Judicial Symposium on Environmental Law for the Judges of the Supreme Court and the Court of Appeal, Imperial Botanical Beach Hotel, Entebbe, 11-13 September 2005.

<sup>142</sup> Constitutional Appeal No 2 of 1998.

<sup>143</sup> Constitutional Petition No 1 of 2009.

<sup>144</sup> Above, lines 166-200.

<sup>145</sup> See discussion in section 2.2.3 above.

<sup>146</sup> Supreme Court Claim No. 668 of 2010.

<sup>147</sup> *Maya Leaders Alliance v Attorney General of Belize*, (2010) 77 WIR 108.



Supreme Court allowed applicants who brought a case for redress for violations on their own behalf and on behalf of the Mayan community. The Court based this on the collective nature of indigenous peoples' rights and the Supreme Court (Civil Procedure Rules) 2005, which allowed representative actions. Despite these few exceptions, the general rule still reigns strong.<sup>148</sup>

In Canada, section 24(1) of the Canadian Charter on Rights and Freedoms only allows persons whose rights have been violated to apply to the court for redress. It thus does not extend standing to persons not directly affected. However, the Supreme Court has relaxed the standing rules in PIL cases to have the public interest nature of the case considered among the factors in determining standing.<sup>149</sup> In addition, the Court should consider whether there are realistic alternative means to challenge the provision, and the potential impact of the proceedings on the rights of others who are equally or more directly affected.<sup>150</sup> All the factors have to be considered cumulatively and purposively.<sup>151</sup>

For Nepal, the Supreme Court is given powers to interpret the Constitution,<sup>152</sup> and this interpretation is binding on all organs.<sup>153</sup> Article 133 gives powers to any citizen to petition the Supreme Court to declare any law unconstitutional. *The courts have interpreted these provisions to allow anyone to bring a case, more so when the affected party is not in position to do so.*<sup>154</sup>

Finally, in the USA, federal courts are bound by the Constitution's article III, section 2, which restricts the courts to hearing only cases where there is a case or a controversy and the courts have interpreted this to require that there should be someone directly affected,<sup>155</sup> and who has, in fact, suffered an injury.<sup>156</sup> Therefore, the public interest exception is not recognised. Different states, however, apply different rules as they are not directly bound by

<sup>148</sup> James, n 108 above.

<sup>149</sup> *Canada (AG) v Downtown Eastside Sex Workers United Against Violence Society* 2012 SCC 45).

<sup>150</sup> Above.

<sup>151</sup> Above. For a discussion of the history of standing in public interest cases see D Phillips 'Public interest standing and access to justice: Canada (AG) v Downtown Eastside Sex Workers United Against Violence' (2013) 22 *Constitutional Forum Constitutionnel* 21-32.

<sup>152</sup> Constitution of the Republic of Nepal, 2015, article 128(2).

<sup>153</sup> Above, article 128(4).

<sup>154</sup> *Gupta v Union of India* (1981) Supp SCC 87, 210.

<sup>155</sup> *Hollingsworth v Perry* 133 S Ct 2652, 2659 (2013).

<sup>156</sup> *Friends of the Earth, Inc. v Laidlaw Environmental Services (TOC), Inc.*, 528 US 167, 180 (2000).



the Constitution of the United States of America but rather the State constitutions, with many states allowing cases in the public interest.<sup>157</sup>

**b) *The role of the judge***

In a number of jurisdictions, the judge's role in PIL is active rather than passive.<sup>158</sup> This means that the judge is an active participant in the proceedings, directing them and engaging in truth-finding.<sup>159</sup> Different judges act differently when handling PIL cases. However, even the most restrained judge will have a more active role to play in such a PIL case than in a private litigation case. The judges determine who joins the case as *amicus curiae*, and can also call upon persons who are not parties to the case to appear before the court or help it in the process of adjudication.<sup>160</sup> According to Mbazira, in reference to South African judges, PIL has enabled judges to 'discard their positions as mere umpires and to assume positions which make them active participants in the dispute.'<sup>161</sup> The role of the judge, and subsequently of PIL, is steadily evolving within deliberative democracies that have constitutional courts. Hubner Mendes argues that judges can be pictured as deliberators due to the fact that most constitutional courts are constituted by a small number of individuals (judges) who engage with the parties, and then with one another in order to finally reach a decision on behalf of the court. In this way, the courts are engaging in a deliberative dialogue in order to reach a position that is constitutionally sound.<sup>162</sup>

**c) *The flexibility of the remedies***

PIL results in remedies that are not restricted to the usual Common Law remedies such as compensation, damages or restitution. Depending on the jurisdiction, it can result in declarations, supervisory orders and structural injunctions. The different Common Law jurisdictions in Africa have a number of differences in how they approach the issue of remedies in PIL.

<sup>157</sup> For a discussion on standing in the US see generally MR Harmanis 'States' stances on public interest standing' (2015) 76 *Ohio State Law Journal* 729-763. Also see B Mqingwana 'An analysis of locus standi in public interest litigation with specific reference to environmental law: A Comparative study between the law of South Africa and the law of the United States of America' Unpublished LLM Thesis, University of Pretoria, 2011, 53-74.

<sup>158</sup> TW Arnold 'Trial by combat and the New Deal' (1934) 47 *Harvard Law Review* 913, 920-21.

<sup>159</sup> Chayes (n 10 above).

<sup>160</sup> In all jurisdictions, experts interested in guiding the courts apply to join the case as *amicus curiae* and may be admitted at the court's discretion. In India however, the courts call experts to guide them. See also J Cassels 'Judicial activism and public interest litigation in India: Attempting the impossible?' (1989) 37 *The American Journal of Comparative Law* 497.

<sup>161</sup> C Mbazira *Litigating economic and social rights in South Africa: A choice between corrective and distributive justice* 2009 165.

<sup>162</sup> CH Mendes *Constitutional Courts and Deliberative Democracies* (2013) 4.

In Botswana, section 18(2)(b) of the Constitution allows the High Court to ‘make such orders, issue such writs and give such direction as it may consider appropriate...’ Despite this expansive language, the courts have taken a restrictive approach and are yet to use structural interdicts and other creative remedies.<sup>163</sup> In Kenya, article 23(3) of the Constitution allows courts to issue specific remedies in cases of constitutional violations and these orders are compensation, judicial review, declaration of invalidity of laws, declaration of rights and injunctions. However, the courts in Kenya have gone beyond these and issued mandamus orders and structured injunctions which require specific actions to be undertaken within a specific timeframe as well as reports on progress to the courts.<sup>164</sup> In South Africa, section 38 of the Constitution gives the courts powers to issue ‘appropriate relief’, including declarations in case of constitutional violations. The Constitutional Court has gone ahead to use this provision to give declaratory orders and directions,<sup>165</sup> and sometimes supervisory orders or structural interdicts when deemed necessary.<sup>166</sup> It has also made it clear that the courts can formulate new remedies if it is what is necessary to protect and enforce the Constitution.<sup>167</sup> Courts in Uganda have largely limited themselves in regard to the remedies that they give, despite the Constitution allowing for more creative remedies. Both article 50(1) and article 137(3) of the Constitution allow courts to give ‘redress’ in case of violations. They do not define the extent of the redress and thus the courts are free to come up with more remedies. The courts, however, have only on rare occasions gone beyond declarations and compensation to issue supervisory orders.<sup>168</sup>

For the Common Law jurisdictions outside Africa that are considered in this study, each has its own unique attributes as regards remedies. In Belize, the Supreme Court is given powers to make ‘such declarations and orders, issue such writs and give such directions as it may

<sup>163</sup> For a discussion of the restrictive way in which judges in Botswana have so far handled PIL cases, especially on social-economic rights, see Dinokopila (n 48 above) 108-125, 119-125.

<sup>164</sup> See Kenyans for Peace with Truth and Justice et al (n 65 above) 21- 22.

<sup>165</sup> For example in *Government of the Republic of South Africa v Grootboom* (20011 1 SA 46, 3 LRC 209 (CC) where the Constitutional Court issued a declaratory order confirming the state’s constitutional obligation to provide housing to the poor.

<sup>166</sup> The Constitutional Court declared its power to issue such orders when necessary in the case of *Minister of Health v Treatment Action Campaign* (No 2) 120021 5 SA 721, 5 LRC 216 (CC). For a general discussion of the use of structural interdicts in South Africa, see C Mbazira ‘From ambivalence to certainty: Norms and principles for structural interdicts in socio-economic rights litigation in South Africa’ (2008) 24 *South African Journal on Human Rights* 1. For the available remedies in general, see Currie & de Waal (n 76 above) 189-228.

<sup>167</sup> *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 19.

<sup>168</sup> One case however that so far stands out is the 2017 High Court decision in *Centre for Health, Human Rights and Development (CEHURD) & 2 Ors v. The Executive Director, Mulago National Referral Hospital & Attorney General HCCS No. 212 of 2013 (Missing Baby case)* before Justice Lydia Mugambe where the court issued supervisory orders requiring the state institutions to report back to the court every four months on the steps taken to implement the decision.

consider appropriate' to enforce the rights protected in the Constitution.<sup>169</sup> Section 134 of the Constitution authorises courts to interpret existing laws 'with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution'. These are broad powers to come up with appropriate remedies that if used properly can make a huge difference. Indeed the Supreme Court has struck down legislation before, including the law criminalising same-sex relations.<sup>170</sup>

In Canada, section 24(1) of the Canadian Charter allows courts to give such remedies as they consider 'appropriate and just in the circumstances'. This makes it open to the courts to decide which remedies to give.<sup>171</sup> The Supreme Court has indeed upheld supervisory orders issued by a trial judge in the case of *Doucet-Boudreau v Nova Scotia (Minister of Education)* (*Doucet-Boudreau* case).<sup>172</sup> In that case, the trial judge had ordered Nova Scotia to build French language schools and report back to the court on the progress of construction. The Supreme Court noted the open nature of the wording in section 24(1) and held that remedies required to be responsive and effective,<sup>173</sup> taking cognisance of the principle of separation of powers.<sup>174</sup> This was an expansion on the earlier decision of *Schachter v Canada*,<sup>175</sup> which had limited the remedies to constitutional exemption, injunctions or damages.

In Nepal, article 133(3) of the Constitution gives the Supreme Court powers to issue 'appropriate orders and writs, including the writs of *habeas corpus*, *mandamus*, *certiorari*, prohibition and *quo warranto*'. This language does not exclude other remedies not specifically mentioned, and in this regard the Supreme Court has come up with innovative remedies. They have thus asked for laws to be tabled,<sup>176</sup> formed committees and issued detailed directives, including in LGB cases.<sup>177</sup>

<sup>169</sup> Belize Constitution, section 20(2).

<sup>170</sup> *Caleb Orozco* case, n 146 above.

<sup>171</sup> Indeed in *R v Mills* 1986] 1 SCR 863, the Supreme Court of Canada refused to list the remedies available stating that this was an unrestricted power and any remedy could be given.

<sup>172</sup> [2003] 3 SCR 3, 2003 SCC 62.

<sup>173</sup> Above.

<sup>174</sup> Such orders are usually controversial as the courts are seen as interfering with executive powers. This case was indeed controversial for this reason. See PW Hogg, et al 'Charter dialogue revisited- or 'much ado about metaphors''' (2007) 45 *Osgoode Hall Law Journal* 18. Also see PS Rouleau & L Sherman 'Doucet Boudreau, dialogue and judicial activism: Tempest in a teapot?' (2010) 41 *Ottawa Law Review* 171-207.

<sup>175</sup> [1992] 2 SCR 679

<sup>176</sup> For example in *Chanda Bajracharya v HMG* (Writ No. 2826 of the year 2051 BS) the court asked the executive to present a bill before parliament on gender discrimination after relevant consultations.

<sup>177</sup> See for example the Supreme Court's detailed orders in *The Sunil Babu Pant* case, n 128 above where a committee was formed to review the issue of same-sex marriages and report to the government, which had to consider the views of the committee.

In the case of the USA, the Constitution in article III section 2 gives the Supreme Court and other courts judicial powers with no limit on the nature of remedies. The Supreme Court started issuing structural injunctions in PIL cases with *Brown v Board of Education (Brown II case)*<sup>178</sup> requiring the authorities to report back on the steps taken to enforce the decision made in *Brown's* case.<sup>179</sup> However, the Supreme Court has eventually become more cautious in issuing such injunctions, starting from the 1974 case of *Miliken v Bradley*,<sup>180</sup> where the Court rejected the lower court's structural remedy issued to stop school segregation in Detroit.<sup>181</sup>

*d) Relaxation of the rules on costs*

The general rule in the Common Law system is that costs follow the event,<sup>182</sup> and they are intended to indemnify the winning party as far as possible.<sup>183</sup> In many of the Common Law jurisdictions considered in this study, the rules on costs for PIL cases are more relaxed. This is because imposing costs on persons acting in the public interest discourages more such actions for fear of paying costs.<sup>184</sup>

In Common Law African countries, it is only in South Africa and Uganda where apex courts have pronounced themselves on the principles applicable to costs in PIL cases. For South Africa, the Constitutional Court held in *Biowatch Trust v Registrar Genetic Resources & Others (BioWatch case)*<sup>185</sup> that as a general rule, unsuccessful parties in constitutional litigation should not be ordered to pay costs, except where the case was vexatious and frivolous or where there was 'conduct on the part of the litigant that deserves censure.'<sup>186</sup> Secondly, that where a rights case succeeds, then the state has to be ordered to pay costs.<sup>187</sup> Marcus et al describe this as a protective costs regime that encourages PIL.<sup>188</sup> Due to the exceptions cited in the *Biowatch* case, courts have gone ahead to award costs against public interest litigants even after the

<sup>178</sup> 349 US 294 (1955).

<sup>179</sup> For a discussion of how structural injunctions have been used in the USA to create social change see RL Hasen *Examples and explanations: Remedies* (2010) 170-176.

<sup>180</sup> 418 US 717 (1974).

<sup>181</sup> See Hasen (n 179 above) 171. Also see BW Joondeph 'Skepticism and school desegregation' (1998) 76 *Washington University Law Review* 161, 161.

<sup>182</sup> See W Blackstone *Commentaries on the law of England* (1765) 3, 403.

<sup>183</sup> *Harold v Smith* (1860), 5 H. & N. 381 at 385. For a discussion on costs and their history see C Tollefson 'Costs in public interest litigation revisited' (2011) 39 *The Advocates' Quarterly* 197.

<sup>184</sup> See C Tollefson, 'When the 'public interest' loses: The liability of public interest litigants for adverse costs awards' (1995) 29 *University of British Columbia Law Review* 303. Also see G Mayeda 'Access to justice: The impact of injunctions, contempt of court proceedings, and costs awards on environmental protestors and first nations' (2010) 6 *McGill International Journal of Sustainable Development Law & Policy* 143.

<sup>185</sup> (2009) ZACC 14.

<sup>186</sup> Above, para 21.

<sup>187</sup> As above, para 24.

<sup>188</sup> See Marcus et al (n 73 above) 134-137.

Constitutional Court's decision in *Biowatch*.<sup>189</sup> For Uganda, the Supreme Court recently held that even in PIL cases, costs follow the outcome. The only exception is where the court decides otherwise. However, the judge's decision must take into consideration all the circumstances of the case, including ensuring that parties are not discouraged from bringing public interest cases for fear of being condemned in costs.<sup>190</sup> This means that the judge has an important role to play in determining whether costs will be awarded against a losing party in a PIL case or not.<sup>191</sup> As regards LGB cases, the trend has so far been for the parties to settle their own costs in the Constitutional Court,<sup>192</sup> and for costs to be awarded against the losing party in the High Court.<sup>193</sup>

For Botswana and Kenya, just like in Uganda, the judges use their discretion. The common trend in Kenya so far in LGB SL cases is to order each party to settle its own costs or to make no order as to costs.<sup>194</sup> For Botswana, costs have generally followed the event. In the *LEGABIBO Registration* case there was no order as to costs made in the lower court, but at the Court of Appeal, the court awarded the costs to the applicants as requested.<sup>195</sup> In Kenya, in the *Eric Gitari* case, each party was ordered to pay its own costs as the matter was one of 'great public interest'.<sup>196</sup> For the UHAI-EASHRI-the East African Sexual Health and Rights Initiative and Health Development Initiative (HDI)-Rwanda application at the East African Court of Justice, costs were also awarded against the groups that unsuccessfully applied to file amicus briefs in the reference challenging Uganda's Anti-Homosexuality Act.<sup>197</sup> This is because under Rule

<sup>189</sup> This was for example done by the High Court in *Christian Roberts v Minister of Social Development* case no 32838/05 (2010) (TPD). For a discussion of the case and this trend see S Heleba 'Mootness and the approach to costs awards in constitutional litigation: a review of *Christian Roberts v Minister of Social Development* case no 32838/05 (2010) (TPD)' (2012) 15: 5 *Potchefstroom Electronic Law Journal* 567-599 [http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S1727-37812012000500018#back81](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812012000500018#back81) (accessed 1 February 2018).

<sup>190</sup> *Muwanga Kivumbi* case (n 11 above).

<sup>191</sup> A recent example is when the Constitutional Court dismissed the MIFUMI petition with costs due to counsel not being ready to proceed, as a way of punishing abuse of court processes. See 'Court dismisses anti-polygamy case' *Daily Monitor*, 25 September 2018. <https://www.monitor.co.ug/News/National/Court-dismisses-anti-polygamy-case/688334-4775994-pxk3ugz/> (accessed 11 Nov 2018).

<sup>192</sup> In the *Adrian Jjuuko* case, n 107 above, the parties were ordered to settle their own costs, while in the *Anti-Homosexuality Act* case, n 108 above, the court awarded half of the costs to the winning applicants

<sup>193</sup> The Court awarded costs against the state in the *Victor Mukasa* case, and against the respondents in the *Rolling stone* case. In the *Lokodo* case and the *SMUG Registration* case, costs were awarded against LGB activists, showing clearly that the High Court sticks to the general rule. This may perhaps be because the judges may not consider the cases as PIL since the High Court usually handles contentious civil matters, which is essentially what these cases were, although activists brought them as strategic cases.

<sup>194</sup> MJ Maithya 'The role of public interest litigation in the promotion and protection of the right to adequate housing: The case of Muthurwa estate in Nairobi, Kenya' Unpublished MA (Arts) Dissertation, University of Nairobi, 2016, 48.

<sup>195</sup> The *LEGABIBO Registration* case (n 51 above) para 81.

<sup>196</sup> *Eric Gitari* case (n 64 above) para 149.

<sup>197</sup> *UHAI EASHRI & Health Development Initiative-Rwanda v Human Rights Awareness & Promotion Forum (HRAPF) and The Attorney General of the Republic of Uganda* Applications No 20 and 21 of 2014 (East African Court of Justice).

111(1) of the East African Court of Justice Rules of Procedure 2013,<sup>198</sup> the costs are supposed to follow the event unless the court 'has good reasons to rule otherwise'. What the 'good reasons' should be is not defined.

Therefore, leaving it all entirely to the discretion of the judges is risky as it is never clear whether the party will be slapped with costs or not. It is for this reason that for the case of Kenya, Kenyans for Peace with Truth and Justice et al give a word of caution and advise that PIL cases should be clearly identified in court as such and frivolous suits should be avoided.<sup>199</sup> For the other countries considered in the study, the rule is generally that each party settles its own costs. In Belize, costs usually follow the event. However, for constitutional litigation, the Supreme Court Rules set the rule that no costs are to be awarded against an applicant except where the Court considers that the applicant has acted unreasonably in bringing the case or pursuing it.<sup>200</sup> In Canada, the courts usually order the successful litigants to be awarded special costs, and excuse the unsuccessful party from adverse costs.<sup>201</sup> The public interest consideration as regards costs was confirmed by the Supreme Court of Canada in *British Columbia (Minister of Forests) v Okanagan Indian Band*.<sup>202</sup> In Nepal, costs are generally awarded against PIL applicants in situations where the cases are found to be frivolous and vexatious.

In the USA, the one-way rule applies where each party settles its own costs, but where successful parties can recover reasonable attorney fees.<sup>203</sup>

#### e) *The court's role in enforcement*

The courts in PIL cases occasionally remain seized with the matter after delivering judgment, in which case the parties are usually required to report to them on the enforcement of the court's decisions. In Common Law Africa, courts in South Africa and of recent Kenya do follow up on the enforcement of their PIL judgments. In South Africa, the Constitutional Court of South Africa, where the situation so requires, directs the

<sup>198</sup> The East African Community 'East African Court of Justice Rules of Procedure' Legal Notices Supplement No. 1 to the East African Community Gazette No. 7 of 11th April 2013.

<sup>199</sup> See Kenyans for Peace with Truth and Justice et al (n 65 above) 22.

<sup>200</sup> Supreme Court Rules 2015 (Belize), Rule 56.13(6).

<sup>201</sup> See Tollefson (n1 83 above) 200. For example in *B (R) v Children's Aid Society of Metropolitan Toronto*, 1995 1 SCR 315 where the Supreme Court of Canada upheld a costs order to the applicants as against the Attorney General who had intervened in a case involving a family's protest against blood transfusion which was done against their wishes as Jehovah's Witnesses.

<sup>202</sup> *British Columbia (Minister of Forests) v Okanagan Indian Band* 2003 3 SCR 371 (SCC).

<sup>203</sup> See Tollefson (n 183 above) 197, 199 and also B Thompson 'The continuing innovation of citizen enforcement' (2000) *University of Illinois Law Review* 185, 192-193.



respondents to report back to them on the implementation of its orders.<sup>204</sup> The Court, for example, ensured that its orders in the *Makwanyane* case were implemented. In that case, it declared the death penalty unconstitutional and ordered for substitution of the sentences of convicted persons. In 2005, the Constitutional Court considered the circumstances in *Sibiya v Director of Public Prosecutions: Johannesburg High Court*,<sup>205</sup> in which convicted prisoners who had been sentenced to death challenged the government's slow efforts in substituting their punishments. The Court ordered the government to take all necessary steps to ensure substitution of the punishment and report back to the court in 60 days. The Kenyan courts have since 2010 been issuing mandamus orders and structured injunctions requiring the state to report back to the courts.<sup>206</sup> For Botswana and Uganda, these supervisory powers have not been generally employed.<sup>207</sup>

For the other Common Law countries outside Africa, different approaches apply depending on the prevailing conditions in the country. In Belize, courts do indeed read the laws with the necessary modifications to bring them into conformity with the Constitution, and this includes making orders reading words into the statutes.<sup>208</sup> That way, there is direct application of the Constitution by the courts. For Canada, the High Courts issue supervisory orders and the Supreme Court has declared this to be constitutional.<sup>209</sup> However, this is done rarely in light of the principle of separation of powers.<sup>210</sup> Indeed, the Supreme Court in the *Doucet-Boudreau* case ensured that the judgment was complied with.<sup>211</sup> In the case of Nepal, the Court issued detailed instructions.<sup>212</sup> In the USA, the Supreme Court started issuing structural injunctions in PIL cases with the *Brown II* case where the Court issued detailed orders and instructions for the enforcement of its decision in the *Brown* case, and requiring the authorities to report back on the steps taken to enforce the decision.<sup>213</sup> Since then, such remedies have been employed whenever necessary.<sup>214</sup>

<sup>204</sup> See Marcus et al (n 73 above). Also see Mbazira (n 161 above) 165.

<sup>205</sup> [2005] ZACC 6; 2005 (5) SA 315 (CC).

<sup>206</sup> See Kenyans for Peace with Truth and Justice et al (n 65 above) 21-22.

<sup>207</sup> With the exception of the *Missing Baby* case in Uganda, n 168 above.

<sup>208</sup> This was done in, among other cases, the *Orozco* case n 146 above, and in *San Jose Farmers' Cooperative Society Ltd v Attorney General* (1991) 43 WIR 63.

<sup>209</sup> The *Doucet-Boudreau* case (n 171 above).

<sup>210</sup> Indeed the *Doucet-Boudreau* case itself was won on a narrow majority (4-3). For the discussions on why this is so, see Rouleau & Sherman (n 174 above).

<sup>211</sup> Rouleau & Sherman (n 174 above).

<sup>212</sup> See for example the *Sunil Babu Pant* case, n 128 above.

<sup>213</sup> Hasen (n 180 above) 170-176.

<sup>214</sup> Above, 171.



### 2.3 The concept of social change

As JW Berry has pointed out, the term 'social change' is not easy to define.<sup>215</sup> Nevertheless, various sociologists have over the years attempted to define the term. Lauer defined it as 'alterations in social phenomena at various levels of human life from the individual to the global.'<sup>216</sup> Goodwin defined social change as 'any substantial shift in a political, economic, or social system.'<sup>217</sup> In terms of social change meant for purposes of redressing inequalities and overturning disadvantage, the change from a position of inequality to one of equality and from one of disadvantage to one of equal opportunities is what is considered as social change.<sup>218</sup>

The aspects that are usually considered to show that social change has taken place are social actions, interactions, attitudes, human relationships, perceptions, and cultures.<sup>219</sup> Time is an important element, as change can only be observed over a period of time: the before and the after.<sup>220</sup> The other important aspect is the dimension of change. For change to be regarded as social change, it has to be significant, not at the level of an individual but rather the society as a whole or at least a significant portion of it,<sup>221</sup> or it must be a change involving 'modification of basic institutions during a specific period.'<sup>222</sup> Rosenberg refers to this as 'significant social reform.'<sup>223</sup> Discussing what sort of change in terms of the law would amount to significant social reform, he stated that change affecting large groups of people as well as altering 'a whole set of bureaucracies or institutions nationwide' would qualify as significant social reform.<sup>224</sup> However, the changes do not have to be big on their own, it is the aggregate effect that matters.<sup>225</sup> In simple terms, therefore, social change can be defined

<sup>215</sup> JW Berry 'Social and cultural change' in HC Triandis & RW Brislin (eds) *Handbook of cross-cultural psychology* (1980) 211-279.

<sup>216</sup> RH Lauer *Perspectives on social change* (1977) 4.

<sup>217</sup> R Goodwin *Changing relations: Achieving intimacy in a time of social transition* (2009) 2.

<sup>218</sup> See for example, J Dovidio et al 'Commonality and the complexity of "we": Social attitudes and social change' (2009) 13 *Personality and Social Psychology Review* 3; and SC Wright & ME Lubensky (2008) The struggle for social equality: Collective action versus prejudice reduction. In S Demoulin et al (eds) *Intergroup misunderstandings: Impact of divergent social realities*, 291-310. See also M van Zomeren et al 'Put your money where your mouth is! Explaining collective action tendencies through group-based anger and group efficacy' (2004) *Journal of Personality and Social Psychology*, 87, 649.

<sup>219</sup> Above.

<sup>220</sup> This may be a short period of time as in situations of revolution or a longer period of time as in situations of evolution. See WE Moore *Social change* (1974) 22.

<sup>221</sup> Rosenberg uses the example of policy change affecting the whole nation. GN Rosenberg *Hollow hope: Can courts bring about social change?* (2008) 4.

<sup>222</sup> See A Giddens 'A reply to my critics,' in D Held and JB Thompson *Social theory of modern societies: Anthony Giddens and his critics* (1989) 45.

<sup>223</sup> As above.

<sup>224</sup> As above.

<sup>225</sup> Moore (n 220 above) 71.

as significant alterations, over time, in social actions, interactions, attitudes, human relationships, perceptions, and cultures. More specifically, in terms of addressing inequalities, social change refers to significant alterations over time in the socio-legal status of marginalised persons and groups.

Social change is always happening. It may be positive or negative, but change is always happening.<sup>226</sup> Sometimes, it is difficult to measure social change or even to know that it is taking place. Different theories have been put forward to explain how social change happens. One of these is the evolutionary (unilinear) theory, which originates from Charles Darwin's biological evolution theory, in which he asserts that life progresses from simple stages to more complex forms through a process of organic evolution.<sup>227</sup> This was applied to the social sciences to come up with the evolutionary theories, which are about change constantly happening and progressing slowly but steadily from one stage to another. Auguste Comte saw change as happening progressively in three stages: the theological where belief in supernatural powers was pre-eminent; the metaphysical, where the supernatural became more abstract, and the positive stage where reason and science prevail.<sup>228</sup> Durkheim on his part saw social change as happening due to changes in the structures that link people together: the law, norms, and sanctions, with specialisation and division of labour being key to causing the change to happen.<sup>229</sup> The other set of theories are the cyclical theories, which see change as happening in cycles, and therefore what has happened before will happen again and again. This was first forwarded by Pareto who saw power as changing in circles within elites, from the cunning to the violent.<sup>230</sup> Similarly, Sorokin saw society as moving through three stages: the ideational stage which is more about spiritual aspects; then the sensate which is about material aspects; and then the idealistic which combines both. At Sorokin's time of writing, western society was at the sensate stage, and would get to the idealistic stage, and then back to the ideation stage.<sup>231</sup> Then there are the structural-functionalist theories that see change as happening in order to restore the stability, such that when one component changes, the others adjust to the change in order to restore stability. Key proponents were Parsons Talcott<sup>232</sup> and Emile Durkheim.<sup>233</sup> Finally, there are the conflict theories, which are mainly Marxist in nature and see change as

<sup>226</sup> Giddens (n 222 above) 43.

<sup>227</sup> C Darwin *The origin of species* (1859).

<sup>228</sup> See generally, A Comte *Auguste Comte and positivism: The essential writings* (1866).

<sup>229</sup> E Durkheim & WD Halls *The division of labor in society* 1984.

<sup>230</sup> See generally V Pareto *The mind and society* (1916).

<sup>231</sup> P Sorokin *Social and cultural dynamics* (1937).

<sup>232</sup> T Parsons *Societies: Evolutionary and comparative perspectives* (1966).

<sup>233</sup> Durkheim, n 229 above.

happening in a revolutionary and rapid way, overthrowing the existing order, and propose that this was bound to happen. The exploitation by the bourgeoisie of the proletariat is what causes this rapid change.<sup>234</sup> Of course, where it is a revolutionary change, the changes are obvious but where it is evolutionary, 'major changes in the magnitude or direction of societies may be very slow in developing and perhaps not become apparent for generations.'<sup>235</sup> There is, therefore, need to consistently measure the changes over time. At the same time, not all change may be moving in the same direction, and there are possibilities of the immediate change appearing like it is retrogressive, but when considered over a long period of time, it is actually positive change.

There are factors that influence the occurrence, direction, and speed of social change. Among these are changes in technology; actions of influential individuals, leaders or the elite; changes in the law; and major natural disasters. By manipulating these factors, one can be able to influence social change either positively or negatively. Regarding legal change, because of the binding and coercive nature of the law, when there is a change in the law, it is expected that members of society have to act accordingly in order to align their behaviour and actions with what the law requires. As Tocqueville stated: 'A law can modify the social state that seems most definitive and most firm, and with it, everything changes.'<sup>236</sup> It is however not merely the change in the law that creates social change, but rather the change in the law having the ability to cause a change in societal attitudes and perceptions.<sup>237</sup> Other factors that make social change to happen may as well fall out of the legal process and lie in political processes such as election cycles and the coming into office of influential leaders. During such times, political leaders usually make changes depending on what they think will obtain for them more votes, or what in their view would be good for society. Therefore changes in the law are just one of the factors that determine the extent to which social change occurs.

Stoddard pointed out that there are some laws that are 'rule shifting' and those that are 'culture shifting.'<sup>238</sup> In his analysis, rule shifting laws are those that touch specific groups and not everyone, that do not proscribe conduct and indeed have limited impact, while culture shifting laws are those that affect large groups of people and cannot be ignored. He

<sup>234</sup> K Marx *The Communist manifesto* (1992).

<sup>235</sup> Above, 16.

<sup>236</sup> Tocqueville (n 31 above) 483.

<sup>237</sup> TB Stoddard 'Bleeding heart: Reflections on using the law to make social change' (1997) 72 *New York Law Review* 967, 972.

<sup>238</sup> Above, 972-973.

pointed out that for a change in law to be ‘culture shifting’ rather than merely ‘rule shifting,’ it must be ‘a change that is very broad or profound,’ there must be ‘[p]ublic awareness of that change;’ there must be ‘[a] general sense of the legitimacy (or validity) of the change;’ and there must be ‘continuous enforcement of the change.’<sup>239</sup> In his view, for a change to be broad or profound, it should be able to affect a large number of people in a profound way. Usually, laws that proscribe conduct and require bureaucracies and people to behave differently, with sanctions for non-compliance or rewards for compliance, rather than those that are merely declaratory, have this sort of impact.<sup>240</sup> On the issue of public awareness, if the change in the law is widely disseminated and people know about the change and how it will affect them, the chances of the law being adhered to are higher than if only a handful of people get to know about the change.<sup>241</sup> On legitimacy, he states that a law requires ‘an aura of moral and cultural legitimacy to sustain widespread adherence to any new code of conduct.’<sup>242</sup> Legitimacy goes to acceptance of the law and acceptance of the power of the law-making body to make such a law, which leads to limited or no resistance to the law. Cultural validity of a law is very important in this regard. The law should be able to align with people's values and cultures.<sup>243</sup> Finally, if the change in the law is strictly enforced, then people are more likely to adhere to it than if there is no enforcement whatsoever or mere pretence at enforcement.<sup>244</sup>

It is not always the case that legal change precedes social change, as sometimes society's perceptions and attitudes may change before the law does, and in such cases, the law would just have to play catch-up with society. This however usually happens for popular issues. For unpopular issues, the law usually changes before society can change and in such cases, the law can be said to have contributed to the social change that later follows.

#### **2.4 The potential of strategic litigation to influence social change generally**

Roscoe Pound famously pointed out that the law should be used to change society through a process of social engineering.<sup>245</sup> Indeed, one of the ways of social engineering is through SL, as it can lead to a change in the law and consequently influence social change. SL relies on the

<sup>239</sup> Above, 978.

<sup>240</sup> Above, 978-980.

<sup>241</sup> Above, 980-982.

<sup>242</sup> Above, 983.

<sup>243</sup> Above, 982-986.

<sup>244</sup> As above 986-987.

<sup>245</sup> See generally R Pound *Social control through law* (1942).

powers of the third arm of government, the judiciary, to bring about a change in laws. The judiciary has powers in a democracy to nullify laws made by the legislature and to validate executive actions, thus effectively making law.<sup>246</sup> When laws are changed, then society's conduct can be arranged in accordance with the new legal order, thus leading to social change.

Litigation leads to social change both directly and indirectly. It does this directly when there is a victory in court involving the nullification of a law, the ordering of the legislature to pass another law or the interpretation of a law that effectively changes that law. In its turn, changing the law has ramifications for the wider society,<sup>247</sup> as the coercive nature of the law requires people to align their conduct to match with the law, thus effecting social change. Handler highlights the importance of court victories by showing that various social movements relied on success in the courtroom to stimulate social change.<sup>248</sup> Keck also highlights that despite the backlash that court victories sometimes spur, the gains from a win in court cannot be understated.<sup>249</sup> Even Rosenberg, who generally argues that courts cannot create social change, recognises that winning is the first step towards creating change.<sup>250</sup>

Indirectly, the power and aura of the courts in itself implies that even simply bringing a case to court will be enough to create what Galanter refers to as 'radiating effects.'<sup>251</sup> The courts have both special effects, which apply to the individual concerned, and general effects, which affect the population at large, and the application of all these forces may radiate into social change.<sup>252</sup> In this regard, even loss will not be very bad as the fact that the matter was brought before court will increase awareness of the injustices that are inherent in that particular law,<sup>253</sup> and the judgment will also generate debate on the particular issue, thus creating the desired political momentum for change.<sup>254</sup> Court decisions also affect different people differently and therefore can spur different reactions.<sup>255</sup>

<sup>246</sup> See Oloka-Onyango (n 29 above) 1-12; also see generally M Gomez *In the public interest: Essays on public interest litigation and participatory justice* (1993).

<sup>247</sup> Oloka-Onyango (n 84 above) 766.

<sup>248</sup> See JF Handler *Social movements and the legal system: A theory of law reform and social change* (1978) 22.

<sup>249</sup> TM Keck 'Beyond backlash: Assessing the impact of judicial decisions on LGBT rights' (2009) 43 *Law and Society Review* 151, 156-57

<sup>250</sup> Rosenberg (n 221 above) 31.

<sup>251</sup> M Galanter 'The radiating effects of courts' in K Boyum & L Mather (eds) *Empirical theories about courts* (1983) 117, 125-26.

<sup>252</sup> Above, 121.

<sup>253</sup> See generally, D NeJaime 'Winning through losing' (2011) 96 *Iowa Law Review* 941; MW McCann *Rights at work: Pay equity reform and the politics of legal mobilization* (1994).

<sup>254</sup> Gloppen, n 26 above.

<sup>255</sup> McCann, n 253 above.

Another way that loss can contribute to social change is when it spurs protests and social movements among those dissatisfied with the court's decision,<sup>256</sup> which can lead legislatures to act.<sup>257</sup> It will also most likely lead to appeals and further plans on how to overturn the law, thus bolstering the movement.<sup>258</sup> Also, failed cases have the capacity to inspire copycat suits which are filed by other people using the example of the initial one, in a bid to pile more pressure, and thereby forcing eventual victories or changes.<sup>259</sup> Finally, bringing a matter to court, even if it fails, can spur negotiations, which can eventually lead to social change. These negotiations can be two fold, those between the judges as they formulate their decision, which may lay the ground for future success,<sup>260</sup> and between the applicants and public officials, which may eventually lead to the desired change happening.<sup>261</sup> Therefore, court action is important in spurring or influencing social change, whether there is a victory or not.

#### 2.4.1 Advantages of using courts to advance social change

The use of the courts to influence social change stems from the advantages that courts in Common Law countries have over the other state organs as regards influencing change. These are:

##### *a) The power of the courts to nullify laws or declare conduct unconstitutional*

The higher courts in most Common Law countries have the powers to declare laws unconstitutional, and either make alterations themselves or order the legislature or the executive to make the necessary alterations. This is so even in those countries like Canada that still follow the principle of parliamentary supremacy, although in such cases, the courts merely 'advise' and not order the legislature, with the real possibility of the legislature refusing to abide by the advice.<sup>262</sup> In most other Common Law countries, however, these decisions are binding on the executive and the legislature. This special power of the courts is in line with the principle of checks and balances where the different organs of the state act as checks on the other organs' powers. Although this power is controversial and in some instances regarded as anti-

<sup>256</sup> SA Scheingold *The politics of rights: Lawyers, public policy, and political change* (1974) 131.

<sup>257</sup> JL Sax 'Defending the environment: A strategy for citizen Action' (1972) 47 *Indiana Law Journal* 157.

<sup>258</sup> As above.

<sup>259</sup> Yiyi Lu discusses this as a strategy used in China against the railway companies in order to bring prices down and improve quality. See Y Lu *Public interest litigation and political activism in China* (2008) 16-17 [http://publications.gc.ca/site/archivee-archived.html?url=http://publications.gc.ca/collections/collection\\_2008/dd-rd/E84-24-2008E.pdf](http://publications.gc.ca/site/archivee-archived.html?url=http://publications.gc.ca/collections/collection_2008/dd-rd/E84-24-2008E.pdf) (accessed on 20 May 2017).

<sup>260</sup> Mendes, n 162 above.

<sup>261</sup> R Cavanagh & A Sarat 'Thinking about court: Toward and beyond a jurisprudence of judicial competence' (1980) 14 *Law & Society Review* 371, 405.

<sup>262</sup> Even in such cases, the court ruling will still take effect after five years if it is a decision concerning human rights. This is under section 33 of the Canadian Charter. See discussion in n 33 above.



democratic,<sup>263</sup> it is an inbuilt protection in the democratic system<sup>264</sup> and in practice, courts do indeed nullify statutes and reverse executive actions in all Common Law jurisdictions considered in this study.<sup>265</sup>

**b) *The binding power of the decisions of the courts***

In all jurisdictions considered in this study, court decisions bind every party to the case, including the state. Decisions of superior courts are binding on the state and on the lower courts. The only exception is Canada, where the legislature can opt out of the decision for up to five years,<sup>266</sup> but this rarely happens. The courts have the powers to find any party that does not act in accordance with the orders of the courts to be in contempt. The Common Law doctrine of precedent ensures that decisions of the higher courts bind lower courts. According to Lord Reid,

A decision of the House of Lords [the then highest court in England] is final not because it is right but because no one can say it is wrong—except writers in legal journals.<sup>267</sup>

This implies that what the courts order is more likely to be enforced than not. This is what makes the courts a good avenue to create legal change which is expected to lead to social change as it reorders conduct of all affected persons in the country.

**c) *The ability of strategic litigation to lead to political mobilisation***

Courts are a legitimate way of engaging the state on any issue. It is always clear that the actions are in support or further propagation of the court case and so people can engage and use the case as a rallying point. In this way, court action has the potential to mobilise people around a cause in a legitimate and legal way.<sup>268</sup>

<sup>263</sup> For this argument see for example AM Bickel *The least dangerous branch: The Supreme Court at the bar of politics* (1962) 16-17. S Holmes 'Precommitment and the paradox of democracy' in J Elster and R Slagstad (eds) *Constitutionalism and democracy* (1988) 195; and RN Daniels & J Brickhill 'The counter majoritarian difficulty and the South African Constitutional Court' (2006) 25 *Pennsylvania State International Law Review* 371.

<sup>264</sup> JH Ely *Democracy and distrust: A theory of judicial review* (1980) 153.

<sup>265</sup> See discussion in 2.2.3 above.

<sup>266</sup> As discussed in n 33 above.

<sup>267</sup> See L Reid 'The judge as law maker' (1972) 12 *Journal of Society of Public Law Teachers* 22.

<sup>268</sup> FW Jjuuko 'Law and access to justice and the legal system in contemporary Uganda' (2004) 76 *Law and Access to Justice in East Africa* 102.

## 2.4.2 Challenges in using courts to create social change

There are identified and well-recognised challenges in using courts to create social change. These challenges stem from the positioning of the courts within the democratic system, which makes courts' decisions illegitimate where they overturn the popular will, and the inability of the courts to enforce their own decisions; the narrow nature of constitutional rights which limits arguments that can be made; the judicial structure and set up which makes it difficult to follow up judgments; and the effect of SL as a strategy on movement building. Although each of these limitations has valid counter-arguments, they remain largely applicable. Some of them are:

### a) *Illegitimacy of courts*

Courts can only be effective when they have sufficient legitimacy to be respected.<sup>269</sup> Courts' powers to overturn laws made by popularly-elected legislatures and to overturn the actions of a democratically-elected executive are anti-democratic and thus illegitimate. This is the 'counter-majoritarian difficulty' first articulated by Bickel. Bickel contended that unelected judges should not nullify statutes made by elected representatives as they are not answerable to the people, and the people are powerless to overturn the courts' decision.<sup>270</sup> Others have since argued that it should be the people with the ultimate power to interpret the Constitution.<sup>271</sup> Since this is not practical, however, it would only make sense that the legislature, which is composed of elected representatives of the people, should be the one with the powers to interpret the Constitution and drive constitutionalism, rather than unelected judges.<sup>272</sup> This argument of illegitimacy has real implications where the other organs refuse to respect the courts' decisions or where the people act like the decision has no legitimacy. This is what Rosenberg identifies as 'Constraint II'- that '[t]he judiciary lacks the necessary independence from the other branches of government to produce significant social reform'.<sup>273</sup> In such cases, no positive social change will occur and instead, there will be backlash. According to Baxi, judges are appointed by the executive and in some ways must pay allegiance to it. Even if they later follow a mind of their own, they can never be completely severed from the system and therefore usually act with constraint.<sup>274</sup>

<sup>269</sup> See TR Tyler 'Psychological perspectives on legitimacy and legitimation' (2006) 57 *Annual Review of Psychology* 375.

<sup>270</sup> Bickel (n 263 above) 17-13.

<sup>271</sup> LD Kramer *The people themselves: Popular constitutionalism and judicial review* (2004) 128, 144.

<sup>272</sup> R West 'Progressive and conservative constitutionalism' (1990) *Georgetown Public Law and Legal Theory Research Paper No. 11-46*.

<sup>273</sup> Rosenberg (n 221 above) 15.

<sup>274</sup> U Baxi, 'Judicial discourse: Dialectics of the face and the mask' (1993) 1 *Journal of the Indian Law Institute* 1.

The response to the argument is that a power that is part of the system of democracy cannot be undemocratic and illegitimate. The judiciary's powers are part of the system of checks and balances, which is the modern manifestation of Montesquieu's separation of powers doctrine. It is a power meant to protect the constitution against majoritarian impulses – the tyranny of the majority.<sup>275</sup> For other countries, the difficulty also has limited application as the courts are deliberately given wide powers within the Constitutions to nullify statutes or review executive actions as part of an agreed compromise,<sup>276</sup> unlike the US Supreme Court where the power is simply inferred.<sup>277</sup>

In less established democracies however, courts are usually illegitimate not because of their positioning within the democratic systems, but rather because they are seen as foreign impositions introduced by the colonialists to facilitate exploitation and subjugation through colonialism.<sup>278</sup> Even post-independence, they are usually much more aligned to the executive in nascent democracies and are therefore seen as being against the people, as the case was for the Indian courts during the time of Indira Gandhi,<sup>279</sup> and indeed for most African countries. The response to this strand of illegitimacy would be that once the courts start to behave in a way that protects the public - as the Indian courts did after Indira Gandhi - then the legitimacy will return as this is not inherent illegitimacy but rather one that is dictated by circumstances. There are various other factors, beyond the institutional positioning of the courts, which could potentially undermine their legitimacy. Considerations such as the absence of sufficient judicial independence which manifests in politicisation of the courts, the absence of an independent judicial selection process, corruption within the judiciary as well as inefficiency and resource constraints<sup>280</sup> could all limit the effectiveness of the use of courts to bring about social change.

<sup>275</sup> Tocqueville n 31 above; Mill n 31 above.

<sup>276</sup> For example for the case of the South African Constitutional Court, it was deliberately given these powers to check executive and parliamentary excesses following the end of legal apartheid. For a discussion of this see Also see generally, RN Daniels & J Brickhill 'The counter-majoritarian difficulty and the South African Constitutional Court' (2006) 25 *Penn State International Law Review* 371. In Nepal, the Supreme Court was given wide powers as a way of controlling the warring political entities. For a detailed discussion see R Stith 'Unconstitutional constitutional amendments: The extraordinary power of Nepal's Supreme Court' (1996) 11:1 *American University International Law Review* 47, 55.

<sup>277</sup> This was in the case of *Marbury v Madison*, n 37 above.

<sup>278</sup> Oloka-Onyango (n 29 above) 26-34.

<sup>279</sup> See generally A Bhuwania 'Courting the people: The rise of public interest litigation in post emergency India' (2014) 34 *Comparative Studies of South Asia, Africa and the Middle East* 314-335; and V Gauri 'Public interest litigation in India: Overachieving or underachieving' Policy Research Working Paper 5109 (2009) 2.

<sup>280</sup> See generally JB Diescho 'The paradigm of an independent judiciary: Its history, implications and limitations in Africa' [http://www.kas.de/upload/auslandshomepages/namibia/Independence\\_Judiciary/diescho.pdf](http://www.kas.de/upload/auslandshomepages/namibia/Independence_Judiciary/diescho.pdf) (accessed 25 March 2016).

***b) Courts cannot enforce their decisions and so they have to rely on other organs***

Courts cannot directly create social change as they cannot enforce their own decisions.<sup>281</sup> Alexander Hamilton called them the 'least dangerous branch' because they 'have no influence on either the sword or the purse.'<sup>282</sup> Handler states that courts almost become impotent when confronted with difficult problems of enforcement. Where the executive or the legislature is not willing or where it is difficult to act, then it becomes challenging to have the required change through the courts.<sup>283</sup> Handler called this the bureaucratic contingency.<sup>284</sup> For the case of India, Baxi highlights that the very active courts have to deal with the deliberately slow enforcement by the executive and the legislature.<sup>285</sup> Rosenberg considers this from the perspective of lack of the requisite judicial independence. In his view, courts lack the independence to implement their decisions as they have to rely on the other two organs for power and money.'<sup>286</sup> These challenges are real for countries in Common Law Africa, as the courts are usually intimidated and in some cases warned off by the executive, or their decisions reversed by the legislature.<sup>287</sup> Therefore, if the courts need to rely on others to enforce their decisions, it would be wrong to claim that the courts can lead to social change without the support and respect of the other organs. It could as well be that the courts are left out of the equation, and the other organs directly lobbied as, according to Rosenberg, 'Political organising, political mobilization, and voter registration are the best if not the only hope to produce change.'<sup>288</sup>

This argument is met with the counterargument that courts usually make decisions and orders that can be implemented. Where they give extensive and complicated orders, they usually have the capacity to monitor the actions of the other organs as the case is in India,<sup>289</sup> South Africa<sup>290</sup> and the USA.<sup>291</sup> For countries like Uganda where judicial independence is not guaranteed, courts usually make declarations rather than detailed orders, or in some cases avoid decisions on substantive grounds and instead use procedural lapses to nullify

<sup>281</sup> Rosenberg (n 221 above).

<sup>282</sup> A Hamilton et al *The Federalist Papers* (1961) 465.

<sup>283</sup> Handler, n 249 above.

<sup>284</sup> Above 18-19.

<sup>285</sup> Baxi (n 272 above) 10-12.

<sup>286</sup> Rosenberg (n 221 above) 3.

<sup>287</sup> For the case of Uganda, see generally, International Bar Association 'Judicial independence undermined: A report on Uganda' 2007.

<sup>288</sup> Rosenberg (n 221 above) 431.

<sup>289</sup> Cassels (n 160 above) 505.

<sup>290</sup> Marcus et al (n 73 above) 124-125.

<sup>291</sup> For example in *Brown v Board of Education of Topeka*, 349 U.S. 294 (1955) - (*Brown II* case), the Supreme Court issued detailed orders on what had to be done to implement the decision in the *Brown* case and threatened sanction on those who did not comply, as well as requiring reporting back on steps taken.

laws as the case was in the *AHA* case in Uganda.<sup>292</sup> Again courts also have powers to punish those who refuse to comply with their orders including imposing criminal sanctions on them as the case is for contempt of court proceedings.<sup>293</sup>

c) *The limitations of using constitutional rights as a basis for court action*

SL relies on the use of constitutional rights that are interpreted and declared by the courts. These rights are limited within certain parameters and only those rights that are recognised are the ones that can be claimed. Rosenberg regards this as ‘Constraint I’ as to why courts cannot lead to social change. He frames it as follows:

The bounded nature of constitutional rights prevents courts from hearing or effectively acting on many significant social reform claims and lessens the chances of popular mobilisation.<sup>294</sup>

This limitation implies that many issues cannot be brought before the courts, and yet these are the very issues that would require a resolution one way or the other. Handler is also of the opinion that framing issues as constitutional rights limits their wider emotional appeal, and therefore weakens the case and quest for the realisation of the claims.<sup>295</sup> Scheingold warned against the ‘myth of rights,’ which diverted attention from the political roots of social problems and simply narrowed them down as rights claims.<sup>296</sup>

The response to this argument would be that many constitutions actually contain a provision recognising rights that are not expressly mentioned in the constitution,<sup>297</sup> and that judiciaries have also adopted the concept of implied rights, where rights can be read into other rights even where they are not expressly stated. The concept of implied rights has been employed in many countries to recognise rights that are not expressly protected. In Uganda, the right to livelihood was implied under the right to life in the case of *Salvatori Abuki v Attorney General*.<sup>298</sup> Indian courts have implied a number of rights in a bid to protect the

<sup>292</sup> *Anti-Homosexuality Act* case, n 108 above.

<sup>293</sup> See M Langford, C Rodriguez-Garavito & J Rossi ‘Introduction: From jurisprudence to compliance’ in M Langford, C Rodriguez-Garavito & J Rossi *Social rights judgments and the politics of compliance: Making it stick* (2017) 3, 10.

<sup>294</sup> Rosenberg (n 221 above) 13.

<sup>295</sup> Handler (n 249 above) 33.

<sup>296</sup> Scheingold (n 256 above) 3-10.

<sup>297</sup> All the constitutions of the Common Law countries considered in this study have this provision, except for Botswana: Article 45 of Uganda’s Constitution; article 19 of Kenya’s Constitution; and section 39 of the Constitution of South Africa.

<sup>298</sup> Constitutional case No. 2 of 1997.

environment.<sup>299</sup> This would allow all arguments to be framed as rights issues and be decided upon by the courts.

*d) Unfriendly court processes and procedures*

The courts themselves are not set up to create or inspire social change, as they are rigid, and not user-friendly. This is based on the nature of the claims that can be made in courts of law, and the way the judiciary behaves and acts in reaction to them.<sup>300</sup> The courts have a number of rules and ways of framing cases that are rigid, for example filing complaints or applications in a particular way, which usually requires the use of lawyers, thus limiting many who would want access but lack the necessary resources. Also, the decisions and orders are made in abstract terms that are not necessarily easy to interpret and make use of by the persons for whom they are meant. This implies that even positive decisions may not be understood and may not be implemented because of the language used in the judgment. For African Common Law countries, this challenge is further exacerbated by the low levels of literacy in many of the countries,<sup>301</sup> and the disconnect between the judiciary and the more acceptable and familiar forms of justice, since the western model judiciary was simply imposed as a result of colonialism.<sup>302</sup>

This argument can in part be met with the response that PIL is inherently designed to be easier and court processes are usually simplified to enable it.<sup>303</sup> Social movements also employ cause lawyers who understand the court processes and practices, and thus are able to utilise the court system and to ensure implementation such that the judgments have meaning for those who may not easily appreciate the court decisions and what they mean.<sup>304</sup> This argument would, however, be weak for the African context as there are yet very few

<sup>299</sup> *Sunil Batra v Delhi Administration* AIR 1978 SC 1675, where the right to a healthy life was implied under the right to life, and in *Maneka Gandhi v Union of India* 1978 AIR 597, 1978 SCR (2) 621 where the right to dignity was also implied under the right to life.

<sup>300</sup> Judges in many jurisdictions dress in wigs and sit on elevated benches, looking down upon everyone else in the courtroom, making them largely unreachable figures to be feared: philosopher kings.

<sup>301</sup> As at September 2015, among the countries being studied South Africa has the highest literacy rate at 94.3%, followed by Botswana at 88.5%, then Kenya 78%, and finally Uganda 73.9%. These figures are for persons above 15 years who can read and write. UNESCO Institute for Statistics 'Literacy statistics metadata information table' September 2015 <http://www.cedol.org/wp-content/uploads/2012/02/lit-stats.pdf> (accessed 20 May 2017).

<sup>302</sup> See for example T Chopra 'Peace vs justice in Northern Kenya: Dialectics of state and community laws' in JC Ghai & Y Ghai (eds) *Marginalised communities and access to justice* (2010) 193 where she discusses that the locals do not care about the courts because in their view the courts are less legitimate as they do not understand them.

<sup>303</sup> See discussion above, section 2.2.4.

<sup>304</sup> For example, in the USA, cause lawyering has become a separate arm of the legal profession with lawyers dedicated to that. See for example the work of Scheingold & Sarat (n 24 above) 269.



specialised lawyers focusing on PIL.<sup>305</sup>

*e) Litigation deflects social movement energies*

SL is an elitist strategy, which usually requires all available efforts and resources to be focused on it and alternative actions or strategies to be neglected.<sup>306</sup> All the planning goes into litigation and people's hopes are raised, waiting for an answer from the courts. Even when there is a win, the door to more engagement and advocacy may be closed and thus no real social change is effected. Ultimately, the social movement has been weakened.<sup>307</sup> It is also usually spearheaded by professionals and may fail to accurately and holistically reflect the views of the affected groups.<sup>308</sup>

The response to these criticisms has been to point out that litigation *per se* is a form of social mobilisation. Having elites in the movement is not necessarily a problem but rather an advantage as they convert social concerns into claims that can stand the constitutional test,<sup>309</sup> and they are also people with greater social influence and authority.<sup>310</sup> On the issue of draining important resources, Handler considers the ability of litigation to enhance the image of the movement, attract influential members and leaders, and even lead to the mobilisation of resources from other persons or groups.<sup>311</sup>

Therefore, SL remains a recognised and important avenue for creating social change. The arguments against it are largely valid, but as Cummings and Rhode observe, just because SL has these shortcomings does not imply that political mobilisation as an alternative is free from the same defects.<sup>312</sup> In this regard, Hunter recommends that the choice to use litigation or other processes depends on time and opportunity, and so a prescriptive approach must be avoided.<sup>313</sup> For the case of Common Law Africa however, the options may not be as neatly available as they are in the US context and those of other developed countries due to the difference in history and the differences in how people perceive courts in a country with legal pluralism. Therefore in such cases, the inability of courts to create social change may

<sup>305</sup> Oloka-Onyango (n 31 above).

<sup>306</sup> M Galanter 'Why haves come out ahead: Speculations on the limits of social change' (1974) 9 *Law and Society Review* 1.

<sup>307</sup> Scheingold (n 256 above) 3-10.

<sup>308</sup> Gloppen, n 26 above.

<sup>309</sup> D NeJaime 'Constitutional change, courts and social movements' (2012) 111 *Michigan Law Review* 897.

<sup>310</sup> JM Balkin *Constitutional redemption: Political faith in an unjust world* (2011) 182.

<sup>311</sup> Handler (n 248 above) 209.

<sup>312</sup> See SL Cummings & DL Rhode 'Public interest litigation: Insights from theory and practice' (2008) 36 *Fordham Urban Law Journal* 603.

<sup>313</sup> N Hunter 'Lawyering for social justice' (1997) 72 *New York University Law Review* 1009, 1017.

not be inherent but rather as a result of the prevailing political, social and economic conditions which causes courts to be out of touch with the realities on the ground for the people.

## 2.5 The potential of courts to influence social change on LGB issues

While there are many arguments for and against using SL to achieve social change, the situation becomes much more complicated when it comes to social change for LGB persons within a context of homophobia, as is currently prevailing in the selected Common Law countries in Africa. In this respect, there is a need for more introspection and a critical re-examination of the arguments already laid out. This is because in a situation of homophobia, there is already resistance by the general population, and by the executive, the legislature and most likely even the courts themselves. Therefore, each advantage of using litigation has to be double-checked in order to ensure that taking such a strategy does not cause more harm through excessive backlash, and each argument against using litigation has to be re-examined to see how it applies in such a situation.

### 2.5.1 The power of SL to spur social change on LGB issues

SL has been said to be the best, if not the only strategy, to achieve social change in circumstances of active homophobia and hostility.<sup>314</sup> The reasons for this opinion are:

#### a) *Courts have the power to nullify laws passed by the legislature*

This argument was already made in support of using the courts generally to create social change. However, in light of existing conditions of homophobia, the courts' powers to nullify statutes become even more important in the protection of the rights of LGB persons. Protection of minorities in a democracy is usually done through incorporating a Bill of Rights in the Constitution, thus making it part of the supreme law, and subjecting all other laws to the Constitution. The judiciary, usually the higher courts, are given powers to interpret the Bill of Rights, and in this regard subject all other laws and actions to the standards set out in the Constitution. Courts are constitutionally bound to protect minorities,<sup>315</sup> and so even if a statute is popular, once it violates the rights of minorities, the courts have an obligation to nullify such

<sup>314</sup> E Zackin 'Popular constitutionalism's hard when you're not very popular: Why the ACLU turned to courts' (2008) 42 *Law & Society Review* 367-95. Handler (n 248 above) 22.

<sup>315</sup> Ely (n 264 above).

a statute. This is why SL is said to be a great avenue through which to enforce the rights of disadvantaged and marginalised persons.<sup>316</sup>

**b) Courts are bound to take on any case and to make a decision**

Even if they may not want to, courts are bound to receive, hear and decide LGB cases. They may delay the case, but ultimately it has to be decided. For example, the Ugandan case of *Jjuuko Adrian v Attorney General*<sup>317</sup> spent eight years in court (2009 -2016) before being decided, which was a much longer period than the average period that constitutional cases spend in court, even in a country with a big case backlog problem. The case concerned whether section 15(6)(d) of the Equal Opportunities Commission Act, which stopped the Commission from investigating matters regarded as 'immoral and socially unacceptable by the majority', was constitutional. One would not be faulted for thinking that the subject matter of the case was one of the reasons why the judgment was not given upon its first hearing, and the case had to be heard again six years later in 2016.<sup>318</sup> Also, such cases must be decided on constitutional grounds and in situations where the constitution is clear, there may be very little for even the most homophobic judge to use to fail to apply the constitution as it is. This explains why many LGB cases have been successful in the Common Law African countries under consideration even with the high levels of homophobia. In Botswana, by the end of 2018, two out of four completed cases had been successful; in Kenya all the decided cases were successful; in South Africa, ten out of eleven cases on LGB rights were successful; and in Uganda, there were four victories so far out of eight completed cases.<sup>319</sup>

**c) Court action gives legitimacy to community mobilisation and organising**

In situations of homophobia, court action may be the only legitimate way of organising and mobilising, as many other actions may be illegal or put LGB persons at far greater risk of being harmed. In Uganda, for example, organising strategy meetings or group meetings freely would not be easy without a case going on. Indeed, so far at least nine events organised for LGB persons have been stopped in the last ten years.<sup>320</sup> In Botswana and Kenya, LGB groups were

<sup>316</sup> See for example Deva (n 3 above) 19-40, 19-20.

<sup>317</sup> Constitutional Petition No. 1 of 2009.

<sup>318</sup> Human Rights Awareness and Promotion Forum 'Section 15(6)(d) of Uganda's Equal Opportunities Commission Act declared unconstitutional' <https://www.hrapf.org/index.php/10-hrapf-news/56-section-15-6-d-of-uganda-s-equal-opportunities-commission-act-declared-unconstitutional> (accessed 11 November 2018).

<sup>319</sup> For a detailed discussion of the cases, see Chapter 3 below, section 3.2.2.

<sup>320</sup> The latest event was the IDAHOBIT celebrations at Sexual Minorities Uganda offices on 17 May 2018. See 'Minister Lokodo halts Uganda's 2018 IDAHOBIT event' *Kuchu Times* 17 May 2018 <https://www.kuchutimes.com/2018/05/minister-lokodo-halts-ugandas-2018-idahobit-event> (accessed 19 August 2018).

denied registration and thus the freedom to operate before the court decisions.<sup>321</sup> In all these countries, no single court hearing has been stopped, or people turned away. This is therefore an important power that can give legality to the activities of groups that are mobilising.

**d) *The courts are usually the only political avenue left for LGB persons***

Courts are bound under the Constitution to protect all persons using constitutional principles.<sup>322</sup> This appeals more to unpopular and marginalised groups that may not be able to appeal to public opinion.<sup>323</sup> Indeed, in many cases, there may be no option of engaging the populist bodies.<sup>324</sup> In many Common Law African countries where homophobia is rife, LGB persons have only been able to have their rights recognised and protected through the judiciary and not any of the other organs.<sup>325</sup> This is not by choice, but rather because that was the only option left as the other bodies turned them away, or could not even be accessed.<sup>326</sup> In Uganda, for example, soon after the first court decision upholding the rights of LGBT persons to privacy and dignity,<sup>327</sup> a member of the ruling party<sup>328</sup> tabled a Private Member's Bill proposing severe curtailment to LGB rights.<sup>329</sup> The Bill was widely supported by Members of Parliament<sup>330</sup> and by members of cabinet.<sup>331</sup> The judiciary was thus the only option of the three organs of state left for the LGB groups to oppose the Bill, which they eventually made use of with success.<sup>332</sup> The judiciary was also the only option available to LEGABIBO in Botswana and to the National Gay and Lesbian Commission of Kenya (NGLHRC) to ensure that these organisations could finally be registered.<sup>333</sup>

<sup>321</sup> See *LEGABIBO Registration* case (n 51 above); *Eric Gitari* case (n 64 above).

<sup>322</sup> Ely (n 264 above).

<sup>323</sup> Emily (n 314 above) 367-95. A Neier *Only judgment: The limits of litigation in social change* (1982) 9.

<sup>324</sup> Hunter (n 313 above) 1009, 1017.

<sup>325</sup> This is true for Botswana, Kenya, South Africa, and Uganda, the Common Law African countries considered in this study.

<sup>326</sup> A Jjuuko 'The incremental approach: Uganda's struggle for the decriminalisation of homosexuality' in C Lennox & M Waites (eds) *Human rights, sexual orientation and gender identity in the Commonwealth: Struggles for decriminalisation and change* (2013) 381.

<sup>327</sup> *The Victor Mukasa* case (n 107 above).

<sup>328</sup> Hon David Bahati, Member of Parliament, Ndorwa West, who was later elected as the Vice Chairperson of the National Resistance Movement caucus in parliament and is currently the State Minister of Finance for Planning.

<sup>329</sup> The Anti-Homosexuality Bill, 2009 originally proposed among others the death penalty for 'aggravated homosexuality' which was defined to include repeat offenders. Bills Supplement No. 13 to the Uganda Gazette No. 45 Volume CII.

<sup>330</sup> The then Speaker of Parliament, Hon. Rebecca Kadaga made it a personal mission to pass the bill into law with the support of the majority of parliamentarians. See for example 'Uganda to pass anti-gay bill as 'Christmas gift' *BBC* 13 November 2012. <http://www.bbc.com/news/world-africa-20318436> (accessed 27 August 2018).

<sup>331</sup> The most vocal supporters in parliament were Hon. James Nsaba Buturo and Rev Fr Simon Lokodo, the successive ministers of state for Ethics and Integrity.

<sup>332</sup> See generally, Jjuuko, n 318 above.

<sup>333</sup> *Thuto Rammoge* case (n 51 above); *Eric Gitari* case (n 64 above).

**e) Courts are independent and are not bound by majority decisions and opinions**

The reason why judges are generally not elected and have security of tenure is to ensure the independence of the judiciary. As such they are generally not afraid of losing their positions when they make unpopular decisions, and so they are ideally not bound by popular opinion, or by executive action. Although courts do indeed take cognisance of public opinion,<sup>334</sup> and sometimes are swayed by it, they are not bound by it.<sup>335</sup> Courts have for example ruled in favour of LGB persons in all of the Common Law African countries under study, and there have been no direct repercussions. As such they are in a good position to make positive judgments that can influence social change.

## **2.5.2 Inhibitions of SL in being a catalyst for social change on LGB issues**

Despite the clear advantages of the judiciary, the previously identified challenges of using SL apply with even greater force when it comes to the pursuit of LGB rights in a situation of homophobia, and as such, merit further discussion.

**a) Illegitimacy of courts**

The issue of illegitimacy of courts frequently arises in situations of unpopular decisions that the question of legitimacy arises. This is because such decisions get to be known by more people, many of whom may question where the courts get the legitimacy to make decisions that are against popular opinion. It is then that issues such as corruption in the judiciary, the mode of appointment of judges, and the qualifications and past records of judges come up. In Common Law African countries where homosexuality is regarded as taboo, this issue raises its head all the time. In South Africa, there are calls to remove the constitutional protection on sexual orientation;<sup>336</sup> in Uganda, signatures were collected to revamp the Anti-Homosexuality Bill;<sup>337</sup> and in Kenya, the state appealed the decision made in the *Eric Gitari* case,<sup>338</sup> just like it did in

<sup>334</sup> For example in the South African case of *Makwanyane* (n 81 above), the Constitutional Court recognised that public opinion was in favour of the death penalty

<sup>335</sup> In the *Makwanyane* case (n 81 above), although the Constitutional Court took cognisance of public interest, it was not bound by it and in fact ruled against public opinion by declaring the death penalty unconstitutional.

<sup>336</sup> A Klarsfeld (ed) *International handbook on diversity management at work: Country perspectives on diversity and equal treatment* (2010) 259.

<sup>337</sup> 'MPs start process to re-table gay bill' *The Daily Monitor* 3 September 2014  
<http://www.monitor.co.ug/News/National/MPs-start-process-to-re-table-gay-Bill/688334-2438860-8baoovz/index.html> (accessed 27 May 2017).

<sup>338</sup> African Human Rights Coalition 'Kenyan Attorney General appeals LGBT NGO court decision' 19 May 2015 <http://www.africanhrc.org/single-post/2015/05/19/Kenyan-Attorney-General-Appeals-LGBT-NGO-Court-Decision> (accessed on 27 May 2017).

Botswana.<sup>339</sup> Instead of seeing a change of heart, what is commonly seen is seen seems to be backlash against the courts and LGB persons.<sup>340</sup> So, this is a real concern. Indeed, Stoddard, a key actor in the struggle for LGB rights in the USA, noted that the US Supreme Court's decisions in such unpopular cases are usually seen as 'illegitimate, high-handed, and undemocratic- another act of arrogance by the nine philosopher-kings sitting on the Court.'<sup>341</sup> Indeed, to avoid such accusations, many times the courts decide to steer clear of controversial issues. For example, in the *AHA* case in Uganda,<sup>342</sup> the courts steered away from the question of the constitutionality of the provisions of the law and opted to decide the case on technical grounds. The *Adrian Jjuuko* case had to be heard twice and spent 8 years in the court's docket before a decision was given.<sup>343</sup> Therefore, it might be better to lobby the popular bodies than resort to 'illegitimate' courts. As Stoddard advises, there is a need for the LGB community to engage in one-on-one mobilisation and engagement with those who can create change within the executive and the legislature if meaningful social change is to happen.<sup>344</sup> They can also engage in the political process by giving block support to politicians who support their interests.<sup>345</sup>

***b) Inability of courts to enforce their own decisions***

The courts are unable to enforce their own decisions, more so when the legislature and the executive are against such decisions, and in cases of homophobia, decisions on LGB rights are most likely not to be enforced. This is because the courts neither have their own money or the power to enforce their decisions. They therefore have to rely on the executive or the legislature to implement their decisions. This means that in situations where the above two organs are unwilling to act, the courts' decisions will largely go unenforced and they will not have much recourse to resort to, with the exception of complaints or further orders, which may also go unheeded. However, it is important to note that courts have other mechanisms such as contempt of court proceedings, and imposing criminal sanctions upon those who fail to heed their orders.<sup>346</sup> These may to some extent be applied when the legislature or the executive fail to act. This usually makes them respectable even when the legislature and the executive are reluctant to do so. In the USA, when there was backlash and resistance after the Supreme

<sup>339</sup> *LEGABIBO Registration* case (n 51 above).

<sup>340</sup> Human Rights Awareness and Promotion Forum (HRAPF) et al 'Uganda report of violations based on sexual orientation and gender identity 2016' (2016) 51.

<sup>341</sup> Stoddard (n 237 above) 977.

<sup>342</sup> *Oloka Onyango* case (n 108 above).

<sup>343</sup> The case was filed in 2009 and was decided in 2016. See Human Rights Awareness and Promotion Forum, n 318 above.

<sup>344</sup> Stoddard (n 237 above) 966, 977.

<sup>345</sup> See generally M Tushnet *Taking the Constitution away from the courts* (1999).

<sup>346</sup> See M Langford et al, n 293, above.



Court's decision in the *Brown* case, the Court issued further orders, which required compliance with 'with all deliberate speed.'<sup>347</sup> The court explained what the schools had to do to comply as well as what the government had to do, and required the state to report back, therefore leaving no space for non-action.<sup>348</sup> This implies that courts may in certain circumstances be able to ensure enforcement of their judgments using the powers granted to them by the constitutions.<sup>349</sup>

*c) Unsuccessful cases may completely block the way for change*

Judges will sometimes decide cases in line with public opinion.<sup>350</sup> Activists, working on unpopular issues, therefore, face a real risk of losing cases at the highest levels and thus permanently closing the way through unfavourable precedents. An example is the *Lokodo* case in Uganda, where the High Court extended the criminal prohibition of sodomy to apply to all persons who do actions that are seen to be 'aiding and abetting' those engaging in acts of sodomy.<sup>351</sup> This decision has been relied on by the High Court again to find that the refusal to register Sexual Minorities Uganda as a company by the URSB was justified by the constitutional prohibition of same-sex marriage and by the criminalisation of same-sex conduct under section 145 of the Penal Code.<sup>352</sup> In Kenya, the High Court ruled that anal examinations were constitutional,<sup>353</sup> and this was a bad precedent that was only saved by the Court of Appeal overturning it on appeal.<sup>354</sup> Although the rest of the decisions are being appealed, and can thus be overturned, they are currently the law in these countries and so the courts below them, which are actually the magistrates' courts where trials of LGB people take place, are bound to follow them. These are bad precedents that change the law for the worse. This is therefore negative rather than positive change.

*d) Lack of sufficient judicial independence*

In the context of Common Law Africa, judicial independence from the executive and the legislature is a real issue. Judges are appointed by the executive and approved by the legislature. Furthermore, the executive usually attacks courts when they make decisions that are not in line with what the executive wanted, and legislatures have passed legislation reversing court decisions. In such a situation, decisions that may greatly alienate the executive and the

<sup>347</sup> n 292 above.

<sup>348</sup> Above, at 301.

<sup>349</sup> Langford et al, n 293 above.

<sup>350</sup> Rosenberg (n 221 above).

<sup>351</sup> *Lokodo* case (n 107 above).

<sup>352</sup> The *SMUG Registration* case, n 107 above.

<sup>353</sup> *COL & GMN v Resident Magistrate Kwale Court & 4 Others* Petition No. 51 Of 2015.

<sup>354</sup> The *COL* case.

legislature, and also greatly divert from public opinion, may not be delivered.<sup>355</sup> LGB issues are among such issues. This can perhaps explain why litigation for recognition of same-sex marriages is yet to be undertaken among the selected African countries with the exception of South Africa, where they were legalised through court action,<sup>356</sup> and eventually through the legislature.<sup>357</sup> The lesson from South Africa also shows that running ahead of public opinion may not lead to much social change as the courts have to be seen to be in touch with reality.<sup>358</sup>

#### e) *Backlash*

Backlash becomes a real concern in situations of homophobia. Instead of creating positive social change, successful court cases will simply spur the community to protest and challenge the courts, harm the activists or do certain actions to reverse the victories. This is the backlash thesis as elaborated by scholars like Klarman<sup>359</sup> and Rosenberg.<sup>360</sup> In the USA, the victory in *Brown v Board of Education*, which declared segregation of schools on the basis of race unconstitutional, was met with strong backlash with active resistance from both state governments and citizens.<sup>361</sup> On LGB rights, the case of *Lawrence v Texas*, which decriminalised sodomy, was also not received well.<sup>362</sup> On same-sex marriages, all the important cases between 1993 and 2003 were met with backlash in the form of legislative amendments and electoral upsets.<sup>363</sup> In Uganda, the victory in the *Victor Mukasa* case led to the introduction of the repressive Anti-Homosexuality Act,<sup>364</sup> and the victory in the Anti-Homosexuality Act case saw an increase in violations against LGBT persons.<sup>365</sup> Backlash is, therefore, a real concern and threat.

<sup>355</sup> The *Anti-Homosexuality Act* case (n 107 above) is an example, as is the case at the East African Court of Justice, (*Human Rights Awareness and Promotion Forum v Attorney General of Uganda*, Reference No. 6 of 2014) where in both cases the courts relied on technicalities to avoid rulings on the validity of the laws.

<sup>356</sup> *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2006).

<sup>357</sup> The Civil Union Act, 2006 (Act No. 17 of 2006).

<sup>358</sup> Klarsfeld (n 336 above).

<sup>359</sup> See generally, MJ Klarman *From Jim Crow to civil rights: The Supreme Court and the struggle for racial equality* (2006) 385, 441-442; and MJ Klarman 'Brown, racial change, and the civil rights movement' (1994) 80 *Virginia Law Review* 7-150.

<sup>360</sup> Rosenberg (n 221 above) 339-429.

<sup>361</sup> Above. See Klarman (n 359 above) 385, 441-442; MJ Klarman 'Brown and Lawrence (and Goodridge)' (2005) 104 *Michigan Law Review* 431-89, 482.

<sup>362</sup> As above.

<sup>363</sup> Rosenberg (n 221 above).

<sup>364</sup> A Jjuuko & F Tumwesige 'The implications of the Anti-Homosexuality Bill 2009 on Uganda's legal system' (2013) *Evidence Report 44 Sexuality, Poverty and the Law* 7.

<sup>365</sup> See generally, The Consortium on Monitoring Violations Based on Sex Determination, Sexual Orientation and Gender Identity 'The Uganda report of violations based on sexual orientation and gender identity' (2014).

### *f) Court action deflecting movement energies*

When litigation becomes the main strategy to achieve social change in situations of homophobia, it deflects social movements' energies as all efforts are geared towards the cases, and it stifles other approaches. The movement is taken over by elites, usually lawyers and civil society organisations, and the whole movement comes to be defined through litigation<sup>366</sup> ignoring other more radical ways of social mobilisation.<sup>367</sup> Although SL is litigation plus other strategies, all the other strategies tend to come in to support litigation and not the other way around. In Uganda, litigation has come to dominate the strategy of the movement.<sup>368</sup> In South Africa, after winning victories through litigation, the fight for equality largely ran aground,<sup>369</sup> while in Kenya, litigation now seems to be the leading strategy. One of the reasons why litigation becomes the main strategy is because it is safer since one is legitimately engaging with the state, it is less aggressive and thus can be tolerated by the state and it is also highly visible, meaning that mainly the litigation work will be seen and not all the other work. This is despite the fact that courts lack popular appeal and their decisions are largely unknown to the majority, and therefore few people act upon them.

## **2.6 Conclusion**

SL is an important avenue for seeking social change. It holds great potential for the realisation of LGB rights through stimulating and influencing social change. This potential lies in the fact that courts are bound to hear cases and they have indeed done so, but they also seem to be the most readily available avenue to engage on LGB issues. More so, there have been huge gains from the courts in Common Law Africa and in regions elsewhere in the world. However, although SL holds considerable potential to realise social change in favour of LGB persons, current conditions in the selected Common Law African countries need to be taken into deeper consideration as the strategy is employed. The selected African Common Law countries have high levels of homophobia, and in such situations, courts cannot function optimally as they lack the support of the executive, the legislature, and the general public. They may thus feel constrained to rule in line with prevailing opinion, but even when they affirm the rights of LGB

<sup>366</sup> For the case of the US LGBT movement, Leachman documented litigation as the most visible strategy in the struggle for equality. He found that litigation received the most news coverage and that organisations that used litigation had better chances of survival. See GMM Leachman 'From protest to Perry: How litigation shaped the LGBTI movement's agenda' 47 *University of California, Davis Law Review* 1667.

<sup>367</sup> M Kessler 'Legal mobilization for social reform: Power and the politics of agenda setting' (1990) 24 *Law & Society Review* 121, 137-38; Handler (n 249 above) 25-26; Tushnet (n 41 above) 1925-1950, at 146.

<sup>368</sup> Jjuuko, n 326 above.

<sup>369</sup> As above.

persons, these rights may never be realised. The judgments may attract backlash against the courts and the LGB community, as the situation in Common Law Africa already shows. Therefore, employing SL in the current circumstances in Common Law Africa with a view to influencing social change has to be carefully considered, with each case and its potential impact weighed independently, as court action might still be the only meaningful way to influence social change in situations of active homophobia.

## CHAPTER 3

# LGB STRATEGIC LITIGATION IN THE SELECTED COMMON LAW COUNTRIES 1998- AUGUST 2018

### 3.1 Introduction

Strategic litigation (SL) in favour of lesbians, bisexual and gay (LGB) persons has been going on in the selected Common Law African countries in the past 20 years (1998 - August 2018). Starting in South Africa in 1997, it spread to different countries and by the end of 2015, four countries: Botswana, Kenya, South Africa and Uganda had at least one courtroom victory. This chapter analyses the different LGB SL cases in these countries and the trends that can be discerned therefrom over the past twenty years. It starts with an analysis of the number, nature and outcomes of these cases, and then discusses the decisions made in the cases in more detail. The cases are classified on the basis of their subject matter; that is: whether they challenged discriminatory laws, the actions of state actors, or the conduct of non-state actors. Cases challenging discriminatory laws are by far the most common, and accordingly, they have been further subdivided basing on the nature of the laws being challenged. The chapter then identifies four stages of a SL case: the overarching strategy phase; the pre-litigation phase; the litigation phase; and the post-litigation phase, and then discusses the trends of LGB SL at each of these stages in the four countries. For purposes of comparison of trends, a discussion of the same issues in the four selected Common Law countries outside of Africa: Belize, Canada, Nepal and the United States of America (USA) is made. The chapter concludes with a highlight of the common trends of LGB SL in all the eight selected countries.

### 3.2 Number and nature of LGB strategic cases in the selected Common Law countries in Africa

Not all cases that have been undertaken on LGB issues in the selected Common Law countries in Africa are included as part of this study. This is for a number of reasons, the

first being that only strategic cases are included in the study. For a case to be regarded as strategic for purposes of this study, it has to have been filed as part of a defined, organised and long-term strategy, and must be backed up by other legal and non-legal approaches, with the aim of creating positive change in laws, and in the lives of a specific group of people or the general public.<sup>1</sup> However, where a case started as ‘wild cat’ suit – suits filed by persons who are not part of the organised LGB movement and who seek their own private remedies,<sup>2</sup> it can be regarded as a strategic case, provided it was later joined or actively supported by the organised LGB groups and thus incorporated into the long term strategy. Secondly, the study only includes cases that were deliberately brought before domestic courts of record and before international courts by members of the LGB community or their allies, or cases where the LGB community was forced to defend a case in court that challenged their legal status. Thirdly, in terms of timeframes, only cases completed or filed in courts of law by the end of August 2018 are considered. Completion means that a court made the final decision in the case, with no appeal pending, or the case was withdrawn, or there is an on-going appeal. For on-going appeals, the decision of the lower court is what is considered as the ‘case,’ and the fact that an appeal is on-going is noted. Cases in which appeals were finalised also count as one case, and it is the decision of the final appellate court that counts. Cases, which were heard and decided together, are also counted as one case.

### 3.2.1 Number of cases

Using the above criteria, the numbers of LGB SL cases in the selected Common Law African countries are as follows:

<sup>1</sup> See definition adopted by this study in Chapter 2, section 2.2, above.

<sup>2</sup> This term borrows from ‘wildcat’ strikes, which are strikes by individual labourers that are not sanctioned or approved by the leaders of workers. Tom Keck is known for applying this term to litigation. See for example T Keck *Judicial Politics in Polarized Times* 2014, 264.

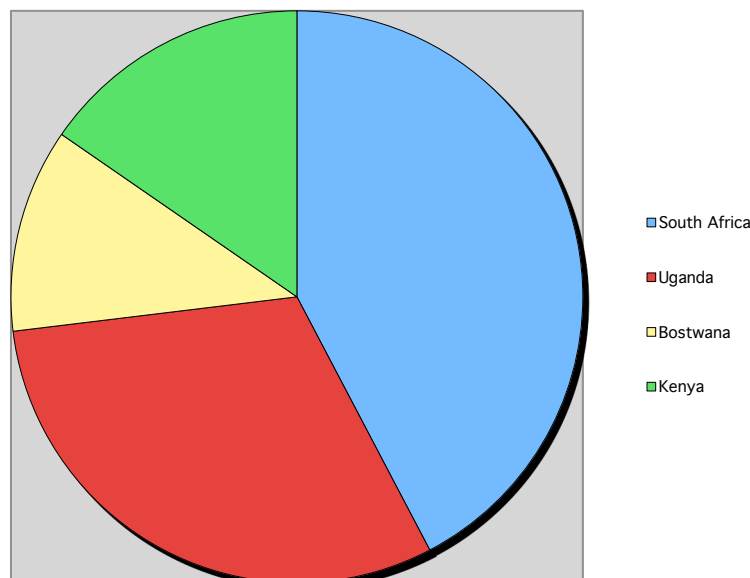


**Table 1: Number of LGB strategic cases in Common Law Africa by the end of August 2018**

Country	Filed cases	Completed cases	Successful cases	Unsuccessful cases	Pending cases	Pending appeals
South Africa	11	11	10	1	0	0
Uganda	8	8	4	4	0	2
Kenya	4	2	2	0	2	1
Botswana	3	2	1	1	1	0
<b>Total</b>	<b>26</b>	<b>23</b>	<b>17</b>	<b>6</b>	<b>3</b>	<b>3</b>

In terms of the total number of cases filed, South Africa stands out with 11 out of 26, accounting for approximately 42% of all cases filed. Uganda follows with 8 (approximately 31%), then Kenya with 4 (approximately 15%) and Botswana with 3 (approximately 12%).

**Figure 1: Share of strategic litigation cases per country**



Similarly, in terms of courtroom successes, which are calculated using the number of successful cases divided by the number of decided cases filed, South Africa has a 91% success rate (with 10 out of 11 cases), Uganda and Kenya at 50% (with 4 out of 8 and 2 out of 4 respectively), and Botswana at 33% (with 1 out of 3). This shows that at the level of

courtroom success, there have been more successful LGB SL cases in South Africa, followed by Uganda, then Kenya and finally Botswana. The successes in Kenya however are the most recent with the latest coming in 2018,<sup>3</sup> and then Uganda,<sup>4</sup> Botswana,<sup>5</sup> and South Africa follow in that order.<sup>6</sup>

### 3.2.2 Nature of cases

The cases can be categorised into: cases challenging discriminatory laws; cases challenging actions of state officials; and those challenging actions of third parties.

#### *a) Cases challenging discriminatory laws*

Challenging discriminatory laws has been the major pre-occupation of LGB activists in the selected Common Law countries. These cases call upon the courts to determine whether the laws are at odds with the equality provisions in the various constitutions. The South African Constitutional Court laid down a three-stage test for determining whether a legal provision infringes upon the right to equality and non-discrimination. The questions to be determined in this test are: i) whether the differentiation amounted to discrimination; ii) whether the discrimination was unfair; and iii) whether the unfair discrimination could be justified under the limitation clause.<sup>7</sup>

Out of the 26 cases filed against discriminatory laws in the twenty-year period, 18 challenge discriminatory statutes, regulations or the common law. The majority of these cases (12) have been successful, 1 case was lost on the merits, 1 was dismissed on grounds of mootness, 3 were still pending before the courts of law by the end of August 2018, and 1 had been withdrawn. These cases shall be categorised in accordance with the nature of the laws that they challenged. The categories are 9 and they concern laws on: criminalisation of consensual same-sex relations; further criminalisation of consensual same-sex relations and 'promotion of homosexuality'; equality in employment; parental rights to children and

<sup>3</sup> *COL & GMN v Resident Magistrate Kwale Court & 4 Others* Civil Appeal 56 of 2016 (2018) e KLR (The COL case), which was decided on 22 March 2018.

<sup>4</sup> The latest successful case was *Adrian Jjuuko v Attorney General* Constitutional Petition No. 1 of 2009 (*Adrian Jjuuko* case), which was decided on 10 November 2006. It is important to note however that the latest case in Uganda was a loss - *Frank Mugisha, Dennis Wamala & Ssenfuka Warry Joanita v Uganda Registration Services Bureau*, Miscellaneous case No. 96 of 2016 (*SMUG Registration* case), decided on 14 June 2018.

<sup>5</sup> The only successful case so far is *Attorney General v Thuto Rammoge & 19 Others* (2014) CACGB-128-14 (CA) (*LEGABIBO Registration* case), which was decided on 16 March 2016.

<sup>6</sup> *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being and Another* 2016 1 BCLR 1 (CC), which was decided on 24 November 2015. This however came after a period of ten years when the last decision on LGB rights, *Geldenhuys v National Director of Public Prosecutions & Others* 2009 5 BCLR 435 (CC) was made.

<sup>7</sup> *Harksen v Lane* NO 1998 (1) SA 300 (CC) at para 54.

adoption; access to justice; estate support for a surviving spouse; immigration; same-sex marriages; and consent to sexual relations. They are all described in detail below:

i) *Cases challenging laws criminalising consensual same-sex relations*

Decriminalisation of same-sex relations was the most significant aim of litigation on LGB rights in the past 20 years in the four selected countries. Out of the 18 cases challenging discriminatory laws, five (approximately 28%) concern this issue. Decriminalisation of same-sex relations has been the subject of litigation in at least one case in each of the countries apart from Uganda by the end of August 2018. Botswana so far has 2 such cases, Kenya also has 2 and South Africa has 1. Two of these cases (one in South Africa and one in Botswana) had been finalised while 3 were still pending before courts of law, 1 in Botswana and 2 in Kenya by the end of August 2018. Of the 2 completed cases, the South African case was successful, and the Botswana one was lost.

The successful case was *National Coalition for Gay and Lesbian Equality v Minister of Justice*<sup>8</sup> (*Sodomy case*), which was decided on 9 October 1998. This case was brought by the National Coalition for Gay and Lesbian Equality (NCGLE)<sup>9</sup> following the arrest of a group of men under the sodomy provisions in Pretoria in 1996.<sup>10</sup> At the time, the LGB movement was expecting the newly elected government of South Africa to decriminalise sodomy as part of the mass law reform project that was undertaken after the end of Apartheid in 1994.<sup>11</sup> However, this arrest hurried the process along and left the movement with little choice but to contest the sodomy provisions in court.<sup>12</sup> It was the very first case on LGB rights decided by the Constitutional Court of South Africa,<sup>13</sup> which had been established as the final Court

<sup>8</sup> 1999 1 SA 6 (CC).

<sup>9</sup> The National Coalition for Gay and Lesbian Equality (NCGLE) was formed during the First National Gay and Lesbian Legal and Human Rights Conference held on 3 December 1994. The Coalition had four main objectives: to maintain the sexual orientation clause in the Constitution; decriminalise same-sex conduct; undertake litigation challenging discrimination and to train leaders and representatives within the gay and lesbian movement. It brought together 78 different organisations from all over the country. See CF Stychin 'Constituting sexuality: The struggle for sexual orientation in the South African Bill of Rights' (1996) 23(4) *Journal of Law and Society* 455-83. It however only used its membership for legitimacy reasons, as otherwise its work and strategy was determined by the executive committee rather than the member organisations. See N Oswin 'Producing homonormativity in neoliberal South Africa: Recognition, redistribution, and the equality project' (2007) 32.3 *Signs: Journal of Women in Culture and Society* 649, 653. It later extended its fourth objective from merely training leaders to building an inclusive and strong LGB movement. J Mazibuko & S Lapinsky 'Forging a representative gay liberation movement in South Africa' (1998) 2(2) *Development Update: Quarterly Journal of the South African National NGO Coalition and Interfund* 32-56.

<sup>10</sup> Interview with Crystal Cambanis, one of the attorneys who handled cases on behalf of the Coalition, Johannesburg, 8 February 2018.

<sup>11</sup> As above.

<sup>12</sup> As above.

<sup>13</sup> The Constitutional Court of South Africa is established under section 167(3)(a) of the Final Constitution as the highest court in all constitutional matters. The very first case under the new constitutional dispensation on

of Appeal for constitutional matters under the Constitution of the Republic of South Africa, 1996 (Final Constitution).<sup>14</sup>

The case challenged the common law offence of commission of an unnatural sexual act, section 20A of the Sexual Offences Act, which criminalised sexual acts between men in public, as well as the reference to the offence of sodomy in the schedules to the Criminal Procedure Act, 1977 and the Security Officers' Act, 1987 as unconstitutional because they violated the rights to equality, dignity and privacy as protected under the South African Constitution. The High Court of the Witwatersrand had held that the impugned provisions were unconstitutional because they unfairly discriminated on the basis of both gender and sex.<sup>15</sup> The case came before the Constitutional Court for confirmation as required by the Constitution.<sup>16</sup> The Court unanimously confirmed the judgment of the High Court. The Court held that the provisions violated the rights to equality, dignity and privacy as protected under the South African Constitution. The offences were declared invalid with immediate effect. On non-discrimination, in a majority judgment written by Ackermann J, the Court based its decision primarily on the non-discrimination clause in the South African Constitution, which listed 'sexual orientation' among grounds upon which people cannot be discriminated against.<sup>17</sup> The Court reached this conclusion after making an analysis of discrimination using the test laid down in the case of *Harksen v Lane*.<sup>18</sup> On the right to dignity, the Court stated that criminalisation makes every LGB person a criminal and thus validates marginalisation and discrimination, and devalues LGB persons, even if the provision was not actively enforced. The Court stated that the value and worth of all individual members of society was at the centre of the right to dignity.<sup>19</sup> On the right to privacy, the Court was emphatic that criminalisation was an intrusion into the most private aspects of human life: consensual sexual relationships.<sup>20</sup> The Court did not find a

LGB issues was the case of *Langemaat v Minister of Safety and Security* 1998 (3) SA 312 (T) decided by the Transvaal Provincial Division of the High Court on 4 February 1998.

<sup>14</sup> Constitution of the Republic of South Africa, No. 108 of 1996.

<sup>15</sup> *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* 1998 (6) BCLR 726 (W).

<sup>16</sup> Whereas section 172(2)(a) of the Constitution of the Republic of South Africa, 1996 gives powers to the High Court or the Supreme Court of Appeal to make orders invalidating a statute or conduct of the President, under section 167(5), such orders have no legal force until confirmed by the Constitutional Court.

<sup>17</sup> The *Sodomy* case (n 8 above) paras 20-25.

<sup>18</sup> n 7 above.

<sup>19</sup> Above, para 28.

<sup>20</sup> Above, para 32.

justification for the limitation.<sup>21</sup> In a separate opinion, Sachs J linked both the right to dignity and the right to privacy to the right to equality.<sup>22</sup>

The case that had an adverse outcome was *Kanane v The State* (*Kanane case*)<sup>23</sup> decided on 30 July 2003 by the Court of Appeal of Botswana.<sup>24</sup> It was the first strategic case on LGB rights to be brought before the Botswana courts. It arose out of the arrest of Utjiwa Kanane who was accused of having anal sex with Graham Norrie on 26 December 1994 at Maun Village. Norrie, being a foreigner, was deported, and the charges continued against Kanane alone. He was convicted by the High Court.<sup>25</sup> The Botswana Centre for Human Rights (DITSWANELO)<sup>26</sup> facilitated an appeal against this conviction to the Court of Appeal. The case came soon after the Supreme Court of Zimbabwe's decision in *Banana v State*,<sup>27</sup> which upheld the sodomy laws in that country,<sup>28</sup> and also at a time when the issue of criminalisation of same-sex relations had been discussed publicly during the 1998 amendment to the Penal Code of Botswana<sup>29</sup> that expressly extended criminalisation of carnal knowledge against the order of nature to women in an attempt to make provisions in the Penal Code gender neutral.<sup>30</sup>

The Court held that section 164 of the Penal Code criminalising 'carnal knowledge against the order of nature' and section 167 criminalising 'committing indecent practices between males' were not unconstitutional. According to the Court, the Constitution of Botswana did not provide explicit protection against discrimination on the basis of sexual orientation and prevailing public opinion in the country favoured the continued criminalisation of consensual same-sex acts in private. On the constitutional provisions, the Court distinguished the *Sodomy* case in South Africa, arguing that the Final Constitution expressly prohibited discrimination on the basis of sexual orientation, while that of Botswana did not. On the issue of public opinion, the Court relied on the fact that Parliament had moved to confirm the colonial penal code offences, including the sodomy provision, by adopting the

<sup>21</sup> Above, para 57.

<sup>22</sup> Above, paras 108-138.

<sup>23</sup> 2003 2 BLR 67 (CA).

<sup>24</sup> The Court of Appeal of Botswana is the highest court in the land. It is established under section 99(1) of the Constitution of the Republic of Botswana, 1966 (The Constitution of Botswana).

<sup>25</sup> *State v Kanane* 1995 BLR 94 (High Court).

<sup>26</sup> M Tabengwa & N Nicol 'The development of sexual rights and the LGBT movement in Botswana' in C Lennox & M Waites (eds.) *Human rights, sexual orientation and gender identity in the commonwealth: Struggles for decriminalisation and change* (2013) 339, 342.

<sup>27</sup> [2000] 4 LRC 621 (Supreme Court of Zimbabwe).

<sup>28</sup> The case had been decided on 26 March 1998, at the time when the *Kanane* case was already pending before the High Court.

<sup>29</sup> The Penal Code Amendment Act No. 5 of 1998.

<sup>30</sup> Tabengwa & Nicol, n 26 above, 342-343.

Penal Code Amendment Act No. 5 of 1998. That it was clear that the then recently-expressed majority sentiments in Botswana were in favour of criminalisation rather than decriminalisation of same-sex sexual conduct. The Court referred to the minority judgment of Gubbay CJ in the *Banana* case in Zimbabwe, in which it was stated that public opinion could not dictate whether or not an activity ought to be criminalised,<sup>31</sup> and held that despite this view, human rights can be limited where the enjoyment of such human rights would prejudice the public interest.

The first of the three pending cases is *Eric Gitari v Attorney General (Eric Gitari Decriminalisation case)*,<sup>32</sup> which was filed on 15 April 2016 and challenges sections 162, 163, and 165 of the Penal Code of Kenya. These provisions criminalise carnal knowledge against the order of nature, attempts to commit carnal knowledge against the order of nature and indecent practices among males, respectively. The second pending case is also a Kenyan one, *John Mathenge & Others, v Attorney General & Others (John Mathenge case)*,<sup>33</sup> filed on 8 June 2016. The case challenges the constitutionality of sections 162(a) and (c) as well as section 165 of the Penal Code in as far as they criminalise consensual same-sex relations among adults. These two cases, challenging two of the same provisions of the Penal Code Act, were filed in such close succession due to disagreements within the LGB movement in Kenya. The Gay and Lesbian Coalition of Kenya (GALCK), which is the largest coalition of LGB organisations, was steering the process of instituting a strategic case. However, one of the organisations involved in the process, the National Gay and Lesbian Human Rights Commission (NGLHRC) went ahead and instituted the case on the basis that GALCK was taking too long to file the case and risked missing the opportunity to have the case heard by a bench constituted by human rights friendly chief justice, Willy Mutunga, who had indicated that he would be retiring early.<sup>34</sup> The *Eric Gitari Decriminalisation case* and the *John Mathenge case* were heard together by the High Court in February and March 2018, and by the end of August 2018, judgment had not yet been delivered.<sup>35</sup>

<sup>31</sup> n 27 above, 646.

<sup>32</sup> Petition 150 of 2016 (High Court of Kenya).

<sup>33</sup> Petition No. 234 of 2016 (High Court of Kenya).

<sup>34</sup> Interview with Eric Mawira Gitari, National Gay and Lesbian Human Rights Commission NGLHRC, Kenya, Nairobi, 27 July 2017.

<sup>35</sup> See Gay and Lesbian Coalition of Kenya 'Decriminalisation of consensual same sex sexual conduct in Kenya' 22 February 2018 <https://www.galck.org/repeal162/> (accessed 26 August 2018). Also See KELIN 'Court hears the case seeking decriminalization of same sex consensual sex' 2 March 2018 'http://www.kelinkenya.org/court-hears-case-seeking-decriminalization-sex-consensual-sex/' (accessed 8 July 2018).



The third pending case is *LM v Attorney General of Botswana (LM case)*,<sup>36</sup> which was filed in the High Court of Botswana on 26 September 2016. The case challenges the constitutionality of section 164(a) and (c) of the Penal Code of Botswana in as far as they criminalise consensual same-sex relations. Lesbians, Gays, Bisexuals of Botswana (LEGABIBO) were allowed to join the case as *amicus curiae*.<sup>37</sup>

ii) *Cases challenging further-criminalisation of consensual same-sex relations and 'promotion of homosexuality'*

Further-criminalisation of consensual same-sex relations is a term used to refer to the introduction of new laws criminalising consensual same-sex relations and any other actions supporting LGB persons without repealing the existing criminal laws.<sup>38</sup> Among the four countries, further criminalisation is largely a Ugandan development. The Anti-Homosexuality Act (AHA) went beyond the existing Penal Code criminalisation of 'carnal knowledge against the order of nature' to introducing the new offence of 'homosexuality', which was defined to go beyond sexual intercourse to actions such as touching between people of the same sex with intent to commit homosexuality.<sup>39</sup> It also criminalised 'aiding and abetting' homosexuality,<sup>40</sup> and the 'promotion' of homosexuality, which included any actions done to support the promotion of LGB rights including funding and publication of materials.<sup>41</sup> Two cases were brought to challenge the Act. One was successful, while the other was dismissed.

The first case is *Prof. J Oloka-Onyango & 9 Others v Attorney General (Anti-Homosexuality Act (AHA) case)*,<sup>42</sup> which was decided on 1 August 2014. In this case, a group of persons led by Makerere University Constitutional Law professor, J Oloka-Onyango challenged the constitutionality of the Anti-Homosexuality Act. This was on the basis that it was passed when there was no constitutionally mandated quorum in parliament. The second set of grounds was that the provisions of the Act violated a number of constitutionally guaranteed rights, including the rights to equality, privacy, and freedom from inhuman and degrading

<sup>36</sup> MAHGB- 000591-61.

<sup>37</sup> Southern African Litigation Centre 'Media Advisory: Botswana – High Court hearing: challenging criminalisation of same-sex sexual relationships' <http://www.southernafricalitigationcentre.org/2018/05/29/media-advisory-botswana-high-court-hearing-challenging-criminalisation-of-same-sex-sexual-relationships/> (accessed 8 July 2018).

<sup>38</sup> For a deeper analysis of this term and how it has manifested so far see A Jjuuko & M Tabengwa 'Expanded criminalisation of consensual same sex relations in Africa: Contextualizing the recent developments' in N Nicol et al (eds) 'Envisioning global LGBT human rights: (Neo)colonialism, neoliberalism, resistance and hope' 2018, 63, 65-69.

<sup>39</sup> Anti-Homosexuality Act 2014, section 2.

<sup>40</sup> Above, section 7.

<sup>41</sup> Above, section 13.

<sup>42</sup> Constitutional Petition No. 008 of 2014 (Constitutional Court of Uganda).

treatment. The Constitutional Court of Uganda<sup>43</sup> declared the AHA unconstitutional on the grounds that the Act was passed without quorum and thus in violation of Rule 23(1) of the Rules of Procedure of Parliament, which establishes the quorum to pass a bill into law at one-third of all parliamentarians entitled to vote. Article 88 of the Constitution specifies that quorum should be as provided for under the Rules of Procedure made under Article 94 of the Constitution. Rule 23(3) requires the Speaker to ascertain the quorum before voting on any matter, and although she was reminded three times before the vote on the Anti-Homosexuality Bill (the AHB) was taken, she did not ascertain the quorum in the House. The Court relied on affidavit evidence to find that, on a balance of probabilities, there was no quorum in the House at the time the vote on the Bill was taken. The Speaker of Parliament was found to have acted illegally and unconstitutionally. The Court held that there was no need to consider the other set of grounds, as the issue of quorum was sufficient to dispose of the matter.

This case was the culmination of a five-year struggle against Uganda's Anti-Homosexuality Bill (AHB),<sup>44</sup> which had been tabled in 2010 and which initially included a provision prescribing the death penalty for 'aggravated homosexuality',<sup>45</sup> imposed reporting obligations on lawyers, doctors and other persons in authority,<sup>46</sup> as well as nullifying international instruments that were in favour of homosexuality.<sup>47</sup> The fact that such a popular bill had taken five years to be passed showed the contestation around it, with major western donor countries including the USA and the United Kingdom of Great Britain and Northern Ireland (the UK) being expressly against the law and the Uganda government being ambivalent about its support for the bill.<sup>48</sup> The case follows a line of cases for the enforcement of rights of LGB persons in Uganda from 2006 onwards which were brought

<sup>43</sup> The Constitutional Court is a special court established under article 137 of the Constitution of Uganda to interpret the Constitution. It has powers to declare any Act of Parliament, or any act by any person unconstitutional in as far as it is inconsistent with the Constitution and to give redress where appropriate (article 137(3)). It is the court of first instance for constitutional interpretation matters (article 137(1)) and it also receives references from any other court in case a constitutional matter arises (article 137(5)).

<sup>44</sup> The Anti-Homosexuality Bill, Bill No. 18 of 2009, Bills Supplement to the Uganda Gazette No. 47 Volume CII, 25 September, 2009. This Bill was tabled before Parliament by Ndorwa West Member of Parliament, Hon. David Bahati in October 2009.

<sup>45</sup> Above, clause 3(2).

<sup>46</sup> Above, clause 14.

<sup>47</sup> Above, clause 18.

<sup>48</sup> For a full discussion of the case and how it was planned as well as the struggles around the AHB and the AHA, see A Jjuuko & F Mutesi 'The multifaceted struggle against the Anti-Homosexuality Act in Uganda, Accepted for Publication in N Nicol et al, in N Nicol et al *'Envisioning global LGBT human rights: (Neo)colonialism, neoliberalism, resistance and hope'* 2018, 269.

before courts using what has been described as the incremental approach,<sup>49</sup> and which were largely successful.<sup>50</sup> Therefore, a culture of judicial enforcement of LGB rights had slowly started to emerge which, on the one hand, had set the tone to deal with a strategic case of this gravity. However, according to Prof Christopher Mbazira, a Ugandan academic, it is these successes in SL that might have inspired the tabling and passing of the AHB, as the anti-gay groups felt that the LGB groups needed to be stopped.<sup>51</sup> Advocate Rwakafuuzi also agrees with this view and contends that the victory in the case of *Victor Mukasa & Yvonne Oyoo v Attorney General*<sup>52</sup> (*Victor Mukasa* case) was probably the catalyst for the AHB.<sup>53</sup>

The other case is *Human Rights Awareness and Promotion Forum (HRAPF) v Attorney General of Uganda and the Secretariat of the Joint United Nations Programme on HIV/AIDS (UNAIDS)* (*HRAPF* case),<sup>54</sup> which was decided by the East African Court of Justice (EACJ)<sup>55</sup> on 27 September 2016. The case was brought by HRAPF, a Ugandan legal support and advocacy organisation. It challenged the passing of the AHA as well as some of the provisions of the Act on the grounds that these were contrary to the good governance and rule of law principles of the Treaty for the Establishment of the East African Community. The case was instituted at the same time as the *Anti-Homosexuality Act* case in the Constitutional Court of Uganda as the Rules of Procedure of the EACJ required a case to be filed within 60 days of the law complained about being passed,<sup>56</sup> and it was at the time believed that the Uganda Court would inordinately delay hearing and deciding the case.<sup>57</sup> Surprisingly, the case in Uganda was heard before the case at the EACJ was heard, thus necessitating an amendment of the pleadings at the EACJ. The Court nevertheless decided that the case was moot as the AHA had been nullified by the Constitutional Court of Uganda by the time the case was heard in the EACJ. The Court relied on its earlier judgment in *Legal Brains Trust v Attorney General of Uganda*,<sup>58</sup> where it held that the court would not adjudicate on hypothetical

<sup>49</sup> A Jjuuko 'The incremental approach: Uganda's struggle for the decriminalisation of homosexuality' in C Lennox & M Waites (eds) *Human rights, sexual orientation and gender identity in the Commonwealth: Struggles for decriminalisation and change* (2013) 381.

<sup>50</sup> By the time this case was decided, only one out of three LGB decided cases had been unsuccessful. This was the case of *Kasha Jacqueline Nabagesera & 3 Others v The Attorney General and Hon. Rev. Fr Simon Lokodo* (High Court Miscellaneous Cause No. 33 of 2012 (*Lokodo* case).

<sup>51</sup> Interview with Prof Chris Mbazira, Dean of Law, Makerere University, Kampala, 26 March 2018.

<sup>52</sup> (2008) AHRLR 248.

<sup>53</sup> Interview with Ladislaus Rwakafuuzi, Advocate in many of the LGB cases, Kampala 23 July 2017.

<sup>54</sup> Reference 6 of 2014 (East African Court of Justice).

<sup>55</sup> The EACJ is an international court established under article 9 of the Treaty for the Establishment of the East African Community, 1999. It hears cases arising from the six East African countries and it has powers to interpret the Treaty and to grant redress.

<sup>56</sup> Article 30(2) of the Treaty for the Establishment of the East African Community, 1999.

<sup>57</sup> Jjuuko & Mutesi, n 48 above, 284.

<sup>58</sup> EACJ Appeal No. 4 of 2012.

questions, in which ‘no real dispute exists.’ The Court considered the public interest exception to the general rule against deciding moot cases and found that the evidence on record was not sufficient to ‘establish the degree of public importance attached to the practice of homosexuality in Uganda.’<sup>59</sup>

iii) *Cases challenging laws on equality in employment*

Two successful cases have been brought concerning employment and both are from South Africa. The earliest is the *Langemaat* case,<sup>60</sup> decided on 4 February 1998 by the Pretoria High Court.<sup>61</sup> This case was brought by a female police officer who was in a permanent same-sex relationship with her female partner, whom she wanted to register on the South African Police Medical Scheme. The Chairman of the Scheme had refused to register the partner on the basis of Regulation 30(2)(b) of the South African Police Services Regulations, and Rule 4.2 of the rules made under the Regulations, which defined dependents as legal spouses and children. The Court considered the question as to whether the relationship between the partners created a legal duty to support each other and concluded that there was no difference between permanent same-sex relationships where parties undertook mutual obligations to each other and shared a common home and marriage. The Court declared the regulations and rules of the scheme to be unconstitutional and invalid on the basis that they were discriminatory and ordered the chairperson of the scheme to reconsider the decision. The decision has been criticised for not expressly relying on the constitutional provisions of discrimination on the basis of sexual orientation but rather on Roman-Dutch law.<sup>62</sup>

The other case is *Satchwell v President of the Republic of South Africa and Another* (*Satchwell* case),<sup>63</sup> decided on 25 July 2002. In this case, a lesbian judge who was in a permanent same-sex relationship brought a case challenging the constitutionality of sections 9 and 10 of the Judges’ Remuneration and Conditions of Employment Act,<sup>64</sup> (the Act), and Regulations 12(2) and 13(2) of the 2002 Regulations to the Act.<sup>65</sup> These provisions only covered ‘spouses’ and therefore excluded partners of judges in permanent same-sex relationships with reciprocal duties to each other. The Pretoria High Court ruled that the provisions were

<sup>59</sup> *HRAPF* case (n 51 above) at para 60.

<sup>60</sup> n 13 above.

<sup>61</sup> Under section 169(a) of the South African Constitution, High Courts in South Africa are empowered to decide constitutional matters with the exception of those that can only be decided by the Constitutional Court or those assigned by law to other courts.

<sup>62</sup> See generally R Louw ‘Langemaat v Minister of Safety and Security 1998 (3) SA 312 (T): A gay and lesbian victory but a constitutional travesty’ (1999) 15 *South African Journal on Human Rights* 393.

<sup>63</sup> 2004 1 BCLR 1 (CC) (17 March 2003).

<sup>64</sup> 47 of 2001.

<sup>65</sup> Government Notice No. R. 894 published in Government Gazette 23564 of 5 July 2002.

unconstitutional on the basis that they discriminated on the grounds of sexual orientation.<sup>66</sup> The case came before the Constitutional Court for confirmation. The Court found that these provisions were indeed discriminatory on the grounds of sexual orientation, which is a protected ground under section 9(3) of the Constitution. It found the discrimination to be unfair, and the respondents did not claim that it was justified.<sup>67</sup> The Court noted that the recognition of only marriage as giving rise to obligations excluded 'many relationships which create similar obligations and have a similar social value.'<sup>68</sup>

*iv) Cases challenging laws on parental rights to children and adoption*

There are two successful cases on this issue, both from South Africa. The first case is *Du Toit & Another v Minister of Welfare and Population Development & Others*.<sup>69</sup> It was brought at a time when the wider LGB movement did not deem the society and the judiciary to yet be in a place to acknowledge the rights of same-sex couples to adopt children.<sup>70</sup> The movement was of the view that this issue should be dealt with at the very end of the battle – even after ensuring the legalisation of same-sex marriage.<sup>71</sup> The case was brought by a well-known judge and her partner, who were not directly involved with the LGB movement, but had the personal matter of joint adoption of their children to settle.<sup>72</sup> They had been denied joint adoption and only one of them was made the adoptive parent. This was done under the provisions of sections 17(a), 17(c) and 20(1) of the Child Care Act, 74 of 1983 and section 1(2) of the Guardianship Act, 192 of 1993, which provided for the joint adoption and guardianship of children by married persons only. The matter was brought before the Pretoria High Court, which found that the provisions were discriminatory on the grounds of sexual orientation.<sup>73</sup> On application to the Constitutional Court for confirmation, the Court confirmed the High Court's ruling. It found that the provisions were discriminatory on the grounds of sexual orientation as they excluded persons in permanent same-sex relationships and were also in violation of the right to dignity in respect of the first applicant who was denied parental rights. The Court further held that the denial of adoption rights to persons in stable same-sex relationships was not based on whether or not they were fit to adopt children, but rather on their unmarried status, which was directly based on their sexual

<sup>66</sup> *Satchwell v President of the Republic of South Africa and Another* 2001 (12) BCLR 1284 (T).

<sup>67</sup> Above, para 21, per Madala J.

<sup>68</sup> Above, para 24.

<sup>69</sup> 2002 ZACC 20.

<sup>70</sup> Skype interview with Anna-Marié de Vos, one of the applicants in the case, 24 November 2017.

<sup>71</sup> As above.

<sup>72</sup> As above.

<sup>73</sup> *Du Toit and Another v Minister of Welfare and Population Development and Others* 2001 (12) BCLR 1225 (T).

orientation.<sup>74</sup> Regarding the right to dignity, the Court found that in respect of the first applicant, the denial of adoption also meant the denial of her rights as a parent solely on the basis of her sexual orientation, which was demeaning.<sup>75</sup> The Court did not find any reasonable justification for the limitation. It therefore read into the statute words to make it applicable to two persons of the same-sex in a permanent relationship.

The second case is *J & B v Director-General, Department of Home Affairs, Minister of Home Affairs, and President of the Republic of South Africa*,<sup>76</sup> decided by the Constitutional Court of South Africa on 28 March 2003. The case was filed by two women in a permanent relationship, who had given birth to twins using sperm from an anonymous donor and the ovum of one of the partners. On registration of the parents however, only the birth mother was registered since section 5 of the Children's Status Act of 1987, which concerns artificial insemination, only recognised children who are born to a married couple. They challenged the provision before the Durban High Court on grounds that it was discriminatory on the basis of marital status as well as sexual orientation. The High Court found the provision to be unconstitutional on the grounds of marital status, 'and probably sexual orientation,' as well as social origin and birth for the case of the children.<sup>77</sup> The case came up to the Constitutional Court for confirmation. The Court held that section 5 of the Children's Status Act<sup>78</sup> was discriminatory on the basis of sexual orientation. It further held that such discrimination was unfair with respect to permanent same-sex life partners and could not be justified. The Court therefore read down the provision by deleting words that restricted recognition to married couples. The Court referred to the *Du Toit* case,<sup>79</sup> which it considered analogous to the present one.

v) *Cases challenging laws on access to justice*

Only one case has so far been brought concerning access to justice laws. This is the *Adrian Jjuuko* case<sup>80</sup> from Uganda decided by the Constitutional Court of Uganda on 10 November 2016. This case was instituted in 2009 and was the second case concerning LGB rights filed in Uganda. It was filed on 5 January 2009, two months after the judgment in the first LGB

<sup>74</sup> Above, para 26.

<sup>75</sup> Above, para 29.

<sup>76</sup> (2003) AHRLR 263 (SACC) 28 March 2003.

<sup>77</sup> *J and Another v Director General, Department of Home Affairs and Others* 2003 (5) BCLR 605 (D).

<sup>78</sup> Act No. 82 of 1987.

<sup>79</sup> n 73 above.

<sup>80</sup> n3, above.



rights case in Uganda, the *Victor Mukasa* case<sup>81</sup> had been delivered. The background leading up to the case concerns the Equal Opportunities Commission. Pursuant to article 32(2)(2) of the 1995 Constitution of the Republic of Uganda, and later article 32(4) of the 1995 Constitution as amended in 2005, Parliament passed the Equal Opportunities Commission Act, 2007. The Act was aimed at ensuring the elimination of discrimination against social groups that were marginalised by historical as well as other factors. It created the Equal Opportunities Commission to which cases of marginalisation could be reported. The Bill leading to the Act<sup>82</sup> initially had no limitation on who would access the Commission. However, during the second reading in Parliament, a member proposed to amend the bill by including a provision that would prevent ‘homosexuals and the like’ from claiming protection under the Act.<sup>83</sup> This was adopted and it became section 15(6)(d), which denied persons who engage in behaviours that are regarded as ‘immoral or socially unacceptable’ access to the Commission. The matter was taken to the Court by the author, who is a human rights lawyer.

The Constitutional Court struck down section 15(6)(d) of the Equal Opportunities Commission Act, on the basis that it violated the right to a fair hearing. The Court observed that the right to a fair hearing was at the heart of the Equal Opportunities Commission, since this body was established to redress imbalances and ensure equal opportunities for all persons.<sup>84</sup> The Court furthermore held that the EOC was established to monitor, evaluate, investigate and redress discriminatory practices and tendencies and this was clear from the Constitution, the policy upon which the EOC Act was based<sup>85</sup> and the EOC Act itself. If the persons mentioned in section 15(6)(d) appeared before the Commission, they would likely be excluded from any form of hearing, which clearly restricts the right to a fair hearing. The Court held that

[a] law that precludes a group of people from adjudication on violation of their rights and does not create an alternative forum to hear them out breaches the right to a fair hearing.<sup>86</sup>

<sup>81</sup> n 52 above.

<sup>82</sup> Equal Opportunities Commission Bill.

<sup>83</sup> The amendment was proposed by Hon. Jalia Bintu and supported by Hon. Syda Bumba, the then Minister of Gender, Labour and Social Development. See Parliament of Uganda ‘Hansard, December 12 2016’. For a full discussion of the process leading to the inclusion of the provision, see S Tamale ‘Giving with one hand, Taking away with the other: The Uganda Equal Opportunities Commission Act, 2007’ in Human Rights Awareness and Promotion Forum (HRAPF) *Still Nowhere to Run: Exposing the deception of minority rights under the Equal Opportunities Commission of Uganda* (2010) 19-22. <http://hrapf.org/?mdocs-file=1604&mdocs-url=false> (accessed 6 April 2018).

<sup>84</sup> *Adrian Jjuuko* case, n 4 above, line 215-264.

<sup>85</sup> Ministry of Gender, Labour and Social Development ‘The National *Equal Opportunities Policy*’ July 2006.

<sup>86</sup> *Adrian Jjuuko* case, n 4 above, line 286-289.

The Court also found that the provision violated the constitutional provisions on the inherent nature of rights and the right to equality and freedom from discrimination. On discrimination, the Court noted that the provision excluded a group of persons simply on the basis of the fact that they were regarded as 'immoral, harmful and unacceptable'.<sup>87</sup> The Court considered the limitation clause and concluded that the limitation was not acceptable or demonstrably justifiable in a free and democratic society. It therefore nullified the provision.

vi) *Cases on laws on estate support for a surviving spouse*

There are two successful cases on this issue, both from South Africa. The first was *Du Plessis v Road Accident Fund*,<sup>88</sup> decided by the Supreme Court of Appeal (SCA)<sup>89</sup> on 19 September 2003. In this case, the applicant had been in a permanent same-sex relationship with the deceased, who had taken on the duty to care for him after he (the applicant) had become disabled. They had both bequeathed property to each other. The applicant wanted to claim from the Road Accident Fund, for loss of support, and funeral costs. However, the Fund argued that the Common Law only recognised a spouse and therefore denied him the benefits. The applicant applied to the High Court challenging the Common Law position. The High Court dismissed the application, and denied leave to appeal.<sup>90</sup> The plaintiff applied for leave to appeal before the Supreme Court of Appeal and this was granted. The Supreme Court of Appeal found the Common Law to be out of line with the Constitution, as it discriminated on the basis of sexual orientation. The Court developed the South African Common Law by extending a spouse's action for loss of support in cases of deaths arising out of accidents to persons in permanent same-sex relationships where the partner was owed a contractual duty of support. The Court explored the developments in other countries and found a shift towards recognising obligations arising out of same-sex relationships, which were not marriages.<sup>91</sup> The Court therefore held that the legal duty of maintenance owed by the deceased to the plaintiff deserved to be protected.<sup>92</sup>

<sup>87</sup> Above, line 375.

<sup>88</sup> 2004 1 SA 359 (SCA).

<sup>89</sup> The Supreme Court of Appeal is created under section 168 of the South African Constitution. It only hears appeals and can thus invalidate statutes on appeal.

<sup>90</sup> *Du Plessis v Road Accident Fund* (73992/13) [2015] ZAGPPHC 992.

<sup>91</sup> Above, para 32.

<sup>92</sup> Above, para 33.

The second case is *Gory v Kolver NO & Others* (the *Gory* case)<sup>93</sup> decided on 23 November 2006. The deceased and the applicant were in a permanent same-sex relationship with reciprocal duties to each other. The parents of the deceased claimed to be the administrators to his estate. The applicant challenged section 1(1) of the Intestate Succession Act<sup>94</sup> that did not recognise partners in permanent same-sex relations to inherit automatically, as a spouse would when their partner died without will beneficiaries, as being discriminatory on the grounds of sexual orientation. The High Court found the exclusion of same-sex persons in permanent relationships to be discriminatory on the grounds of sexual orientation and therefore unconstitutional. The case came before the Constitutional Court for confirmation, and the Court confirmed that the law was unconstitutional as it was discriminatory on the grounds of sexual orientation. To reach this conclusion, the Court built on the earlier cases, which had dealt with the recognition of obligations arising out of same-sex relationships in relation to spouses.<sup>95</sup> There was no justification for the differential treatment of spouses from persons in permanent same-sex relationships as far as intestate succession was concerned. The Court read the words ‘or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support’ into section 1(1) after the word ‘spouse,’ wherever it appeared.

The decision was made after the court had ordered for the legalisation of same-sex marriages in *Minister of Home Affairs and Another v Fourie and Another; and Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* (*Fourie* case)<sup>96</sup> and seven days before the Civil Unions Act became law.<sup>97</sup> The judges therefore had to address the issue of what would happen after same-sex marriages became legal, as at that point, cohabiting unmarried same-sex couples would have far more rights than heterosexual couples similarly situated, which indeed is what happened.<sup>98</sup> The Court concluded that it was up to parliament to remedy this.<sup>99</sup>

vii) *Cases challenging laws on immigration*

The only case on the issue of immigration is the South African case of *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* (the *Immigration*

<sup>93</sup> 2007 3 BCLR 249 (CC).

<sup>94</sup> 81 of 1987.

<sup>95</sup> *Gory* case n 93 above, para 19.

<sup>96</sup> 2005 ZACC 19.

<sup>97</sup> The Civil Unions Act came into force on 30 November 2006.

<sup>98</sup> See P de Vos and J Barnard, *Same-sex marriage, civil unions and domestic partnerships in South Africa: Critical reflections on an ongoing saga* 2007 (124) SALJ 795, 823.

<sup>99</sup> n 96 above, paras 30-31.

case),<sup>100</sup> decided on 2 December 1999. This was the third case to be brought before the courts on LGB rights, following the *Sodomy* case, and the first applicant was the NCGLE as it was in the *Sodomy* case. The case challenged the constitutionality of section 25(5) of the Aliens Control Act,<sup>101</sup> which allowed the issuance of an immigration permit to a spouse of a South African citizen or permanent resident but excluded persons in same-sex relationships as they were not regarded as spouses. The Cape of Good Hope High Court found the provisions to be discriminatory on the basis of sexual orientation.<sup>102</sup> The case came before the Constitutional Court for confirmation. The Court confirmed the invalidity of the provision, finding it to discriminate on the basis of sexual orientation. According to the Court, the word 'spouse' could not be interpreted as including a permanent South African resident who was in a permanent same-sex life partnership with a foreign national. In that regard, the constitutionality of the provision had to be considered in light of the constitutional provisions on non-discrimination. The Court referred to the *Sodomy* case and the analysis that the Court made in that instance. It found that section 25(5) unfairly discriminated against gays and lesbians on the grounds of sexual orientation and marital status.<sup>103</sup> The discrimination was unfair and could not be justified. The Court decided to insert the words 'or partner, in a permanent same-sex life partnership,' after the word 'spouse,' through the technique of 'reading in'.

viii) *Cases challenging the non-recognition of same-sex marriages*

South Africa is the only country in Common Law Africa with a case concerning same-sex marriages. This is the *Fourie* case.<sup>104</sup> It was decided on 1 December 2005. These were in reality two different cases and they were the culmination of the campaign that had started with the *Sodomy* case, to get rid of the laws impeding LGB equality. Same-sex marriage was one of those things that were thought to be the most difficult to obtain and were thus at the bottom of then law professor, Edwin Cameron's bucket list.<sup>105</sup> The first case was brought by a lesbian couple in a permanent same-sex relationship who contended that the Common Law definition of marriage, which states that marriage was a union of one man with one woman to the exclusion, while it lasts, of all others, was discriminatory on the basis of sexual orientation. The second case was brought by the Gay and Lesbian Equality Project, which

<sup>100</sup> 2000 1 BCLR 39.

<sup>101</sup> 96 of 1991.

<sup>102</sup> *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 1999 (3) BCLR 280.

<sup>103</sup> n 100 above, para 40.

<sup>104</sup> n 96 above.

<sup>105</sup> See E Cameron 'Sexual orientation and the Constitution: A test case for human rights' (1993) 110 *South African Law Journal* 450.

challenged section 30(1) of the Marriage Act. This section of the Act provided the marriage formula and it was argued that it was discriminatory on the grounds of sexual orientation as it did not cover same-sex couples. In the first case, the Pretoria High Court refused to make the declaration as in its view, marriage in the law was between a man and a woman.<sup>106</sup> The Constitutional Court also denied direct access.<sup>107</sup> The case came before the SCA, which ruled that the Common Law definition of marriage constituted unfair discrimination against same-sex persons.<sup>108</sup> The case came before the Constitutional Court for confirmation. It was at this stage that the second case was joined to the first one.

The Constitutional Court found the Common Law definition of marriage and section 30(1) of the Marriage Act<sup>109</sup> to be inconsistent with the equality and dignity provisions of the Constitution in as far as they made no provision for same-sex couples to enjoy the status, entitlements and responsibilities they accord to heterosexual couples. Sachs J, writing the majority judgment, traced the different cases that had recognised obligations arising out of same-sex relationships, taking into account the history of discrimination against same-sex persons in South Africa and the need for inclusion, equality and respect for all. Exclusion of same-sex couples from the benefits and responsibilities of marriage was a serious matter that needed to be addressed. Religious objections to same-sex marriages were held to be left for religion to address rather than state laws: religions would be free to determine whether to celebrate same-sex marriages or not. The laws were declared invalid with the declaration suspended for 12 months to enable Parliament to address the discrimination as the matter of same-sex marriages was controversial and there were many differing opinions. As such, it was best suited to be addressed by Parliament.

*ix) Cases on laws on age of consent to sexual relations*

The issue of differing ages of consent for same-sex persons and heterosexual persons came up in one South African case, *Geldenhuys v National Director of Public Prosecutions & Others*,<sup>110</sup> decided on 26 November 2008. The applicant who had been convicted of having sexual relations with male children below the age of 19 under sections 14(1)(b) and 14(3)(b) of the Sexual Offences Act,<sup>111</sup> challenged these provisions before the SCA for being

<sup>106</sup> *Fourie and Another v Minister of Home Affairs and Another (The Lesbian and Gay Equality Project intervening as amicus curiae)*, Case No 17280/02 (2002).

<sup>107</sup> *Fourie v Minister of Home Affairs* 2003 (5) SA 301 (CC).

<sup>108</sup> *Fourie and Another v Minister of Home Affairs and Another* (232/2003) [2004] ZASCA 132.

<sup>109</sup> No. 25 of 1961.

<sup>110</sup> 2009 5 BCLR 435 (CC).

<sup>111</sup> 23 of 1957.

unconstitutional as they made a distinction between heterosexual sex and homosexual sex. The provisions criminalised both men and women for having ‘unlawful carnal intercourse’ with girls under the age of 16 and boys under the age of 19.

Despite the fact that the Constitutional Court had invalidated section 20A of the Sexual Offences Act, which concerned same-sex conduct between men under certain circumstances, in the *Sodomy* case<sup>112</sup> these provisions remained on the law books until they were repealed by the Criminal Law (Sexual Offences and Related Matters) Act.<sup>113</sup> This Act came into effect on 16 December 2007 and among other provisions provided for a single age of consent for both girls and boys in heterosexual as well as homosexual relationships.<sup>114</sup> The Act furthermore expanded the definition of rape to be far broader than unlawful, forced penile-vaginal penetration but included the penetration of the genital organs, anus or mouth of either a male or female by an object or the genital organs of another person. While forced sexual penetration of men was previously charged and prosecuted under the sodomy provisions, or limited to the crime of ‘sexual assault’, rape charges could now be instituted against perpetrators committing sexual crimes against men. The differential treatment occasioned by sections 14(1)(b) and 14(3)(b) of the Sexual Offences Act, had been noted by Ackermann J in the *Sodomy* case but he did not rule on its constitutionality.<sup>115</sup> The case concerned convictions that were made before the above provisions of the Sexual Offences Act were repealed. The Court observed that the different ages of consent show that same-sex relations are viewed as deviant, disgraceful or being of lesser value and that is why a higher age of consent is imposed.<sup>116</sup> The discrimination was found to be unfair and there was no reasonable justification for it. The Court declared the provisions invalid effective 27 April 1994 when the Interim Constitution came into force.

#### *b) Cases challenging actions of state officials*

Another area where LGB activists have resorted to the courts is in challenging the actions of state officials who violate LGB rights. There were six such cases by the end of August 2018. Four of these were successful, and two were lost. Activists in Uganda lead the way in this area and have brought four out of the eight cases before the courts, while two have been brought in Kenya, one in Botswana and none in South Africa.

<sup>112</sup> n 8 above.

<sup>113</sup> Amendment Act 32 of 2007.

<sup>114</sup> See section 3 of the Act and the case of *Masiya v Director of Public Prosecutions* [2007] ZACC 9.

<sup>115</sup> n 8 above, para 71.

<sup>116</sup> n 110 above, para 36.



The first successful case is the *Victor Mukasa* case,<sup>117</sup> decided by the High Court of Uganda on 22 November 2008. It was the first case to be instituted in the struggle for the recognition of LGB rights in Uganda. It was brought by Victor Mukasa, the then most visible face of the LGB movement in Uganda,<sup>118</sup> and Yvonne Oyoo, a guest who had been found at Mukasa's house. The house of Mukasa, who then self-identified as a lesbian, was raided by local council authorities, who forced their way into the house, took various materials they found, and arrested Oyoo. They took her to the office of the Local Council 1 chairperson.<sup>119</sup> While there, she was referred to as 'creature' by the chairperson, and denied access to toilet facilities causing her to urinate on herself. She was later taken to the police station where she was forced to undress before police officers, ostensibly to establish her sex. The Officer in charge of the station then went ahead and fondled her breasts. She was released without any charges being preferred and the police refused to hand over all the materials taken from the first applicant's house. The applicants challenged the constitutionality of the actions of the local council authorities and the police. The state argued that their actions were intended to protect the applicants from mob violence, as they were lesbians. The High Court declared that the actions of the police in forcing their way into the first applicant's house, taking away her documents and the abuse of the second applicant while at the police station - all because they were suspected of being lesbians - was a violation of the first applicant's right to property and the second applicant's right to freedom from inhuman and degrading treatment. According to Joe Oloka-Onyango, this case being the first case was significant for both what it said and for what it did not say.<sup>120</sup> The judge recognised that homosexuals are entitled to the same rights as every other Ugandan, when she stated that the case was not about homosexuality but about human rights.<sup>121</sup> The case also showed that harassment and mistreatment of persons based solely on their sexual orientation could not be accepted in a free and democratic society.

<sup>117</sup> n 57 above.

<sup>118</sup> See A Jjuuko, n 49 above, 391.

<sup>119</sup> Local Councils are established under the Local Government Act, Cap 243. The Local Council 1 is the lowest level of government administration in Uganda, operating at the village level. The Chairperson is the head of the nine-person committee that constitutes the Local Council 1, and under section 50 of the Local Government Act, is the political head of the village council and has among other duties, the duty to 'monitor the general administration of the area under his or her jurisdiction'.

<sup>120</sup> See J Oloka-Onyango 'Debating love, human rights and identity politics in East Africa: The case of Uganda and Kenya' (2015) 15 *African Human Rights Law Journal* 28, 37-38.

<sup>121</sup> Whereas this statement was obviously an evasion of the issue of homosexuality by the judge since it was obvious that homosexuality was the 'elephant in the room,' (B Kabumba 'The Mukasa judgment and gay rights in Uganda' (2009) 15 *East African Journal of Peace and Human Rights* 221), here it is treated as a positive statement since the judge was able to recognise that LGB persons were entitled to the same rights as everyone else. See J Oloka Onyango, n 120 above, 36.

The second successful case was the *Eric Gitari case*<sup>122</sup> decided on 24 April 2015. This was the first case on LGB rights in Kenya. In that case, the National Non-Governmental Organisations Coordination Board refused to register the applicant's organisation. This was on the basis that the organisation sought to protect gays and lesbians and yet same-sex conduct was criminalised in Kenya. The Board relied on regulation 8(3)(b) of the NGO Regulations of 1992<sup>123</sup> which gave discretion to the registrar to refuse to reserve a name that is regarded as 'repugnant to or inconsistent with any law or is otherwise undesirable'. The High Court of Kenya found that this refusal constituted a violation of the rights to equality and freedom of association. The objectives of the proposed organisation included 'protecting the rights of LGBTI persons'. The Court found that the applicant's rights to freedom of association as well as the right to freedom from discrimination had been violated. It also found that the term 'every person' in article 36 of the Constitution meant every individual regardless of their attributes, including sexual orientation. As such, all persons – regardless of how reprehensible their behaviour was – were entitled to the same rights. The Penal Code only criminalises carnal knowledge against the order of nature and not the right of individuals to associate. Only the limitation clause in the Constitution should be the basis for a limitation of rights. Moral or religious views, however strongly held, cannot be used to limit rights. The Constitution protects even those whose views are unpopular or controversial. Article 27 of the Constitution does not expressly prohibit discrimination on the basis of sexual orientation. However, it uses the words 'including' which shows that it is an open-ended list and indeed allowing discrimination on the basis of sexual orientation would be contrary to the constitutional principles of among others human rights, equality, non-discrimination and social justice. The rights belong to everyone regardless of their sexual orientation and the whole constitutional scheme supports protection and inclusion.

The third successful case is the *LEGABIBO Registration case*,<sup>124</sup> decided on 16 March 2016 by the Court of Appeal of Botswana. In this case, the Registrar of Societies had refused to register LEGABIBO on the basis that the name was undesirable. 20 individuals, mainly members of LEGABIBO, brought the matter before the High Court which ruled in their favour, finding that the refusal to register was unconstitutional as it violated the right to freedom of assembly and association which is protected under section 13 of the Constitution.<sup>125</sup> The state appealed to the Court of Appeal. The Court confirmed that the

<sup>122</sup> *Eric Gitari v Attorney General & Another* Petition 440 of 2013 [2015] eKLR

<sup>123</sup> NGOs Co-ordination Regulations 1992.

<sup>124</sup> n 5 above.

<sup>125</sup> *Thuto Ramogge & 19 Others v The Attorney General* MAHGB-000175-13.

refusal to register the organisation Lesbians, Gays, Bisexuals of Botswana (LEGABIBO) because its objectives included protection of LGB persons was a violation of the right to freedom of assembly and association under section 13 of the Constitution. The Court confirmed that ‘all persons’ in section 3 indeed included homosexuals and that the *Kanane* case did not purport to exclude them from the ambit of ‘all persons.’<sup>126</sup> The provision allowed limitations to these rights if such limitations were done under the ‘authority of any law’ or were ‘reasonably required’ for among others public morality and were ‘reasonably justifiable in a democratic society’.<sup>127</sup> The Court observed that the Societies Act did not make reference to ‘public morality’ and so this is not something the Registrar or the Minister had to consider. While the prevention of crime was indeed a legitimate concern, the objectives of LEGABIBO were about doing advocacy for legal reform, which was the legitimate right of every citizen.<sup>128</sup> The Minister’s act was found to be unconstitutional and unreasonable. The judgment was seen as progressive,<sup>129</sup> and although the Court in this case did not overturn the *Kanane* case, this case nevertheless shows that between 2003 and 2016, the judiciary’s approach had undergone tremendous change as regards LGB rights.

The fourth and most recent successful case is the Kenyan *COL* case,<sup>130</sup> decided on 22 March 2018. It dealt with the issue of forced medical examinations - including anal examinations - of persons charged under section 162(a) of the Penal Code of Kenya, which provision criminalises carnal knowledge against the order of nature. The petitioners, who were arrested and charged under section 164 of the Penal Code of Kenya, were ordered to undergo medical examinations including an anal examination and HIV and Hepatitis B tests. Their test results were publicly declared. They contended that the medical examinations were a violation of their constitutional rights to freedom from inhuman and degrading treatment under article 29(f) of the Constitution and the right to privacy under article 28 of the constitution; and that using the evidence obtained through such unconstitutional measures in their trial constituted a violation of the right to a fair trial as guaranteed by article 50 of the Constitution, as it amounted to self-incrimination. The High Court of Kenya held that the right against self-incrimination does not exclude the taking of samples from persons for the purposes of criminal investigations, and that on the right to dignity, there was a need to balance that right with the need for criminal investigations

<sup>126</sup> Above, para 56-57.

<sup>127</sup> Above, para 58.

<sup>128</sup> Above, para 61-67.

<sup>129</sup> LC Olebile ‘The status of LGBTI rights in Botswana and its implications for social justice’ in Namwase, S & Jjuuko, A (2017) *Protecting the human rights of sexual minorities in contemporary Africa* 190, 197-200.

<sup>130</sup> n 3 above.

since, according to the Court, the only way to ascertain whether one had had sexual intercourse *per anum* was to examine the anus for signs of recent sexual activity.<sup>131</sup> The Court of Appeal at Mombasa held that the order for medical examination was not made lawfully, as the court did not properly exercise its jurisdiction. In this case, the appellants had been picked up in a bar while ordering drinks and there was nothing to suggest that they were engaging in sexual acts. The unlawful order therefore violated the right to dignity, privacy and self-incrimination of the appellants. On dignity, the court specifically stated that ‘regardless of one’s status or position or mental or physical condition, one is, by virtue of being human, worthy of having his or her dignity or worth respected.’<sup>132</sup> The court held that the right to privacy extended to not forcing someone to undergo a forced medical examination. On limitation, the court held that the order to undergo medical examination was limited to only the Sexual Offences Act and could not extend to the Penal Code Act under which the accused were charged.<sup>133</sup> As such, the order for medical examination, whether consented to or not, went against the principle against self-incrimination, which amounted to a violation of the rights to a fair trial.<sup>134</sup>

The two lost cases were both in Uganda. The first one was *Kasha Jacqueline Nabagesera & 3 Others v The Attorney General and Hon. Rev. Fr Simon Lokodo (Lokodo case)*,<sup>135</sup> decided on 24 June 2014. The case was brought by the organisers of an LGB skills workshop, which was raided and stopped by the second respondent, who was the Minister of Ethics and Integrity, with the help of police officers. The other applicants were participants in the workshop. The respondents argued that the second respondent was not personally responsible as he was acting in his official capacity, and that the rights of the applicants could be limited in the public interest for purposes of protection of morals under the limitation clause in the Constitution since they were promoting homosexual activities, which are criminalised in the Penal Code Act. The High Court held that stopping an LGB workshop by the Minister of Ethics and Integrity based on the criminalisation of same-sex conduct in Uganda was a justifiable limitation to the right to freedom of association. Musota J noted that the second respondent was acting in his official capacity and was thus not personally liable. Furthermore, the protection of morals was a legitimate reason for limiting the applicants’ rights, and as such the criminal law could be used to restrict human rights. Not only persons

<sup>131</sup> *COL & GMN v Resident Magistrate Kwale Court & 4 Others* Petition No. 51 of 2015 (2015) eKLR.

<sup>132</sup> Above, para, 26.

<sup>133</sup> Above, Para 31.

<sup>134</sup> Above, Para 33.

<sup>135</sup> High Court Miscellaneous Cause No. 33 of 2012 (High Court of Uganda).

directly involved in the commission of the offence were liable for it, but also those who directly or indirectly encourage or assist the commission of the offence or who conspire with others to commit it, regardless of whether the substantive offence is actually committed. Accordingly, those persons who are engaged in activities that encourage members of the LGB community to engage in criminal conduct are condoning an illegality. By the end August of 2018 an appeal in this case was still pending hearing and decision.<sup>136</sup>

The second and most recent case was the *SMUG Registration* case,<sup>137</sup> decided on 27 June 2018. It challenged the refusal by the URSB to reserve the name 'Sexual Minorities Uganda' contending that this was justified by section 145 of the Penal Code criminalising consensual same-sex relations. The applicants argued that the refusal of registration violated the constitutional rights to freedom from discrimination and freedom of association, while the two year delay to make and communicate a decision on registration constituted a violation of the right to a fair hearing. The objectives of the proposed company were about research and documentations of violations of fundamental human rights of LGBTI people in Uganda; promoting security, well-being and dignity of LGBTI persons; combatting discriminatory laws and providing healthcare services and security in crisis situations. The URSB argued that the name 'Sexual Minorities Uganda' was undesirable and un-registrable under section 36 of the Companies Act, 2012, as the proposed company was to advocate for the rights and well-being of people engaged in activities labeled 'criminal acts' under section 145 of the Penal Code Act, including lesbians and gay persons. The High Court (Patricia Wasswa Basaza J) held that the refusal of the URSB to reserve SMUG's name, and consequently to register the proposed company, did not contravene the Constitution of Uganda, as the rights that the applicants claimed were subject to limitation under article 43 of the Constitution. The article subjected rights to the public interest. It was held that the proposed company was formed to promote prohibited and criminal acts since article 31(2)(a) of the Constitution, as amended by section 10 of the Constitution (Amendment) Act, 2005, prohibits same-sex marriages, and section 145 of the Penal Code Act prohibits 'having carnal knowledge against the order of nature.' It was further held that the proposed company's objectives go against the values and norms of the Ugandan people and are prejudicial to the public interest. Relying on the European Court of Human Rights' decision in the case of *Schalk and*

<sup>136</sup> Civil Appeal No. 195 of 2014. It challenges the decision of the High Court in reaching a conclusion based only on affidavit evidence and conjecture, that the workshop was aimed at encouraging persons to engage in homosexuality. It also challenges the conversion of a case on fundamental human rights into a criminal trial; and the conclusion that the minister could not be sued in his personal capacity.

<sup>137</sup> n 4 above.

*Kopf v Austria*,<sup>138</sup> the Court equated the registration of an organisation advocating for rights, safety and services for LGBTI persons to the sanctioning of same-sex marriage, which was a matter held to be within each country's margin of appreciation in that case. The Court also rejected precedents from other countries, including Botswana and Kenya, whose legal position on same-sex relations is almost similar to that of Uganda. It stated that 'what happens or is allowed in other jurisdictions cited by the applicants does not apply here and indeed in most African States'. The court agreed with the judgment of Musota J in the *Lokodo* case, in which he held that it is also prohibited to encourage or assist the commission of an offence or to conspire to do so with others. The Court further criticised the position in the case of *Jacqueline Kasha Nabagesera & 2 Others v Rolling Stone Ltd. & Giles Muhame* (the *Rolling Stone* case)<sup>139</sup> that section 145 of the Penal Code is about specific acts and not generally about 'being gay'. This decision together with the decision in the *Lokodo* case, have further narrowed the operation space for LGB organisations in Uganda.<sup>140</sup> An appeal was being prepared by the end of August 2018,<sup>141</sup> and has since been filed as Civil Appeal No. 223 of 2018.

*c) Cases challenging actions of non-state actors*

Another category of cases are those challenging the actions of non-state actors. There have so far been three such cases, of which one has been successful, and two were dismissed on grounds other than sexual orientation.

The successful case is the *Rolling Stone* case<sup>142</sup> in Uganda. In this case, the applicants were featured in a newspaper publication, which had published photos, names and addresses of real and suspected LGB persons and called for their hanging. They argued that this publication violated their rights to privacy, and freedom from inhuman and degrading treatment and therefore among other things sought an injunction to stop further publication. The High Court held that the publication was a violation of the applicants' rights to freedom from inhuman and degrading treatment and to privacy. Musoke Kibuuka J also noted that the application was not about homosexuality, but rather about whether the publication

<sup>138</sup> Application no. 30141/04.

<sup>139</sup> Miscellaneous Cause No. 163 of 2010 (High Court of Uganda).

<sup>140</sup> Human Rights Awareness and Promotion Forum & Sexual Minorities 'Joint Communiqué: Uganda's High Court dismisses case challenging the refusal to register Sexual Minorities Uganda' 28 June 2018 (on file with author).

<sup>141</sup> Human Rights Awareness and Promotion Forum (HRAPF) & Sexual Minorities Uganda 'Uganda's high court dismisses case challenging the refusal to register Sexual Minorities Uganda' Joint Communiqué, 28 June 2018 (on file with author).

<sup>142</sup> n 139 above.



infringed the rights of the applicants, something that resonates with the judgment in the *Victor Mukasa* case. He held that the publication threatened the applicants' right to dignity. By calling for their hanging, the respondent extracted the applicants from the other members of the community who are regarded as 'worthy' of human dignity. If a person is only worthy of death, then that person's human dignity is placed at the lowest ebb.<sup>143</sup> He further noted that publishing the applicants' faces and addresses for the purposes of fighting 'gayism' (sic) threatened their right to privacy, a right they are entitled to. The judge also commented on the scope of section 145 of the Penal Code noting that it is '... narrower than gayism (sic) generally. One has to commit a prohibited act under section 145 to be regarded a criminal.'<sup>144</sup> The Court therefore issued an injunction barring the newspaper from further publication of such details and awarded damages to each applicant.

Two of the cases were dismissed without the courts making a decision on sexual orientation issues. The first of these was the South African *De Lange* case,<sup>145</sup> decided on 24 November 2015. The Constitutional Court held that the issue of whether or not the dismissal of the applicant, a Methodist minister, on the basis of her intended marriage to another woman amounted to unfair discrimination had been abandoned in the lower courts, and so could not be raised at the Constitutional Court level. The Court emphasised the principle of constitutional subsidiarity, which required that the unfair discrimination claim should have been taken to the Equality Court first. It also held that the applicant's failure to file a notice as to the unfair discrimination issues deprived others, including religious groups, of the opportunity to intervene as parties or as *amicus curiae*. The appeal was thus dismissed.

The second case was the Ugandan case of *Sexual Minorities Uganda v Scott Lively*<sup>146</sup> (*Scott Lively* case). This was an appeal by the defendant in the case of *Sexual Minorities Uganda v Scott Lively*,<sup>147</sup> American evangelist, Scott Lively against the words of the judge portraying him as guilty of crimes against humanity. The appeal was dismissed on 10 August 2018, on the basis that the winning party had no right of appeal, more so from words that were dicta, not forming the gist of the decision.<sup>148</sup> The appeal rose from the decision of the US District Court in Springfield Massachusetts on 5 June 2017. In this case, *Sexual Minorities Uganda*

<sup>143</sup> n 139 above, 8 - 9.

<sup>144</sup> Above, 9.

<sup>145</sup> n 6 above.

<sup>146</sup> No. 17-1593 (United States Court of Appeals for the First Circuit)

<sup>147</sup> 254 F. Supp. 3d 262 (D. Mass. 2017).

<sup>148</sup> *Sexual Minorities Uganda v Scott Lively*, No. 17-1593 (United States Court of Appeals for the First Circuit) (*Scott Lively* case).

had sued Pastor Lively under the Alien Tort Statute for his role in promoting persecution of LGB persons in Uganda. Lively had allegedly taken part in a conspiracy to persecute LGB persons in Uganda. He visited Uganda and played a role in the introduction and passing of the AHA/AHB in Uganda, having met with legislators and spoken at an anti-gay conference in 2009 organised by the Family Life Network in Kampala. He also kept in communication with key persons behind the AHB/AHA. Lively had applied for summary dismissal of the suit basing on freedom of expression, but this was turned down, and the case proceeded to hearing.<sup>149</sup> The Court held that there was not enough evidence to invoke the Court's jurisdiction under the USA's Alien Tort Statute (ATS).<sup>150</sup> In coming to this conclusion, the court relied on the Supreme Court decision in *Kiobel v Royal Dutch Shell Limited*,<sup>151</sup> where the Court emphasised the canon against extraterritoriality of US laws and therefore that since the ATS went against this principle, it could only be invoked where there was a sufficient connection to USA soil. No such substantial connection to the USA existed in the instant case, as the defendant only wrote a few emails from the USA and carried out all the other actions from Uganda. The judge, however, made the important observation that the actions of the accused in promoting hate against LGB persons amounted to crimes against humanity.

### 3.2.3 General observations on LGB SL in the selected Common Law African countries

From the above summary of cases, a number of observations can be discerned about the number, nature and outcomes of LGB strategic cases in Common Law Africa. These are:

#### a) *Exponential rise in the number of LGB strategic cases in the last 20 years*

A total of 26 strategic cases on LGB rights were filed by LGB activists and lawyers in the four selected Common Law African countries between the period 1998 and 31 August 2018.<sup>152</sup> Before 1998, there was no single decided strategic case on LGB rights in any of these

<sup>149</sup> *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304 (D. Mass. 2013)

<sup>150</sup> Alien Tort Statute (28 U.S.C. § 1350; ATS).

<sup>151</sup> 569 US 108 (2013).

<sup>152</sup> These are almost all the cases filed in Common Law Africa during the period. Besides the four countries, only two other African Common Law countries, Malawi and Nigeria, have had LGB SL cases that fit the criteria set out at the beginning of this chapter. However they could not be part of this study, since the study considered only countries that had successful cases by the end of 2015. Zimbabwe is the only outstanding country excluded, and this is because its case, the *Banana* case (n 27 above) was not brought by the LGB community in Zimbabwe but rather by a politician who challenged the law primarily to achieve an acquittal, rather than for social change, and the case was not joined by any LGB groups. For Nigeria, there have so far been two cases, one successful and the other one not. The first case was *Teriah Joseph Ebah v Federal Government of Nigeria*, Suit FHC/ABJ/CS/197/2014 where the High Court dismissed the challenge to the Same-sex Marriages

countries. Litigation increased only after the countries concerned underwent the so-called 'third wave of democratisation,'<sup>153</sup> which introduced bills of rights in constitutions and vested courts with the power to interpret these bills of rights.<sup>154</sup> This created a new avenue of engaging, not just on LGB rights in particular, but on human rights in general.<sup>155</sup> Therefore, the LGB recourse to the courts is not an isolated development, but rather one that has affected all other interest groups too, as a direct result of increased democratisation and constitution-building in Common Law Africa. This period also coincided with the first Supreme Court successes on LGB rights in countries like the USA<sup>156</sup> and Canada.<sup>157</sup> As a consequence of these victories, the LGB rights lobby in many of these countries started providing support to activists in Africa. The registered successes were therefore not a 'Common-Law Africa only' development.

At the international level, the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity, codifying international law principles were also drafted and adopted in 2006 by a group of international scholars, UN officials, and activists.<sup>158</sup> The LGB lobby was also making progress at the UN, and in 2011, the first UN Human Rights Council Resolution on LGBT

(Prohibition Act) 2013 on the basis that the applicant had no standing to bring the case. An appeal was pending in this case by the end of August 2018. The second and more recent case was *Ifeanyi Orazulike v Inspector General of Police & Abuja Environmental Protection Board*, Suit No. FHC/ABJ/CS/799/2014, (*Orazulike case*) where the applicant was arrested in the night of October 22nd, 2014, at his office in Abuja, while holding a party to celebrate his birthday. The High Court found the detention unconstitutional and ordered the respondents to pay damages to the applicant and to publicly apologise. In Malawi the case is *The State v Director of Public Prosecutions Ex parte Gift Trapence and Timothy Pagonachi Mtambo* Constitutional case No. 1 of 2017 (*Msonda case*), which challenged the decision of the Director of Public Prosecutions (DPP) in Malawi to discontinue charges for inciting violence against politician Ken Msonda who had described gays as worse than dogs and called upon the public to kill them. The Court on 19 July 2018 found that the way the DPP exercised her powers did not violate the Malawi Constitution.

<sup>153</sup> This term was popularised in by Huntington. See S Huntington *The third wave: Democratization in the late twentieth century* (1991). However, the book did not include Africa among the regions studied. Nevertheless, the 'third wave' had also swept across Africa and has left its imprint and as such the 'constitutional moments' in Africa, as Prempeh refers to them, can also be included within Huntington's 'third wave' narrative. For a more detailed discussion of this. See also K Prempeh 'Africa's 'constitutionalism revival': False start or new dawn?' (2007) 5 *International Journal of Constitutional Review* 469-487, 470.

<sup>154</sup> Prempeh, above 471.

<sup>155</sup> Oloka-Onyango traces the historical development of PIL in East Africa and shows that there have been huge shifts in the use of PIL over time and generally PIL is used more regularly and effectively today than before. See J Oloka-Onyango *When courts do politics: Public Interest law and litigation in East Africa* (2017), page 101-110.

<sup>156</sup> The successful streak of eight cases in the US starting with *Romer v Evans* 517 US 620, in 1996, through *Lawrence v Texas*, 539 US 558 in 2003 to *Obergefell et al. v. Hodges, Director, Ohio Department of Health, et al.* 576 US (2015) in 2015 galvanised US LGB organising and support of other groups outside the US.

<sup>157</sup> Activists in Canada had their first successful case in *Egan v Canada* [1995] 2 SCR 513 and the winning streak continued in a series of provincial and Supreme Court cases.

<sup>158</sup> Yogyakarta Principles: <http://www.yogyakartaprinciples.org/> (accessed 3 March 2018). These have now been updated with the Yogyakarta Principles plus 10 (YP+10) - Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles, adopted 10 November, 2017 <http://yogyakartaprinciples.org/principles-en/yp10/> (accessed 31 August 2018).

rights was passed.<sup>159</sup> Another resolution was passed in 2014,<sup>160</sup> and the latest in 2016.<sup>161</sup> The government of the USA also firmly joined the struggle for LGB rights, and during the presidency of Barack Obama, LGB and Transgender (LGBT) rights was a key feature of USA's foreign policy.<sup>162</sup> Uganda's AHB was also a key issue internationally, including at the United Nations,<sup>163</sup> and international support for litigation in Uganda and other countries increased.<sup>164</sup>

The other factor that spurred litigation on LGB rights in Common Law Africa was the influential example of South Africa. After successfully lobbying for the inclusion of sexual orientation as a protected ground in the new Constitution, South African activists made use of the provisions in the new Constitution, which facilitated PIL actions. Within 10 years they had successfully challenged all the discriminatory laws on LGB rights. This ensured that other discriminatory practices such as discrimination in employment,<sup>165</sup> restrictions on gay persons joining the army,<sup>166</sup> or LGB persons donating blood<sup>167</sup> were lifted even without the need for litigation. Legislation was also passed to extend protection in the areas of: inclusion in national unity and reconciliation processes,<sup>168</sup> electoral processes,<sup>169</sup> public

<sup>159</sup> United Nations Human Rights Council resolution 'Human rights, sexual orientation and gender identity' A/HRC/RES/17/19' 17 June 2011' <https://daccessods.un.org/TMP/4965864.71796036.html> (accessed 3 March 2018).

<sup>160</sup> As above.

<sup>161</sup> United Nations 'Protection against violence and discrimination based on sexual orientation and gender identity' A/HRC/RES/32/2' 30 June 2016 [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/HRC/RES/32/2](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/RES/32/2) (accessed 3 March 2018).

<sup>162</sup> For example, in the Presidential Memorandum on LGB rights, December 2011. See White House 'Presidential Memorandum -- International Initiatives to Advance the Human Rights of Lesbian, Gay, Bisexual, and Transgender Persons' 6 December 2011. <https://obamawhitehouse.archives.gov/the-press-office/2011/12/06/presidential-memorandum-international-initiatives-advance-human-rights-1> (accessed 3 March 2018). Also on 9 December 2011, then US Secretary of State, Hillary Clinton made the 'LGBTI rights are human rights' speech in Geneva before representatives from other countries, showing clearly that the US government was firmly behind LGBT rights. See Amnesty International 'Clinton to United Nations: "gay rights are human rights"' <https://www.amnestyusa.org/clinton-to-united-nations-gay-rights-are-human-rights/> (accessed 3 March 2018).

<sup>163</sup> See for example, United Nations 'Report of the Working Group on the Universal Periodic Review: Uganda' 22 December 2011 <https://daccess-ods.un.org/TMP/5137775.54035187.html> (accessed 3 March 2018). Also see United Nations 'Report of the Working Group on the Universal Periodic Review: Uganda' 27 December 2016 <https://daccess.ods.un.org/TMP/4898009.30023193.html> (accessed 3 March 2018).

<sup>164</sup> See A Jjuuko 'International solidarity and its role in the fight against Uganda's Anti-Homosexuality Act' in K Laror et al (eds.) *Gender, Sexuality and Social Justice: What's Law Got to Do with It?* (2016) 126-134, 132.

<sup>165</sup> Employment Equity Act 55 of 1998 Sec 6(1); Labour Relations Act 66 of 1995.

<sup>166</sup> A Belkin & M Canaday 'Assessing the integration of gays and lesbians into the South African National Defence Force' (2010) 38 *Scientia Militaria: South African Journal of Military Studies* 1.

<sup>167</sup> 'SA finally ends gay blood donation ban' *Mamba Online* 20 May 2014 [www.mambaonline.com/2014/05/20/sas-gay-blood-donation-ban-finally-ends/](http://www.mambaonline.com/2014/05/20/sas-gay-blood-donation-ban-finally-ends/) (accessed 3 March 2018).

<sup>168</sup> The Promotion of National Unity and Reconciliation Act 34 of 1995 (South Africa) section 11(b) requires that commissions do not discriminate on different criteria including gender, sex and sexual orientation.

<sup>169</sup> Under section 16(1)(c)(i) of the Electoral Commission Act 51 of 1996 (South Africa), the Electoral Commission is empowered to refuse to register a name of any political party if the name would be offensive to a section of people including on the basis of gender, sex and sex orientation. It is also empowered under section 17(1)(d)(i) to cancel the registration of any political party which has changed its constitution to include

service provision including education,<sup>170</sup> health insurance,<sup>171</sup> and housing;<sup>172</sup> protection from domestic violence;<sup>173</sup> and protection from discrimination in the areas of access to information;<sup>174</sup> property,<sup>175</sup> tax,<sup>176</sup> rental housing,<sup>177</sup> and refugee matters.<sup>178</sup> These successes in ensuring formal equality within a short period of time using litigation as a strategy, which was able to spur changes in laws through the legislature, helped to inspire and give impetus to activists in other countries to also use the courts to achieve equality. The judgments from the highly respected Constitutional Court of South Africa also gave judges elsewhere precedents to follow when making decisions and indeed all the major cases on LGB rights in Common Law Africa make reference to applicable South African precedents.

### *b) Ongoing LGB strategic litigation*

A second clear trend in LGB SL in the selected countries in Common Law Africa is that it is still continuing. In all the countries, including South Africa, litigation is still current and ongoing. At the time of writing, 11 members of the Dutch Reformed Church had instituted a case seeking the High Court to order the church to overturn its decision to backtrack on the recognition of same-sex marriages.<sup>179</sup> While the Constitutional Court may have been loathe

provisions that include the propagation of violence or that would cause serious offence on the basis of among others gender, sex and sexual orientation.

<sup>170</sup> Section 11 of the Education Laws Amendment Act 53 of 2000, replaced section 18 of The Employment of Educators Act, 1998, to include discrimination on among other grounds, gender, sex, or sexual orientation by an educator as an act of misconduct.

<sup>171</sup> Section 24(2)(e) of the Medical Schemes Act 131 of 1998, requires that no medical scheme shall be registered if it discriminates on the basis of among others, gender and sexual orientation.

<sup>172</sup> Section 2(1)(e)(iv) and (x) of the Housing Act 107 of 1997 imposes an obligation on the state to ensure that they promote measures to prohibit unfair discrimination on the basis of gender and 'other forms of unfair discrimination by all actors in the housing development process' and to meet the 'housing needs of marginalised women and other disadvantaged groups' respectively.

<sup>173</sup> Section 1(vii)(b) of the Domestic Violence Act 116 of 1998 defines a domestic relationship to include a same-sex relationship in which the parties live in a way that is akin to marriage, and therefore covers domestic violence in such relationships.

<sup>174</sup> Section 1 of the Promotion of Access to Information Act 2 of 2000 includes information concerning a person's gender, sex and sexual orientation as personal information. This therefore protects such information from unnecessary disclosure within the terms of sections 34 and 64 on mandatory protection of the privacy of third parties who are natural persons.

<sup>175</sup> Section 9(1)(b)(i) of the Communal Property Associations Act 28 of 1996 requires constitutions of Communal Property Associations to follow among others, the principle of non-discrimination, including on the basis of gender, sex and sexual orientation.

<sup>176</sup> Section 1 of the Revenue Laws Amendment Act 50 of 2000, amends Section 1 of the Estate Duty Act, 1955, by inserting a new definition of 'spouse' to include persons who are in permanent same-sex relationships.

<sup>177</sup> Section 4(1) of the Rental Housing Act 50 of 1999 prohibits against discrimination in advertising or letting rental housing on the basis of among others, gender, sex, and sexual orientation.

<sup>178</sup> Section 1 of the Refugees Act 130 of 1998 defines 'social group' to include a group of persons of a particular gender and sexual orientation. Such groups are protected from being persecuted on the grounds of belonging to such social group (section 2(a)). Also, a well-founded fear of persecution based on membership to such a social group is a ground on the basis of which a person can be granted refugee status (section 3(a)).

<sup>179</sup> *Gaum and Others v Dutch Reformed Church, Case 40819/17* was scheduled for hearing on the 21<sup>st</sup> of August 2018 before the Pretoria High Court. See 'Gender Equality Commission joins NG Kerk gay unions case' *Mamba Online* 13 July 2018 <http://www.mambaonline.com/2018/07/13/gender-commission-joins-landmark-ng-kerk-gay-unions-case/> (accessed 23 July 2018).



to pronounce itself on the intricate balancing of the right to freedom of religion and the right to equality in the past, this case may force a clear pronouncement and is likely to reach the country's highest court. As Anne-Marié De Vos noted, 'Its only when we come up against the right to freedom of religion that we face a wall'.<sup>180</sup> According to another human rights lawyer, Crystal Cambanis, the issue of so-called 'corrective' rape of lesbians could also potentially be dealt with through PIL.<sup>181</sup> There are no cases in Uganda and Kenya that have reached the highest courts so far, but cases are pending with the potential to reach the highest courts. There is only one case in Botswana that reached the Court of Appeal. New cases are being filed and many others are pending.

*c) High levels of courtroom success in LGB strategic cases*

On the whole, the data surveyed demonstrates high levels of success in LGB SL cases. Despite the relatively high levels of homophobia in Africa, the majority of the decided cases in Common Law African countries, either intentionally or not, affirm LGB rights. Of the 23 completed cases over the period under review, only three were entirely lost.<sup>182</sup> In all the others, the losses did not do any direct harm to the LGB community as the status quo remained intact, and in one, the offending law was actually overturned.<sup>183</sup>

There are, however, major differences in the different countries despite the high success levels. Out of the countries that are studied, only activists in South Africa have been able to achieve more than one major victory expressly based on non-discrimination on the grounds of sexual orientation. This is largely due to the fact that the South African Constitution, unlike those of the other three countries examined, expressly protects against discrimination on the grounds of sexual orientation. All cases based on this ground have succeeded. Indeed, only two of the eleven South African cases considered (the *Langemaat* case and the *De Lange* case) were not based on this provision. The latter is the only unsuccessful case in LGB SL in South Africa. Botswana and Kenya have also had success, but these were not based expressly on discrimination on the basis of sexual orientation as their constitutions do not prohibit discrimination on the grounds of sexual orientation. This has been more on account of the activism and progressive interpretation of the judges. Indeed, the judgments could easily have gone the other way. Such is clear in Uganda, where the Constitution also

<sup>180</sup> Interview with Anna-Marié de Vos, n 70 above.

<sup>181</sup> Interview with Crystal Cambanis, n 10 above.

<sup>182</sup> These are: The *Kanane* case n 25 above; The *Lokodo* case, n 50 above; and the *SMUG Registration* case, n 4 above.

<sup>183</sup> The *AHA* case (n 42 above).



does not protect against discrimination based on sexual orientation. None of the four successful cases was decided expressly based on sexual orientation grounds, and indeed the biggest SL victory, the nullification of the Anti-Homosexuality Act, did not come as a result of a judgment based on human rights grounds, but rather as one based on flaws in the procedural aspects of passing the Act. In two of the three other victories (the *Victor Mukasa* case and the *Rolling Stone* case) the judges, rather needlessly, made it clear that their decisions were not about homosexuality, but about human rights. In the *Adrian Jjuuko* case, the judges did not mention sexual orientation even once, despite the fact that evidence of the law being enacted because of the need to exclude 'homosexuals' was given. In two of the lost cases outside South Africa, (the *Lokodo* case in Uganda and the *Kanane* case in Botswana), the fact that sexual orientation was not a protected ground against discrimination was expressly used as the basis of the judges' adverse decisions.

*d) Limited number of Common Law countries where LGB SL is taking place*

It is also interesting to note that there are a limited number of countries where SL on LGB rights is taking place. Of the 19 Common Law countries in Africa,<sup>184</sup> courts in only the selected four countries had made positive decisions in favour of LGB rights by the end of 2015. By the end of August 2018, the High Court in Nigeria had also made a positive decision,<sup>185</sup> and a case had been lost in one other country, Malawi.<sup>186</sup> One thing seems to be certain: the filing of one case almost always guarantees the filing of others. In all the countries studied, the period between filing the first case and the second is not very long.<sup>187</sup> This points to perhaps an absence of a trigger event for LGB litigation such as was present in Botswana after the conviction of *Kanane*;<sup>188</sup> Kenya after the refusal to register the NGLHRC,<sup>189</sup> South Africa after the inclusion of sexual orientation in the Constitution moment,<sup>190</sup> and Uganda after the violation of *Victor Mukasa* and *Yvonne Oyoo's* rights.<sup>191</sup>

<sup>184</sup> These are: Botswana, Ghana, the Gambia, Kenya, Lesotho, Liberia, Malawi, Mauritius, Namibia, Nigeria, Rwanda, Sierra Leone, South Africa, Swaziland, South Sudan, Tanzania, Uganda, Zambia, and Zimbabwe.

<sup>185</sup> Orazulike case, n 152 above.

<sup>186</sup> *Msonda* case, n 152 above.

<sup>187</sup> In South Africa, the difference between the date of the decision in the *Langemaat* case and that in the *Sodomy* case was eight months. In Uganda, the time between the decision in the *Victor Mukasa* case and the *Rolling Stone* case was two years. In Kenya, the time difference between the *Eric Gitari* case and the *COL* case was two months. Only in Botswana was there a big time difference from the *Kanane* case and the *LEGABIBO Registration* case which was ten years.

<sup>188</sup> This is what prompted the constitutional challenge in the *Kanane* case.

<sup>189</sup> *Eric Gitari v Attorney General & Another* Petition 440 of 2013 [2015] eKLR (the *Eric Gitari* case).

<sup>190</sup> This is what opened the way for the litigation starting with *Langemaat* case.

<sup>191</sup> This is what triggered the *Victor Mukasa* case.

*e) South African exceptionalism*

The dominance of South Africa in the area of LGB SL is something important to note. South Africa has the highest number of cases on LGB issues, it also has the highest completion rate with all 11 cases completed, and it also has the highest success rate at 90.9%. All except one case were entirely successful. Compared to all the other countries examined, South Africa clearly stands out. The reason for this lies in the fact that the South African Constitution expressly protects against discrimination on the grounds of sexual orientation, while those of all the other countries do not. Judges therefore find it easier to rule in line with this express protection even where there is homophobia. For countries like Botswana and Kenya where courts have also ruled in favour of LGB rights based on the Constitution, the protection has had to be implied and derived from the non-discrimination clause, rather than having the clause directly applied. Also, South Africa's legal transformation which saw a change from apartheid to democracy had a role to play, as it became clear that all people deserved protection at least within the constitutional framework, and a human rights culture was adopted and embraced at a national level. Nothing of this scale has yet happened in the other countries.

*f) Most of the LGB litigation is aimed at challenging discriminatory laws and decriminalising consensual same-sex relations*

Eighteen out of the 26 cases are challenges to discriminatory laws, while six of these were concerned with decriminalisation. Decriminalisation of consensual same-sex relations is usually the first step towards removing the legal barriers to the equality of LGB persons, and all countries that have made progress start with achieving decriminalisation, including South Africa. It was only after decriminalisation that South Africa was able to challenge all the other discriminatory laws. Therefore, the biggest struggle in the past 20 years has been the issue of decriminalisation. This is a struggle that activists in Botswana and Kenya have started to face head-on by instituting challenges against the criminal provisions in their respective courts. Uganda is yet to challenge the archaic provisions of its Penal Code. The fact that decriminalisation has not yet been achieved could perhaps explain why there are not as many successful challenges of other discriminatory laws in any of the study countries other than South Africa.

### 3.3 Trends in LGB litigation in Common Law Africa

Several trends can be discerned from LGB strategic cases in Common Law Africa. Every legal case involves three stages: the pre-litigation phase, which is concerned with identifying the key issues, actors, the problem and the approach to take towards the overall case;<sup>192</sup> the litigation phase, including testing the admissibility of the case and submissions;<sup>193</sup> and the post-litigation phase which involves implementation and enforcement.<sup>194</sup> A strategic case has one phase in addition to the three mentioned stages, which comes before the pre-litigation phase, and this will be referred to as the overarching strategy stage. It is the stage where the broad strategy involving all the planned cases is developed. This stage is not concerned with only one case, but with a number of cases in a sequence, which is expected to lead to the desired outcome. The following section will discuss the various trends that can be discerned from analysing the LGB strategic cases in Common Law Africa by the end of 2017.

#### 3.3.1 Trends at the overarching strategy phase

The overarching strategy phase is where the ultimate aim of the litigation is ironed out, the order in which issues will be taken on is decided and the way in which the litigation will be organised is planned. The individuals or organisations planning to undertake litigation clarify their overall objective at this stage, agree on the need to use litigation as a strategy, identify potential cases to take before the courts to achieve their aim, and then start planning the individual cases. In some countries, there is a deliberate formal process where a broader strategy is drawn and laid out, involving different stakeholders. For other countries, it is an informal process where one individual or organisation decides to challenge particular laws and does it without involving any of the other groups. The key at this stage is that there is a process of planning which envisages one or more cases with which to achieve the ultimate goal, which is usually social change.

The following trends can be discerned from LGB litigation in the selected Common Law African countries at this stage:

<sup>192</sup> J Oder 'Keeping Promises: Litigation as a strategy to concretise the right to health in Africa' in E Durojaye (ed) *Litigating the right to health in Africa: Challenges and prospects* (2016) 219, 229-230.

<sup>193</sup> Above, 229.

<sup>194</sup> Above, 230.

a) *The strategic objective in pursuing the cases*

All the SL was aimed at achieving equality for LGB persons in the long run. All individuals interviewed for this study who were involved in planning litigation cited different reasons for the litigation,<sup>195</sup> but acknowledged that they also foresaw the litigation leading to equality for LGB persons in the long run.<sup>196</sup> As far as the movement in South Africa is concerned, the NCGLE also clearly aimed at changing the laws and thereby ensuring equality for gays and lesbians.<sup>197</sup> It had a ‘shopping list’ based on Edwin Cameron’s list of demands made in his professorial inaugural lecture in 1992<sup>198</sup> which suggested starting with the easier to achieve demands like same age of consent and decriminalisation of sodomy and ending with the more challenging aims, which included same-sex marriages.<sup>199</sup> This strategy was indeed followed and the cases were by and large brought in this sequence. In Uganda, the litigation so far undertaken was done for the short term aim of obtaining remedies for the violations or to gain protection of a rights, but also with the long-term aim of the decriminalisation of same-sex relations,<sup>200</sup> and ultimately aiming for equality of LGB persons. For Kenya, litigation is largely engaged in to vindicate rights, and eventually to ensure equality for LGB persons.<sup>201</sup> For Botswana, the litigation is aimed at decriminalisation of same-sex relations,<sup>202</sup> with the ultimate aim of equality. Therefore, a victory in one case is simply a stepping-stone for the next case until legal change is achieved, and then social change is expected to follow since the legal barriers would have been removed. Cases are

<sup>195</sup> The main reasons given for the litigation was the immediate remedy that the different cases sought, and the benefits that came out for standing up for what one believed in.

<sup>196</sup> Interview with Patricia Kimera, 24 April 2018, Head of Access to Justice Division, Human Rights Awareness and Promotion Forum (HRAPF), Kampala, 20 July 2017; interview with Dr Chris Dolan, Director, Refugee Law Project, School of Law, Makerere University and former chairperson of the Steering Committee of the Civil Society Coalition on Human Rights and Constitutional Law (CSCHRCL), Kampala, 22 July 2017; interview with Solome Nakaweesi Kimbugwe, former Executive Director, Akina Mama wa Afrika (AMWA), the first host organisation for the CSCHRCL, Kampala, 20 July 2017; joint interview with Lorna Dias, Jackson Otieno, Kelvin N. Washiko, Yvonne Oduor, and Brian Macharia, all of Gay and Lesbian Coalition of Kenya (GALCK), Nairobi, 26 July 2017 – (Lorna Dias and the GALCK team); interview with Eric Mawira Gitari (n 24 above); interview with Cindy Kelemi, Executive Director, Botswana Network on Law, Ethics and HIV/AIDS (BONELA), Gaborone, 10 October 2017; interview with Bradley Fortuin and Botho Maruatone, of Lesbians, Gays and Bisexuals of Botswana (LEGABIBO), Gaborone, 10 October 2017; interview with Caine Youngman, Lesbians, Gays and Bisexuals of Botswana (LEGABIBO), Gaborone, 12 October 2017; and joint interview with Anneke Meerkotter and Tashwill Esterhuizen, Southern African Litigation Centre, Johannesburg, 24 October 2017.

<sup>197</sup> K Botha 1995 ‘Think strategically’ Equality, Newsletter of the NCGLE 1 (March): 4, cited in Oswin n 9 above, 652.

<sup>198</sup> See E Cameron n 105 above, 450–472.

<sup>199</sup> GG Santos ‘Decriminalising homosexuality in Africa: Lessons from the South African experience’ in Lennox & Waites C Lennox & M Waites (eds) *Human rights, sexual orientation and gender identity in the Commonwealth: Struggles for decriminalisation and change* (2013) 313, 323.

<sup>200</sup> See generally, A Jjuuko (n 49 above) 381–408.

<sup>201</sup> See Interview with Eric Gitari (n 34 above). Also see ‘Kenya: Turning the tide for LGBT rights in Kenya: Interview’ AllAfrica.com <http://allafrica.com/stories/201703080284.html> (accessed 15 January 2018).

<sup>202</sup> M Tabengwa & N Nicol ‘The development of sexual rights and the LGBT movement in Botswana’ in C Lennox & M Waites (eds.) *Human rights, sexual orientation and gender identity in the commonwealth: Struggles for decriminalisation and change* (2013) 339.

therefore not brought simply for quick wins, but rather as part of a long and protracted process with a clear end-goal in mind. The objectives are three-tiered: to achieve immediate relief; then to achieve formal equality; that is in terms of the laws promoting equality for LGB persons; and ultimately to achieve substantive equality, which is equal treatment of heterosexual and homosexual persons.

*b) The nature of strategy adopted in pursuing the cases*

Different strategies were employed in pursuing the cases. In some countries, the litigation was formal, well-defined, and a well-known, countrywide incremental litigation strategy. Other countries had informal individual/organisational strategies that were not widely disseminated. South Africa and Uganda both had well-defined strategies that cut across the country and which involved consultations and agreement within broader Coalitions. In South Africa, the NCGLE ensured maintenance of sexual orientation protection in the Final Constitution and then after that was secured, systematically built upon this foundation through seeking decriminalisation,<sup>203</sup> and then either bringing or joining cases strategically to pursue the other equality objectives.<sup>204</sup>

In Uganda, the CSCHRCL specifically aimed at defeating the Anti-Homosexuality Bill (later Act) and eventually decriminalisation. Its strategy thus involved bringing cases opportunistically in order to undermine the further criminalisation efforts and to build a base of precedents to use in an eventual decriminalisation case. It thus had a loose, flexible and opportunistic incremental approach to litigation.<sup>205</sup> For example when the *Rolling Stone* tabloid revealed names, addresses and other details of LGB persons, the Coalition immediately brought a case seeking an injunction.<sup>206</sup> When the Minister of Ethics and Integrity closed down an LGBTI skills training workshop, the CSCHRCL once again swung into action and developed a case challenging this.<sup>207</sup> It also supported SMUG to pursue Scott Lively in the U.S when the opportunity presented itself through the Centre for Constitutional Rights.<sup>208</sup> The CSCHRCL challenged the AHA at the Constitutional Court.<sup>209</sup> It also instituted a challenge against the Act in the EACJ through HRAPF.<sup>210</sup> This flexibility

<sup>203</sup> Stychin (n 9 above).

<sup>204</sup> After the *Langemaat* case, n 11 above), the NCGLE pursued the next two cases, the *Sodomy* case (n 13 above) and the *Immigration* case (n 73 above), directly in its name, and the EP supported the remaining cases.

<sup>205</sup> Jjuuko (n 49 above).

<sup>206</sup> The *Rolling stone* case (n 139 above).

<sup>207</sup> The *Lokodo* case (n 135 above).

<sup>208</sup> The *Scott Lively* case (n 146 above).

<sup>209</sup> The *AHA* case (n 42 above).

<sup>210</sup> *HRAPF* case (n 54 above).

enabled the Coalition to not only address challenges and abuses as they arose but also to make important strides towards achieving equality for LGB persons in Uganda.<sup>211</sup>

For the other countries, since there was no single coalition under which litigation was pursued, multiple strategies existed and each entity seemed to have its own. In Botswana, DITSWANELO used the *Kanane* case to bring the decriminalisation issue to the courts.<sup>212</sup> The ongoing decriminalisation case was filed by an individual without LEGABIBO or other organisations being directly contacted or involved.<sup>213</sup> In Kenya, each entity undertaking litigation has its own strategies, which are sometimes in opposition to other strategies within the same movement. The Gay and Lesbian Coalition of Kenya (GALCK) is the largest group, bringing together different organisations. It prefers a more cautious strategy of getting allies on board, consulting all stakeholders, building relationships and then using this to ensure success of their cases.<sup>214</sup> Such an approach is also supported by UHAI-EASHRI.<sup>215</sup> Through the same approach GALCK has sponsored a decriminalisation case,<sup>216</sup> despite the fact that Eric Gitari of the National Gay and Lesbian Human Rights Commission Coalition (NGLHRC) had already filed another case on the same.<sup>217</sup> Gitari and NGLHRC on the other hand have their own strategy, which is largely aimed at using litigation to achieve equality on the basis of sexual orientation without focusing much on community mobilisation.<sup>218</sup> They started with the registration of NGHRLC, pursued a case on the constitutionality of anal examinations and are currently pursuing decriminalisation. They see litigation as the first and foremost strategy. They see the approach of GALCK as paternalistic gate keeping.<sup>219</sup>

As is the case for organised coalitions, litigation seems to register more success when brought with a carefully laid out, consultative and countrywide strategy involving the different stakeholders. This partly explains why South Africa and Uganda have so far had more decided cases, and more successes in litigation. Where different, multiple and sometimes competing strategies exist, there are fewer successes and also visible rifts which undermine the litigation efforts.

<sup>211</sup> At the formal level, newspapers cannot call for the killing of LGB persons, and LGB persons can now freely access the Equal Opportunities Commission.

<sup>212</sup> Tabengwa & Nicol (n 26 above).

<sup>213</sup> The *LM* case. Eventually LEGABIBO joined the case as amicus curiae.

<sup>214</sup> Joint interview with Lorna Dias and the GALCK team (n 196 above).

<sup>215</sup> Interview with Wanja Muguongo, Executive Director, UHAI-EASHRI, Nairobi, 26 July 2017.

<sup>216</sup> The *John Mathenge* case, (n 33 above).

<sup>217</sup> The *Eric Gitari* decriminalisation case (n 32 above).

<sup>218</sup> Interview with Eric Gitari (n 34 above).

<sup>219</sup> Above.



*c) The nature of organising and collaboration*

Organising for SL has also taken both formal and informal approaches in the four study countries. The formal approach involves pursuing the cases through an organised and broad coalition; while the informal approach involves pursuing cases by individuals or individual organisations without the direct involvement of the broader community, beyond seeking cursory support. The formal approach was perfected by South Africa as almost all the cases on LGB equality were brought under the auspices of or directly supported by the NCGLE, and later by its successor, the Lesbian and Gay Equality Project.<sup>220</sup> This model was also followed in Uganda, which pursued almost all its cases under the auspices of the CSCHRCL.<sup>221</sup> For Botswana and Kenya the lead has been taken by individual organisations with their own aims and objectives in undertaking litigation. For Botswana, DITSWANELO supported the legal challenge in the *Kanane* case.<sup>222</sup> Later the work on the *LEGABIBO Registration* case<sup>223</sup> was undertaken by BONELA, which hosted LEGABIBO and also involved other groups but fell short of a formal coalition.<sup>224</sup> The decriminalisation petition was brought by an individual without the knowledge or involvement of LEGABIBO.<sup>225</sup> In Kenya, Eric Gitari and the National Gay and Lesbian Coalition pursued their litigation almost singlehandedly without the involvement of other LGB organisations,<sup>226</sup> and in fact with direct opposition from them, with two individuals, one from a transgender organisation,<sup>227</sup> and another a parent of an intersex child<sup>228</sup> filing formally to court to join the *Eric Gitari* case for the purpose of opposing the registration of NGLHRC.<sup>229</sup>

<sup>220</sup> The Gay and Lesbian Equality Project emerged in 1999 after the NCGLE ceased being a membership coalition and rebranded as a stand-alone organisation known as the Gay and Lesbian Equality Project. See Oswin (n 9 above) at 650.

<sup>221</sup> The CSCHRCL was established in October 2009 soon after the Anti-Homosexuality Bill, 2009 was tabled in Parliament by the Ndorwa East Member of Parliament, David Bahati. It brought together over 50 organisations, both mainstream and LGBTI, to oppose the Bill. Its main objective was to oppose the AHB, but later in 2012, this expanded to pursuing equality on issues of sexuality throughout the country. The Coalition used litigation as a key strategy in its fight against the Bill. See generally Jjuuko (n 43 above) and interview with Dr Chris Dolan (n 195 above). The Coalition's work stopped after its then host organisation, the Refugee Law Project, was suspended by the government on allegations of promotion of homosexuality. The litigation component of the Coalition's work was continued by Human Rights Awareness and Promotion Forum (HRAPF), a steering committee member of the Coalition and the organisation that chaired the Legal Committee of the Coalition (Interview with Fridah Mutesi, former Legal Officer, Human Rights Awareness and Promotion Forum, chairs of the Legal Committee of the Civil Society Coalition on Human Rights and constitutional Law (CSCHRCL), 29 April 2018).

<sup>222</sup> Tabengwa & Nicol (n 26 above) 342.

<sup>223</sup> n 5 above.

<sup>224</sup> Interview with Cindy Kelemi (n 195 above); and interview with Bradley Fortuin and Botho Namatona (n 195 above).

<sup>225</sup> *LM* case (n 36 above).

<sup>226</sup> Interview with Eric Gitari (n 122 above).

<sup>227</sup> Activist Audrey Mbugua from Transgender Education and Advocacy (TEA)

<sup>228</sup> Daniel Kandie.

<sup>229</sup> Audrey Mbugua of was an intervener in the *Eric Gitari* case (n 122 above).

The model where litigation was undertaken as part of a broader coalition is the more successful of the two models as there is strength in unity. Indeed, where cases have been pursued as part of a broader coalition, there have been more victories than in those countries where litigation has been undertaken by separate entities.<sup>230</sup> Also, there is coherence in terms of how cases are brought to the courts, contributing to what has been referred to as the incremental approach to litigation.<sup>231</sup> Finally, it avoids duplication, as usually only one case is brought per issue rather than multiple fragmented cases as in Kenya, regarding decriminalisation of consensual same-sex relations.<sup>232</sup>

### 3.3.2 Trends at the pre-litigation phase

The pre-litigation stage precedes the filing of a case and is the planning stage for every individual case. It is at this stage that an ordinary case becomes a strategic case. There are two trends observed at this stage in LGB SL in Common Law Africa, which are the nature of consultations and the sources of funding:

#### *a) The nature of consultations that go into building the cases*

In countries where there are single coalitions taking the lead on litigation, there are consultative processes of developing and building cases, while in countries with multiple entities taking lead on litigation, consultation is generally at a minimum. In South Africa, although the NCGLE has been criticised as having been elitist,<sup>233</sup> it at least formally brought together the different groups and made them work together on the different cases.<sup>234</sup> In Uganda, the CSCHRCL had a Legal Committee and a Steering Committee which played direct roles in the litigation. The Legal Committee led the process of planning for every individual case. The initial step was the identification of a case by the Steering Committee, then referral to the Legal Committee for a legal opinion. If agreed upon, a case would be developed based on that opinion, and then subjected to a legal strategy meeting. The

<sup>230</sup> South Africa and Uganda which have more decided cases than other countries also have more victories and are also the ones that had formal coalitions.

<sup>231</sup> See for example A Jjuuko (n 49 above) 393-396.

<sup>232</sup> The *Eric Gitari decriminalisation case* (n 32 above) and the *John Mathenge case* (n 33 above).

<sup>233</sup> Oswin (n 9 above).

<sup>234</sup> This did not mean that sometimes there were no individuals who acted against the advice of the NCGLE. One such case was the *Du Toit case* (n 69 above) which was brought by a well-known lesbian judge, Anna-Marié de Vos, and her partner who had adopted two children and who urgently sought to have the law changed to enable them to both be legally recognised as the parents of their children. The NCGLE had, however, determined an order according to which they were to deal with issues concerning LGB persons by making use of courts. The issue of adoption of children by gays or lesbians was viewed as one of the most controversial and was left at the very bottom of the list: to be dealt with after the legalisation of same-sex marriage. Interview with Advocate Anna-Marié de Vos (n 70 above).

meeting would involve local lawyers, activists and academics and in cases like the challenge to the AHA at the EACJ, lawyers and activists from across the region. The meeting would agree on all points including the specific petitioners to lead the action, the grounds of the petition, the respondents, the lawyers, the amicus curiae, the sources of funding, the advocacy strategy, and above all, a careful consideration of the implications of bringing the case on all involved.<sup>235</sup>

For the other countries, processes of consultations and planning were less elaborate. In the case of Botswana, a good deal of consultation involving different stakeholders went into the *LEGABIBO Registration* case.<sup>236</sup> The decriminalisation case did not involve any consultations as it was filed by an individual.<sup>237</sup> For Kenya, consultations were conducted by GALCK for the decriminalisation challenge. However, Eric Gitari of NGHLC eventually went ahead and filed the case on his own and without involving GALCK because he viewed the collaborative process as unnecessarily lengthy.<sup>238</sup> This approach of limited consultations is what perhaps contributed to other members of the broader LGB and Transgender and Intersex community filing an application opposing the case.<sup>239</sup> Such incidents are the reason why, where there is more coordinated and involved planning of cases, there seems to be more successes than when litigation is brought by individuals without much consultation or involvement of the movement.

#### *b) The sources of funds used in the litigation*

An important component of the pre-litigation stage is the mobilisation of funds to be used in the litigation. Numerous (and sometimes significant) costs are involved in the processes of pursuing a SL cases, ranging from the organisation of strategising meetings, court fees, lawyers' fees, and advocacy costs, and hence the issue of funding is an important one right from the beginning of the contemplated litigation. Up to the end of August 2018, foreign donors funded most of the LGB litigation in the selected African Common Law countries. These are mainly donors based in other countries and indeed other continents, specifically those based in the USA and Western Europe.<sup>240</sup> In some instances, donors based within the

<sup>235</sup> Interview with Fridah Mutesi, n 221 above.

<sup>236</sup> Interview with Cindy Kelemi (n 195 above); interview with Bradley Fortuin and Botho Namatona (n 195 above); interview with Caine Youngman above (n 195 above).

<sup>237</sup> The *LM* case (n 36 above).

<sup>238</sup> Interview with Lorna Dias and the GALCK team (n 195 above).

<sup>239</sup> Audrey Mbugua's application to intervene in the *Eric Gitari* case (n 122 above).

<sup>240</sup> The litigation work done by the Lesbian and Gay Equality Project in South Africa was supported by the Atlantic Philanthropies, a US philanthropic fund which gave core funding to the project. Litigation for Botswana

Common Law African countries<sup>241</sup> or the region<sup>242</sup> also contributed funds. However, they either had their headquarters in the USA or Europe<sup>243</sup> or they received most of their funds from other donors based in the USA or Western Europe. This overreliance on foreign funding brings into question the independence of the actors when making litigation decisions. Funders usually fund what is in line with their own strategies and grantees therefore may have to change their strategies in order to align with donors' priorities.<sup>244</sup> For the case of Uganda for example, Jjuuko mentions instances where in the fight against the Anti-Homosexuality Bill/Act in Uganda, local activists were forced to align with the interests of donors. He calls this 'hijacking of the agenda of local activists.'<sup>245</sup> Where this happens and the change is made in favour of litigation, this raises accusations of litigation actually being a foreigner-motivated strategy.<sup>246</sup> Funds for litigation on LGB issues also seem to be more readily available than funds for other strategies.<sup>247</sup>

With respect to LGB rights, the allegation that funders influence the choice of litigation as a strategy and as a way of more easily realising LGB rights is a particularly serious concern due to the allegations that homosexuality is not African but rather a foreign imposition, and its related argument that the western world has an agenda to promote homosexuality in Africa.<sup>248</sup> Despite the allegations, activists pointed out that their strategy simply happened to align with that of the donors, and denied direct influence over the strategy employed or the type of cases taken to court, or the decisions made along the way.<sup>249</sup> LGB groups in Botswana assert that the financial support of the Open Society Institute for Southern Africa

is supported by the Open Society Institute for Southern Africa (OSISA) through its support of the Southern African Litigation Centre.

<sup>241</sup> For example the UHAI-EASHRI which is based in Nairobi supported the litigation in the *Eric Gitari* case (n 122 above).

<sup>242</sup> UHAI-EASHRI also provided the funds for the Anti-Homosexuality Act cases in Uganda and at the EACJ; and the Open Society Institute for Eastern Africa (OSIEA) based in Nairobi provided the funds for the *Adrian Jjuuko* case (n 4 above) in Uganda. UHAI-EASHRI also provided the initial support for this case.

<sup>243</sup> For example the Open Society Foundations, to which OSIEA belongs, has its headquarters in Budapest, Hungary. The Atlantic Philanthropies, which supported litigation work on LGB rights in South Africa are based in Ireland.

<sup>244</sup> See N Banks, D Hulme et al 'NGOs, states, and donors revisited: Still too close for comfort?' (2015) 66 *World Development* 707-718, 710.

<sup>245</sup> A Jjuuko, n 164 above, 132.

<sup>246</sup> Litigation has largely been successful in countries like the USA which are also incidentally the countries from which most of the donors are based. There are thus many specialists in litigation and mobilisation strategists who work for such donors, and for their partners. They see litigation as a strategy that can work elsewhere and thus promote it in Africa. S Gloppen 'Public interest litigation: Social rights and social policy' in AA Anis & A de Haan *Inclusive States: Social Policy and Structural Inequalities, New Frontiers of Social Policy* (2008) 343.

<sup>247</sup> Gloppen (above) notes that despite criticism of courts as incapable of delivering social change, donors increasingly prefer litigation as a strategy for social change.

<sup>248</sup> See S Hyeon-Jae 'The origins and consequences of Uganda's brutal homophobia' (2017) *Harvard International Review* <http://hir.harvard.edu/article/?a=14531> (accessed 19<sup>th</sup> March 2018).

<sup>249</sup> Interview with Dr Chris Dolan, n195 above; Interview with Bradley Fortuin and Botho Maruatone (n 195 above); Joint interview with Lorna Dias and the GALCK team (n 195 above).

(OSISA) and the technical assistance of the Southern African Litigation Centre simply support ideas that were already in place.<sup>250</sup> UHAI-EASHRI, a local activist fund, also contends that they simply support the ideas of their grantees and do not drive the agenda.<sup>251</sup> However, there are instances where donors have also directly engaged in the strategising process. For example, UHAI-EASHRI, was part of the legal strategising meetings for the Ugandan case at the EACJ and also applied to join the case as *amicus curiae*.<sup>252</sup> OSISA organises litigation conferences,<sup>253</sup> and supports SALC to provide technical assistance in countries like Botswana.<sup>254</sup> It would therefore not be completely accurate to say that donors do not have a say in the process of strategising.

What is clear is that without foreign funding it would have been difficult to pull off the massive campaigns led by the NCGLE in South Africa<sup>255</sup> or the CSCHRCL in Uganda.<sup>256</sup> Donor funding is critical for such processes as structures must be put in place and lawyers well resourced,<sup>257</sup> and this requires large amounts of money. Domestic funding is much limited due to the homophobia and the generally low levels of economic development in these countries. Activists find themselves with no option but to engage foreign donors. The real concern therefore is how to remain in charge of the process while at the same time using donor funds.

### 3.3.3 Trends at the litigation stage

The litigation stage starts at the point when the case is filed and goes on until the final decision of the court is rendered. For appeals, it starts at the point when the appeal is filed until when it is disposed of. This stage is when the strategy is put to the test. The trends at this stage concern: the choice of forum; the nature of the petitioners/applicants; the nature of lawyers arguing the cases; the nature of arguments before the courts; the background of the judges deciding the cases; and the extent of community mobilisation.

<sup>250</sup> Interview with Bradley Fortuin and Botho Maruatone (n 195 above); also joint interview with Anneke Meerkotter and Tashwill Esterhuizen (n 195 above).

<sup>251</sup> Interview with Wanja Muguongo (n 215 above).

<sup>252</sup> *UHAI-EASHRI v Attorney General of Uganda UHAI EASHRI Application No. 20 of 2014.*

<sup>253</sup> OSISA has so far organised two regional litigation conferences in recent times, one in Durban, South Africa in 2014 and the other in Swakopmund, Namibia in 2017.

<sup>254</sup> Joint Interview with Anneke Meerkotter and Tashwill Esterhuizen (n 195 above).

<sup>255</sup> G Marcus et al 'Public Interest Litigation and Social Change in South Africa: Strategies, tactics and lessons' (2014) *Atlantic Philanthropies*, 10-12.

<sup>256</sup> A Jjuuko (n 49 above) 133.

<sup>257</sup> Epp sees this as the most important factor for successful litigation. See CR Epp *The rights revolution: Lawyers, activists and Supreme Courts in comparative perspective* (1998) 197.

a) *Choice of forum*

SL cases are taken to courts with powers to decide on the constitutionality of the laws, and where required and possible, appealed to the highest courts or brought for confirmation, where such a procedure exists. All except two of the South African cases<sup>258</sup> ended at the Constitutional Court. In all the other countries, the cases are either brought to the High Courts for the enforcement of rights or to the constitutional courts which have powers of interpretation of the Constitution and which are in some cases the highest courts. In Botswana, one case from the High Court was appealed to the Court of Appeal for final determination.<sup>259</sup> In Kenya, no case has so far reached the Supreme Court, but two have reached the Court of Appeal,<sup>260</sup> and so there is still the option of appealing to the Supreme Court. In Uganda, although cases have reached the Constitutional Court,<sup>261</sup> no single case has reached the Supreme Court yet. However, an appeal is currently pending before the Court of Appeal and may therefore reach the Supreme Court in due course.<sup>262</sup> This aiming at the final courts ensures that the resultant decisions cannot be overturned or departed from by the lower courts.<sup>263</sup>

In Uganda, activists have initiated litigation in other countries against their nationals. The *Scott Lively* case in the USA is interesting because for the first time, an LGB group in Africa took the fight against US evangelicals back to the USA.<sup>264</sup> The real benefit from this strategy lies in the fact that US evangelical extremists have been given the message that the LGB community in Africa is ready to fight back, including in the USA.

Activists in Uganda and Kenya have used the regional fora as an avenue for LGB litigation, most prominently with the HRAPF case at the EACJ.<sup>265</sup> In Southern Africa, SALC and now the Initiative for Strategic Litigation in Africa (ISLA) support SL in various Southern African

<sup>258</sup> With the exception of the *Langemaat* case (n 13 above), which was concluded at the High Court level; and the *Du Plessis* case (n 90 above) which was finalised at the Supreme Court of Appeal.

<sup>259</sup> *LEGABIBO Registration* case (n 5 above).

<sup>260</sup> The *COL* case (n 3 above), which was successful and the *Eric Gitari* case (n 122 above), which is still pending.

<sup>261</sup> *AHA* case (n 42 above); the *Adrian Jjuuko* case (n 4 above).

<sup>262</sup> The appeal against the *Lokodo* case (n 135 above) if lost at the Court of Appeal level can still be appealed to the Supreme Court, and this was part of the original strategy. Interview with Patricia Kimera (n 195)

<sup>263</sup> Under the doctrine of precedent, which is a key feature of the Common Law system, lower courts are bound by the decisions of the higher courts, and the highest court is the only one which can overturn its own decisions.

<sup>264</sup> Research has shown that US evangelicals have brought their cultural wars in the US to Africa, especially after losing the battle against decriminalisation of same-sex relations. *Scott Lively* is viewed as such an agent. See K Kaoma 'Globalising the Culture wars: US conservatives, African Churches and homophobia' (2009) 6.

<sup>265</sup> *Scott Lively* case n 146 above.



states and therefore facilitate cooperation and the sharing of strategies.<sup>266</sup> This shows increased coordination and working together on the cases in the East African and Southern African regions, but also that activists are willing to go beyond the national courts to the regional courts.

*b) Timing of the filing of the case*

Timing is about bringing a case at a time when it is most likely to succeed. The successful cases were largely well timed, and conversely the lost cases were largely poorly timed. In South Africa, the litigation begun with the decriminalisation challenge soon after the Final Constitution confirmed that discrimination on the grounds of sexual orientation was prohibited. Then the other cases on pertinent issues followed in sequence. In Botswana, the *Kanane* case<sup>267</sup> largely failed because the timing was not right as the activists simply chanced upon an on-going criminal trial to launch their decriminalisation challenge. This was at a time when the *Banana* case had failed in Zimbabwe, although the South African *sodomy* case had also been decided. Indeed, when the approach was changed from seeking decriminalisation to a challenge to the refusal to register LEGABIBO, this was clearly a matter of good timing, and the *LEGABIBO Registration* case<sup>268</sup> was eventually successful. Before pursuing the *LEGABIBO Registration* case, the political options had been pursued as attempts were made to fulfil all the statutory requirements for the registration of LEGABIBO.<sup>269</sup> In Kenya, timing issues were very important in the filing of the *Eric Gitari decriminalisation* case<sup>270</sup> challenging the criminalisation of consensual same-sex relations, as calculations about an LGB rights friendly Chief Justice who was about to retire came into the picture.<sup>271</sup> At the same time, after the *Eric Gitari* case,<sup>272</sup> LGB issues were no longer so shocking to the general public in Kenya. Although the circumstances later changed after the case was filed, nevertheless, the calculations regarding the timing of filing were well-advised. The *COL* case was also initially wrongly timed, as there were high levels of anti-gay sentiment in the coastal area of Kenya at the time. In Uganda, only the *Victor Mukasa* and the *Adrian Jjuuko* cases preceded the Anti-Homosexuality Bill. All the others were aimed at demonstrating the impact of further criminalisation on LGB persons, and above all the *AHA* case was filed just before the President had to travel to the USA for the Africa-USA summit,

<sup>266</sup> Interview with Tashwill and Meerkotter (n 195 above).

<sup>267</sup> n 25 above.

<sup>268</sup> *LEGABIBO Registration* case, n 5 above.

<sup>269</sup> Interview with Caine Youngman, n 195 above.

<sup>270</sup> n 32 above.

<sup>271</sup> Interview with Eric Gitari, n 34 above.

<sup>272</sup> n 122 above.

and this helped to turn the political winds in favour of the case.<sup>273</sup> Therefore, all the successful cases in Common Law Africa were largely well timed, and this contributed to their success as well as eventually to social change, and the reverse is true for the unsuccessful cases.

*c) Elite and community mobilisation*

Having community support for a case is important for SL. Ideally, if cases involved popular support from all corners of society, this would be good, but this remains an ideal in LGB cases in the countries included in this study. One of the causes of the failure to mobilise beyond the LGB community is politicians exploiting the pervasive homophobia in the countries to create an atmosphere where community mobilisation in support of LGB rights is regarded as promotion of homosexuality. In such an environment, the best that can be aimed at is support from the LGB community and civil society allies. Many of the cases in South Africa had mass support from the LGB community but they were nevertheless criticised as not being fully inclusive, as the majority of active supporters were white people, who are generally a minority group, and as such they did not qualify as mass movements but rather as elitist campaigns.<sup>274</sup> In Uganda, there was mass mobilisation of the LGB community and allies for all the cases, and the *AHA* case<sup>275</sup> in particular, where persons from different sectors of society were part of the case both as petitioners and also through attending court proceedings and commenting about the cases online.<sup>276</sup> In Kenya, mobilisation is done, but divisions over consultations between NGHRLC on one hand and the broader LGB community on the other largely affected the effectiveness of this mobilisation. In Botswana, divisions are also beginning to emerge as different people file cases without consulting others.<sup>277</sup> Community mobilisation is also connected to organising. Activists in countries where there are formal broad coalitions easily mobilise LGB persons and others to attend court. On the other hand, in countries where activists are fragmented, there is usually little attention drawn to the cases.<sup>278</sup> Coalitions are an important part of community mobilisation. In South Africa and Uganda, coalitions were used effectively.

<sup>273</sup> See for example 'Museveni behind gay law victory?' *The Observer* 4 August 2014.

<sup>274</sup> Oswin (n 9 above).

<sup>275</sup> n 42 above.

<sup>276</sup> Jjuuko discusses the efforts taken to mobilise communities through mass media and publications. A Jjuuko (n 49 above) 403-404.

<sup>277</sup> Bradley and Botho confirmed that the decriminalisation petition for example was filed without involving LEGABIBO (Interview with Bradley and Botho, n 195 above).

<sup>278</sup> For example, most of the Kenyan cases are usually heard without much involvement by persons beyond the organisation filing the case.

Court hearings were always well attended by movement members. For those where there are no effective coalitions, mobilisation is still an issue.

*d) The nature of the petitioners/applicants*

The persons who file the cases, or in whose names the cases are brought, are also strategically determined. The main categories of applicants identified are: a single individual; two individuals; multiple individuals; a single organisation; multiple organisations; and a combination of individuals and organisations. Single individual petitioners are less common and usually exist in circumstances where a case is brought by an individual with little consultation with other groups, as the case was in Kenya with the *Eric Gitari* case.<sup>279</sup> The community could also make a strategic decision to use only one individual who has the characteristics that would appeal to the court, as the case was in Uganda for the *Adrian Jjuuko* case, where a lawyer who did not identify as a member of the LGB community was the identified petitioner; and in South Africa for the *Satchwell* case, where the petitioner was a well-respected judge who was in a permanent same-sex relationship.<sup>280</sup> A single individual may also be used where the matter directly affects only that one individual as the case was in *De Lange* case<sup>281</sup> in South Africa, where the petitioner had been dismissed from the church as a minister because of her sexual orientation. Two individuals usually file together when the matter jointly affects them. An example is the *Victor Mukasa* case<sup>282</sup> in Uganda where the two people directly affected by the actions of the state officials filed the case.<sup>283</sup> Another is the *Du Toit* case<sup>284</sup> in South Africa, where two women in a permanent same-sex relationship brought the case for joint custody of the children of one of the partners.<sup>285</sup>

Multiple individuals are more than two individuals filing a case together. Multiple individuals usually represent persons with diverse characteristics but with similar interests; or persons who have together been directly affected by a situation. This usually occurs when a matter affects a huge number of people, and those who come up as petitioners, do so to represent broader interests. This was the case in the *LEGABIBO Registration* case<sup>286</sup> in

279 n 122 above.  
 280 *Satchwell* (n 63 above).  
 281 n 6 above.  
 282 *Victor Mukasa* case (n 52 above).  
 283 As above.  
 284 n 69 above.  
 285 Above.  
 286 *LEGABIBO Registration* case (n 5 above).

Botswana, which had 18 individual petitioners. It was also the case in the *Rolling Stone* case<sup>287</sup> and the *Lokodo* case<sup>288</sup> in Uganda, where all the individuals were affected by the same actions of the defendants. Another instance where multiple individuals were joined as petitioners was the *Fourie* case<sup>289</sup> in South Africa. The NCGLE and lawyers handling the case wished to ensure that it was evident that there was support for marriage of people of the same sex across the various ethnic groups that make up the diverse South African population.<sup>290</sup> Consequently, 18 same-sex couples, from various ethnic groups and representing all nine provinces in the country were joined as petitioners.<sup>291</sup>

A number of organisations may agree on a particular organisation to file a case due to specific attributes such as being registered or taking the lead on legal issues in the country as the case was for Uganda in the *HRAPF* case. Two organisations are usually used to bring different perspectives to the case. The case that stands out in this regard is the *Sodomy* case,<sup>292</sup> in South Africa, which was brought by the NCGLE and the South African Human Rights Commission (SAHRC), which is an independent institution created under Chapter 9 of the Constitution. The SAHRC was an important addition to the case.

Finally, a combination of individuals and organisations usually results out of wider consultations and different interests that have to be represented. This explains the South African model of having the NCGLE filing alongside the Commission for Gender Equality and 12 individuals in the *Immigration* case,<sup>293</sup> and the Ugandan *AHA* case, which had ten different petitioners: eight individuals and two organisations.<sup>294</sup> The major determinant of how many people are involved is the level of consultations and mobilisation in the particular country. The more extensive the consultations and mobilisation, the more actors involved.

The petitioners can further be classified into those who only come in for one case, and those that are petitioners in more than one case. Those who only come in for one case have been

<sup>287</sup> n 139 above.

<sup>288</sup> n 135 above.

<sup>289</sup> n 104 above.

<sup>290</sup> Interview with Crystal Cambanis (n 10 above).

<sup>291</sup> As above.

<sup>292</sup> The *Sodomy* case (n 8 above).

<sup>293</sup> The *Immigration* case (n 100 above).

<sup>294</sup> *AHA* case (n 42 above).

termed by Galanter as ‘one-shotters’:<sup>295</sup> they file one case and leave the scene. The other group of petitioners appear in different cases. The ‘one-shotters’ are more common in countries where the levels of homophobia are relatively low, for example South Africa and Botswana. This is because in such countries, many persons would feel empowered and protected enough to bring cases without necessarily belonging to coalitions or needing to hide behind the same organisations or individuals. This partly explains why no two cases have the same petitioner in Botswana, and only two cases have the same petitioner (the NCGLE) in South Africa. For countries where the levels of homophobia are still relatively high, such as Uganda and Kenya, there are more repeat petitioners. The phenomenon of repeat petitioners points to the existence of a few spirited individuals who are in position to bring the cases due to their status as already well-known LGB persons or activists, thus lowering the risks to the individual. In some instances, it may also be because these activists have enough power and influence within their communities, and so they are usually seen as the natural choices to bring cases. In Kenya, Eric Gitari stands out in this regard while in Uganda, Kasha Jacqueline, David Kato, Pepe Julian Onziema and Frank Mugisha, the leading LGB activists in the country, stand out as repeat petitioners. In South Africa, the NCGLE was a repeat petitioner since it is the body under which litigation was organised.

Besides the level of homophobia, the level of organising also seems to have an effect on the existence of repeat petitioners. There are more repeat-petitioners in countries with organised coalitions such as South Africa and Uganda, as the same organisations or faces are more likely to be bringing cases, while one-time petitioners would appear where there is no large coalition, as then anyone may come up and file a case. This points more to access to resources or power in the country by specific individuals or organisations than to homophobia. The Ugandan example shows that more powerful organisations and individuals within coalitions are also the ones who appear in most cases, pointing to the role of power structures within coalitions in determining who appears as a petitioner.<sup>296</sup> Indeed, being a petitioner seems to be a role that is much cherished by the leading activists.<sup>297</sup> For Kenya, since the GALCK has not largely been favouring litigation as a strategy, the repeat

<sup>295</sup> M Galanter ‘Why have come out ahead: Speculations on the limits of social change’ (1974) 9 *Law and Society Review* 1.

<sup>296</sup> For organisations, HRAPF appears in two cases: the *HRAPF* case as the sole petitioner, and as a joint petitioner in the *AHA* case showing that perhaps its role as chair of the Legal Committee, and a member of the Steering Committee as well as having its Executive Director as the second coordinator of the Coalition had some influence in its being able to be a petitioner twice, something which was confirmed by HRAPF’s Head of the Access to Justice Division, Ms. Patricia Kimera. Interview with Ms. Patricia Kimera, n 195 above. For individuals, the repeat petitioners are all incidentally members of the Coalition’s Steering Committee and also internationally acclaimed LGB rights activists.

<sup>297</sup> Interview with Fridah Mutesi, n 221 above.

petitioners have instead been from individual organisations which view GALCK's position as gatekeeping and have therefore decided to follow their own litigation strategies.

In Uganda and Botswana, there have been petitioners who do not identify as LGB. In Uganda, the majority of the petitioners in the *AHA* case did not specifically identify as LGB persons and represented different interest groups beyond the LGB community. Besides the three LGB activists and a gay medical doctor;<sup>298</sup> there was a professor of law;<sup>299</sup> two politicians - a ruling party Member of Parliament<sup>300</sup> and a former leader of the opposition party in Parliament, who is also a professor of entomology and ecology;<sup>301</sup> a leading media personality and activist for freedom of expression,<sup>302</sup> and two mainstream human rights organisations.<sup>303</sup> Another example is the petitioner in the *Adrian Jjuuko* case,<sup>304</sup> who brought the case as a lawyer and human rights activist. The case at the EACJ was brought by HRAPF, a mainstream organisation that operates a legal aid clinic for LGB persons. In Botswana, two of the 18 petitioners in the *LEGABIBO Registration* case<sup>305</sup> did not identify as LGB.<sup>306</sup> This trend is important as it shows that it is not only LGB persons who fight for LGB rights, but rather it is an issue that concerns and should concern everyone.

The other notable thing about the petitioners is their race. In South Africa almost all the petitioners in all cases concerning LGB rights were white, representing the peculiar racial-economic set up of that country which has the minority white population as generally the more economically empowered and thus more visible in social-political processes than the majority black population. Prof David Bilchitz, a Constitutional Law scholar and LGB rights activist who was involved in the *Fourie* case, confirms that the LGB movement as a whole in South Africa has been run by white elite members of society and there has been little input from grassroots organisations and people of the lower classes of society.<sup>307</sup> On the other hand, there is total absence of white petitioners in the other four countries. This is of course understandable since the populations of these countries are by and large black, and it is only in South Africa that there is a relatively large white population. Nevertheless, there is

<sup>298</sup> Frank Mugisha, Pepe Julian Onziema, Kasha Jacqueline and Dr Paul Semugoma.

<sup>299</sup> Prof J Oloka-Onyango.

<sup>300</sup> Hon. Fox Odoi.

<sup>301</sup> Prof Ogenga Latigo.

<sup>302</sup> Andrew Mujuni Mwenda.

<sup>303</sup> HRAPF and the Centre for Health, Human Rights and Development (CEHURD).

<sup>304</sup> *Adrian Jjuuko* case (n 4 above).

<sup>305</sup> *LEGABIBO Registration* case (n 5 above).

<sup>306</sup> Interview with Caine Youngman (n 195 above).

<sup>307</sup> Skype interview with Prof David Bilchitz, Director of the South African Institute for Advanced Studies in Constitutional, Human Rights, Public and International Law, University of Johannesburg, 10 July 2018.



always a conscious decision to leave white people out as petitioners in cases, due to the fear to feed into the popular belief that homosexuality is an import from the west.<sup>308</sup> Having black petitioners makes it clear that this is an issue that affects black people too and that it is not a foreign agenda.

All petitioners were not paid for their role and volunteered to be petitioners.<sup>309</sup> Being a petitioner comes with specific challenges, particularly being exposed to the media and being marked. One individual petitioner who stood out was Thuto Rammoge who was not an activist before being the lead petitioner in the *LEGABIBO Registration* case, and was thus outed and thrown into the limelight by the media in the case. His parents got to know about his sexual orientation from the media. He was aware that all this would happen, but he did so because he believed in the cause and thought that being part of the case was for the good of himself and everyone else.<sup>310</sup> In Uganda, ruling party Member of Parliament, Fox Odoi was not re-elected to Parliament, in large measure due to his participation in the *AHA* case.<sup>311</sup> Crystal Cambanis, a seasoned human rights lawyer from South Africa, noted that exposure to the media usually takes a huge emotional toll on the petitioners, and therefore there was need for support to the petitioners from both the broader community and their lawyers.<sup>312</sup>

*e) The nature of respondents*

Almost all the cases are brought against the state or its agents, including state bodies with their own legal personality. The South African cases were mainly against the specific state institutions or officials responsible for the violations.<sup>313</sup> Only one case was brought against a non-state institution: the Methodist Church.<sup>314</sup> In Uganda, most of the cases were against the state or its agents, with the *Rolling Stone* case<sup>315</sup> as an exception, as it was against a private media house and its editor, as well as the *Scott Lively* case<sup>316</sup> which was against an individual US citizen. The *Lokodo* case included Rev. Simon Lokodo, the Minister of Ethics and Integrity in his private capacity, in addition to the Attorney General. In Kenya, all the cases are

<sup>308</sup> Interview with Dr Chris Dolan (n 195 above).

<sup>309</sup> Interview with Thuto Rammoge, Petitioner, *LEGABIBO Registration* case (n 5 above) Gaborone, 12 October, 2017; interview with Anna-Marié de Vos (n 70 above); interview with Eric Gitari (n 34 above); interview with Frank Mugisha, Executive Director, Sexual Minorities Uganda, 27 July 2017, Kampala, n 195 above; interview with Caine Youngman (n 195 above).

<sup>310</sup> Interview with Thuto Rammoge (n 264 above).

<sup>311</sup> See for example 'Pro-gay MP Fox Odoi booed at Oketcho burial' *The Observer* 28 April 2014.

<sup>312</sup> Interview with Crystal Cambanis (n 10 above).

<sup>313</sup> These included the President in the *Satchwell* case (n 63 above).

<sup>314</sup> The *De Lange* case (n 6 above).

<sup>315</sup> *Rolling Stone* case (n 139 above).

<sup>316</sup> *Scott Lively* case (n 146 above).

against the state or state agencies, and this is the same with Botswana. Targeting the state is important since the constitutions impose a duty on the state and all its agencies to fulfil, protect and respect human rights. The approach of targeting state officials and institutions with corporate personality is also important because such officials are singled out and, where they are targeted in their individual capacities, they have to appear in court and handle their defence rather than hide behind the Attorney General. Going against them in their personal capacity in situations where they exceed their mandate is also critical for purposes of preventing the abuse of office and power. Interestingly, in almost all cases, the state defends the cases, even when the laws or actions challenged are clearly unconstitutional. For the case of South Africa, it was to the great surprise of the lawyers and others involved in handling the cases that the African National congress (ANC) government actually opposed the *Sodomy* case,<sup>317</sup> as well as every other LGB strategic case after that.<sup>318</sup> Such a step seemed to be out of line with the strong human rights agenda which the party and its leaders supported prior to 1994, and many had simply considered the LGB strategic cases to be routine measures to bring the laws of the country in line with its new, transformative Constitution.<sup>319</sup>

*f) Nature of third parties in the case*

Public interest cases have long moved from being about two parties to involving multiple parties.<sup>320</sup> Among these multiple parties are interveners, amicus curiae, and interested parties. Interveners are persons not otherwise involved in a case, who are allowed to submit specialised information of expertise to the court supporting one or the other of the main parties.<sup>321</sup> Amici curiae are ‘friends of the courts’. They apply to join cases as amici curiae in order to help the court to resolve the issues in the case.<sup>322</sup> Interested parties can be either

<sup>317</sup> n 8 above.

<sup>318</sup> Interview with Crystal Cambanis (n 10 above).

<sup>319</sup> The 1996 Constitution of the Republic of South Africa was the central point of reference for ushering in a new era of democracy, human rights, equality and freedom after the end of decades of Apartheid. The new constitutional dispensation required the reform of laws of the country on an extremely large scale. See for example the General Law Fourth Amendment Act No. 132 of 1993 which removed discriminatory differentiations between men and women from laws such as the Deeds Registries Act of 1937 and the South African Citizenship Act of 1949.

<sup>320</sup> S Bades ‘The idea of a case’ (1990) 42 *Stanford Law Review* 227, 250–55. Also see also A Chayes ‘The role of the judge in public law litigation’ (1976) 89 *Harvard Law Review* 1281, 1282–84.

<sup>321</sup> The Public Law Project ‘Third party interventions - A practical guide’ (2008) 3.

<sup>322</sup> The term ‘amicus curiae’ literally translates as ‘friend of the court.’ This however is largely deceptive as amici curiae go way beyond being friends of the court to being advisors of the court. See JC Mubangizi & C Mbazira ‘Constructing the amicus curiae procedure in human rights litigation: what can Uganda learn from South Africa?’ (2012) 16 *Law Democracy and Development Law Journal* 199. Black’s Law Dictionary defines the term amicus curiae as ‘a person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter.’ BA Garner (ed) *Black’s law dictionary* 9<sup>th</sup> edition, 2009, 98.

amici curiae or fall in their own category depending on how the jurisdiction classifies them. It has been noted that amici applications have become important in human rights cases today,<sup>323</sup> and indeed this is so also for LGB cases. Some cases have had parties applying as interveners in order to join the cases. This is more common in Kenya and South Africa and less so in Botswana and Uganda. This perhaps has to do with individual country constitutions and the PIL culture that has developed around them, which makes different parties feel free to intervene in different cases. South Africa stands out with the highest number of amici curiae in LGB strategic cases, with four separate amici curiae in two cases.<sup>324</sup> There were two sets of interveners in the *Gory* case.<sup>325</sup> The first set of four interveners was made of sisters who opposed a same-sex partner's claim to administer their late brother's estate. The counter intervening party was the same-sex partner. The South African interveners simply had their private matters to settle but nevertheless impacted the broader question of whether persons in permanent same-sex relationships are entitled to benefit from the estate of a deceased partner. Kenya follows with three interveners in the *Eric Gitari* case,<sup>326</sup> and one amicus curiae. These were; Audrey Mbugua, the Director of Transgender Education and Advocacy; and Daniel Kandie, a father of an intersex child who both opposed the application on the grounds that registering the organisation would lead to a confusion of sexual orientation and gender identity issues yet the two were distinct. They also argued that there was no violation of the right to freedom of association since the organisation had already been in operation. This was a rather surprising intervention, which indicated divisions between the members of the broader LGBTI community in Kenya, on the approach to litigation. The other intervener was the Kenya Christian Professionals Forum, which joined seeking to oppose the registration on the basis that the registration would advance a cause against public policy and it would also legalise criminality. The amicus curiae was the Katiba Institute, which argued in favour of NGHRLC's registration.<sup>327</sup>

In Uganda, the Inter-Religious Council and two other entities applied to join the *AHA* case on the side of the respondents in order to handle the defence of the petition.<sup>328</sup> However,

<sup>323</sup> Mubangizi & Mbazira, above, 190.

<sup>324</sup> In the *Du Toit* case (n 69 above) the Lesbian and Gay Equality Project was admitted as amicus curiae. In the *Fourie* case (n 104 above), there were three amici: Doctors For Life International, John Jackson Smyth and Marriage Alliance of South Africa and in the *De Lange* case (n 6 above), Freedom Of Religion South Africa (FOR SA) had applied to join as amicus but were not allowed as they had brought new matters.

<sup>325</sup> n 93 above.

<sup>326</sup> n 122 above.

<sup>327</sup> There was one amicus curiae, the Katiba Institute in the *Eric Gitari* case (n 122 above).

<sup>328</sup> *Inter Religious Council of Uganda (IRCU), the Family Life Network and the Uganda Centre for Law and Transformation v The Attorney General of Uganda & 10 Others*, Miscellaneous Constitutional Application No. 23 of 2014.

there was no time to hear them before the main petition was decided.<sup>329</sup> Uganda also had one amicus curiae joining the *HRAPF* case.<sup>330</sup> Botswana had no successful amicus application in LGB cases by the end of 2017.<sup>331</sup>

The role of religious groups in opposing such cases ought to be noted, as it illustrates the function of these groups in accelerating hate against LGB groups in the name of religion, something that Kaoma has highlighted in his writings.<sup>332</sup> The TEA opposition in Kenya to a case seeking registration of an LGB organisation shows that interveners can also be persons within the same movement seeking to push their agenda not only separately but also in a way that curtails progress for others. When admitted, the interveners make submissions which although helping the court to reach a decision, are usually more helpful to one party or the other. Half of the amici applications have been supportive of the LGB groups and the other half have not. There has been one supportive amicus curiae for each of the three countries. Amici curiae that are usually supportive of LGB positions are usually organisations that work on democracy or human rights, while those that do not support LGB rights positions are largely conservative groups, particularly religious groupings.

*g) The nature of lawyers who argue the cases*

There are three categories of lawyers involved in the cases that have been filed: lawyers in private practice, 'community' lawyers and international lawyers. Lawyers in private practice are those lawyers working in private law firms and who handle a wide array of cases beyond LGB issues. These are the most common lawyers in LGB litigation in Common Law Africa. Despite being lawyers in private practice, they are usually selected because of their experience, closeness to the LGB community or the key individuals therein, respectability, and because of their social and political standing. They charge 'pro bono' rates for LGB cases, which are lower than the rates that they would ordinarily charge for other cases. The rates are mostly negotiable and the lawyers usually take what the clients are able to pay. In South Africa, the Bar is divided between advocates and attorneys. Advocates receive their instructions from attorneys and not directly from clients. Clients are entitled to choose their advocate but in practice this is usually done by the attorney. The attorneys firm of Nicholls

<sup>329</sup> See Jjuuko & Mutesi, 48 above.

<sup>330</sup> This was UNAIDS which was admitted in the *HRAPF* case, n 54 above, at the East African Court of Justice.

<sup>331</sup> There was an amicus application filed by Human Rights Watch in the *LEGABIBO Registration* case (n 4 above) but it was withdrawn before being considered after consultations with others.

<sup>332</sup> See generally, Kaoma, n 264 above.

Cambanis & Associates handled several cases for the NCGLE,<sup>333</sup> and would thus instruct advocates who were experienced in constitutional law and sympathetic to the cause.<sup>334</sup> Advocates would frequently do the cases on a pro bono basis. Attorneys would often also do cases pro bono and only received funds to cover disbursements and administrative expenses in running their cases.<sup>335</sup> In Uganda, renowned human rights lawyer Ladislaus Rwakafuuzi has handled most of the cases on the instructions of the CSCHRCL and HRAPF, or by the individual petitioners.<sup>336</sup> Onyango Owor,<sup>337</sup> and Caleb Alaka<sup>338</sup> are the other lawyers in private practice who have handled LGBT cases. In Kenya, Sande Ligunya, a lawyer in private practice, has handled all the cases brought by Eric Gitari/NGLHRC.<sup>339</sup> In Botswana, DG Boko, a lawyer in private practice, handled the *Kanane* case;<sup>340</sup> while Unity Dow<sup>341</sup> and LN Nchunga, both lawyers in private practice at the time, handled the *LEGABIBO Registration* case.<sup>342</sup>

The ‘community lawyers’ are lawyers who work for organisations or coalitions as in-house lawyers. This model is used in Uganda where the Legal Committee of the Coalition, which is made up of in-house lawyers working for the different organisations, actively works on developing and handling the cases through the process.<sup>343</sup> It was also used in South Africa where the Legal Resources Centre, which is a public interest law firm,<sup>344</sup> used to instruct advocates to represent clients in the cases.<sup>345</sup>

International lawyers are those based in countries other than the Common Law African countries under analysis. Lawyers from INTERRIGHTS in the UK, and from the Human

<sup>333</sup> The law firm is well entrenched in the history of LGB rights in South Africa for its work on leading cases. Two of its partners, Caroline Heaton-Nicholls and Crystal Cambanis, were anti-apartheid activists. See N Hoard et al (eds) *Sex and politics in South Africa* (2005) 9, 246.

<sup>334</sup> The law firm instructed advocates in the following cases: the *Langemaat* case (n 13 above); the *Sodomy* case (n 8 above); for the amicus curiae (The Lesbian and Gay Equality Project) in the *Du Toit* case (n 69 above); and in the *Immigration* case (n 99 above); for the applicant in *Gory* (n 93 above).

<sup>335</sup> Interview with Crystal Cambanis (n 10 above).

<sup>336</sup> He has handled four decided cases: *Victor Mukasa* case; *Adrian Jjuuko* case; the *AHA* case; and the *HRAPF* case. He is currently handling the *Lokodo* appeal; and the *SMUG registration* case.

<sup>337</sup> He was part of the legal team for the *AHA* case and also handled the *Lokodo* case in the High Court.

<sup>338</sup> He was part of the legal team for the *AHA* case and filed the appeal in the *Lokodo* case.

<sup>339</sup> *Eric Gitari* case; *COL* case; and the *Eric Gitari Decriminalisation* petition.

<sup>340</sup> The *Kanane* case (n 23 above).

<sup>341</sup> She handled the case only up to the High Court level.

<sup>342</sup> The *LEGABIBO Registration* case (n 5 above).

<sup>343</sup> For more details about the Legal Committee see Jjuuko & Mutesi (n 48 above).

<sup>344</sup> The Legal Resources Centre is a public interest law organisation founded by human rights lawyers including later Constitutional Court judge, Arthur Chaskalson. It uses the law ‘as an instrument of justice for the vulnerable and marginalised, including poor, homeless, and landless people and communities who suffer discrimination by reason of race, class, gender, disability or by reason of social, economic, and historical circumstances.’ It has over 65 lawyers specialising in public interest law. See Legal Resources Centre (LRC) ‘About us’ <http://lrc.org.za/lrcarchive/about-us> (accessed 16 January 2018).

<sup>345</sup> LRC instructed the advocates in the *Immigration* case (n 100 above).

Dignity Trust again based in the UK, the International Commission of Jurists based in Geneva, and SALC based in South Africa have all directly advised on litigation in Uganda. SALC has also been active in Botswana and Malawi. The inter-country collaboration of lawyers is well-developed in the East African region with Kenyan, Ugandan and Rwandese lawyers exchanging ideas and lessons on LGB cases.<sup>346</sup> The lawyers who represented SMUG in the *Scott Lively* case, from the Centre for Constitutional Rights in the USA, worked with HRAPF and other lawyers in Uganda on the case.

There are differing benefits in using the different types of lawyers, depending on the nature and stage of the case. Community lawyers are more important at the overarching strategy stage, international lawyers at the pre-litigation phase while lawyers in private practice are key at the litigation stage, and in the post-litigation period. The main benefit of using community lawyers is that they understand the issues well as this is usually their day-to-day work and in most cases also their passion, while commercial lawyers are usually detached from the community and may not fully understand the issues, and in some cases may not even want to be identified with the clients.<sup>347</sup> In practice, all three categories of lawyers are used simultaneously during the cases although those arguing the cases in court are the ones that get to appear in the court records. The community lawyers help to mobilise people and do research, while international lawyers advise on the international perspectives.

#### *h) The nature of legal and factual arguments raised before the court*

The majority of the decided cases were determined based primarily on human rights arguments. The only exceptions are the *AHA* case and the *HRAPF* case in Uganda; and the *De Lange* case in South Africa, which were decided on the basis of other issues. The primary human rights principle relied upon in the majority of cases is the right to equality and freedom from discrimination. In South Africa, it is the primary ground upon which the majority of the cases were decided.<sup>348</sup> This is based on the fact that sexual orientation is a protected ground against discrimination in the South African Constitution. The equality ground has also succeeded in Kenya<sup>349</sup> and Botswana<sup>350</sup> despite the absence of express protection in the Constitution. It has, however, not largely been relied upon in Uganda

<sup>346</sup> For example the HRAPF case, n 54 above, involved regional meetings of lawyers and activists. Interview with Fridah Mutesi, n 221 above.

<sup>347</sup> Interview with Frank Mugisha, n 309 above.

<sup>348</sup> All the cases with the exception of the *De Lange* case (n 6 above) had this right as the primary ground upon which they were decided.

<sup>349</sup> This was in the *Eric Gitari* case (n 122 above).

<sup>350</sup> The *LEGABIBO Registration* case (n 5 above).



despite the fact that it has been raised in almost all cases. Ugandan courts tend to rule on the basis of other rights other than the right to freedom from discrimination on the basis of sexual orientation.<sup>351</sup> The other right that is usually relied upon is the right to dignity, which has found favour in South Africa,<sup>352</sup> Kenya,<sup>353</sup> and Uganda.<sup>354</sup> The right to privacy was also successfully relied upon in South Africa despite the earlier reservations expressed by Edwin Cameron,<sup>355</sup> which were also discussed and dismissed in the *Sodomy* case as being applicable to the period in which they were made.<sup>356</sup> The right to freedom of expression has been relied on in the registration cases in Kenya<sup>357</sup> and Botswana,<sup>358</sup> while the right to a fair trial argument has succeeded in Uganda.<sup>359</sup>

The counter-argument to the human rights arguments in these cases is ‘limitation of rights’. All constitutions create standards according to which rights may be limited. Human rights of one person or group oftentimes have to be balanced against the human rights of others and can furthermore be limited by the law if predetermined conditions are met.<sup>360</sup> It is up to the courts to ensure that the limitation of a right or the balancing of rights are carried out in accordance with the spirit of the Country’s constitution. The respondents usually use these limitations to convince the courts to limit the rights, and indeed some courts have done so. The most notable cases are the *Lokodo* case<sup>361</sup> in Uganda where the judge held that the criminal law was a limitation to the right to freedom of association;<sup>362</sup> and the *Kanane* case in Botswana, where the court referred to public opinion in refusing to apply the right to equality and freedom from discrimination.<sup>363</sup> It also met with success in the *COL* case<sup>364</sup> in Kenya where the right to dignity had to be balanced with the need for criminal investigations where same-sex conduct is criminalised.

<sup>351</sup> It was only discussed by the judge in the *Lokodo* case but the court found that the limitation was justifiable. See *Lokodo* case (n 135 above) 22-23.

<sup>352</sup> It was based on in the *Sodomy* case; *Fourrie* case; and the *Du Toit* case.

<sup>353</sup> It was relied on in the *Eric Gitari* case .

<sup>354</sup> It was relied on in the *Victor Mukasa* case and the *Rolling Stone* case.

<sup>355</sup> Cameron (n 105 above) 450, 464.

<sup>356</sup> Above Paras 29-32.

<sup>357</sup> *Eric Gitari* case (n 122 above).

<sup>358</sup> *LEGABIBO* Registration case (n 5 above).

<sup>359</sup> The *Adrian Jjuuko* case in Uganda (n 4 above).

<sup>360</sup> See for example section 36 of the South African Constitution which provides that a right in the Bill of Rights may only be limited by a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

<sup>361</sup> n 135 above.

<sup>362</sup> Above.

<sup>363</sup> n 23 above.

<sup>364</sup> n 130 above.

Besides the human rights arguments, courts have also relied on other legal arguments including procedural aspects to find in favour of LGB groups. In Botswana, flouting of administrative procedures was used as another ground to find the actions of the Registrar to be unconstitutional.<sup>365</sup> In Uganda, the *Anti-Homosexuality Act* case was decided on the basis of the unconstitutional procedure followed in the passing of the Act.<sup>366</sup> This rendered the human rights arguments superfluous, according to the Court, because that one reason was enough to have the whole Act declared unconstitutional. The courts have also used justiciability issues to dismiss cases. In two of the cases considered, the preliminary question of justiciability was not answered favourably and the courts subsequently did not delve deeply into the merits of the matters. It can be argued that both the EACJ and the Constitutional Court of South Africa in a sense avoided dealing with the intricacies involved in upholding LGB rights. In the *HRAPF* case, the Court decided that the case was not justiciable on the basis of mootness since the Constitutional Court of Uganda had already nullified the AHA. The Court did not consider whether or not the actions of the government of Uganda, in passing a law that intensified homophobia, contravened the principles of the EACJ Treaty. However, the Court's attitude, expressed in its handling of the question as to whether or not the 'public interest exception' should apply in order to enable the Court to hear a moot matter, was in no way encouraging and played down the severe discrimination and danger faced by the LGB community in East Africa.<sup>367</sup> The *De Lange* case<sup>368</sup> in South Africa's Constitutional Court was dismissed on the preliminary ground that the applicant failed to show good cause as to why she set aside an arbitration agreement that was reached before the case was instituted in the lower courts.<sup>369</sup> The Constitutional Court furthermore declined to consider the issue of unfair discrimination as it was only raised for the first time in the Supreme Court of Appeal and the doctrine of constitutional subsidiarity requires that claims of unfair discrimination should be made in the Equality Court as a court of first instance.<sup>370</sup> The challenging task of balancing the right to equality with the right to freedom of religion was thus left for another day.

It should be noted that in all the cases, the petitioners raise human rights arguments, but the courts simply choose to ignore them in some instances. It is therefore clear that human rights arguments are the preferred arguments for the pro LGB groups in LGB strategic cases,

<sup>365</sup> *LEGABIBO Registration* case (n 5 above).

<sup>366</sup> The *AHA* case (n 42 above).

<sup>367</sup> *HRAPF* case (n 54 above) at para 60.

<sup>368</sup> n 6 above.

<sup>369</sup> *De Lange* case (n 6 above) para 30.

<sup>370</sup> As above.

and the different rights are raised depending on the facts of the case. The fact that human rights arguments have been largely successfully used points to human rights being an effective entry point towards LGB equality. The rights are protected in the respective constitutions and are thus easily and directly applicable. The language used in the constitutions is inclusive and it would thus be difficult to exclude LGB persons based on sound constitutional reasoning. Even where sexual orientation is not a protected ground, courts have been able to use the inclusive language in the Constitutions to find for LGB rights.<sup>371</sup> However, in countries where the hurdle of criminalisation has not yet been removed, counter arguments based on the limitation clause should not be underestimated as they easily connect with most conservative judges' views on the criminalisation of same-sex sexual relations. They therefore need to be adequately addressed and dealt with.

Uganda has also shown through the *AHA* case that procedural flaws in the passing of restrictive laws against LGB persons can be exploited to have such laws nullified. Besides substantive human rights arguments, in countries where homophobia fuels the abuse of legislative processes, challenging the process of passing the laws where flaws exist would be more effective in getting rid of the whole law rather than simply parts of it.

*i) The nature of remedies prayed for*

The lawyers in the different countries pray for different orders, depending on the jurisdiction. For South Africa, the prayers made are usually specific: declarations, and then remedies such as 'reading in,' and statutory interdicts. This is also largely because of the unique nature of the South African Constitution which allows for such remedies to be prayed for. For other countries, the prayers are usually framed around declarations, for example for nullity of the laws, and for damages and costs as well as 'any other remedies as the court deems fit'. These are common in Botswana, Kenya and Uganda.

*j) The background of the judges who decide the cases*

An important factor in determining the success of litigation is the value system, background, and worldview of the judges hearing the cases. This is in line with the legal realist position that judicial decisions determine what the law is.<sup>372</sup> Many of the judges on the South African Constitutional Court who authored some of the ground-breaking decisions on LGB rights in

<sup>371</sup> For example in the *Eric Gitari* case (n 122 above) in Kenya and the *LEGABIBO Registration* case (n 5 above) in Botswana.

<sup>372</sup> For a deeper analysis of legal realism as a theory of law see MS Green 'Legal realism as theory of law' (2005) 46 *William & Mary Law Review* 1915.

Common Law Africa played important roles in the anti-apartheid struggle. Most of the lead judges on these cases, such as Lourens Ackermann (the *Sodomy* case),<sup>373</sup> Albie Sachs (the *Fourie* case),<sup>374</sup> Kate O'Regan (the *Satchwell* case),<sup>375</sup> Thembile Skweyiya (the *Du Toit* case)<sup>376</sup> and Pius Langa (the *Gory* case)<sup>377</sup> as well as members of the coram in many of those judgments for example Justices Dikgang Moseneke, Edwin Cameron and Richard Goldstone were all active in the anti-apartheid struggle in one way or another, and have a record of careers in which they displayed respect for human rights of all.<sup>378</sup>

In Uganda, Justice Arach Amoko, who authored the *Victor Mukasa* decision, is a highly respected judge, and currently a justice of the Supreme Court of Uganda. The judge in the *Rolling Stone* case, Kibuuka Musoke J, is a respected Ugandan judge, known for making independent decisions even when they are not in line with the ruling party's position.<sup>379</sup> As for the *AHA* case, Ugandan Deputy Chief Justice at the time, Steven Kavuma, who led the panel of judges, is a career politician who, during his tenure as Deputy Chief Justice, was known for 'toeing the party line'.<sup>380</sup> Therefore, the apparently progressive decision reached in that case did not have much to do with the progressive stance of the judges but rather the political need to get rid of a law that had made Uganda a pariah state. The fact that the decision was hurriedly made, even against the wishes of the Attorney General who wanted the hearing postponed, and at a time when the President was due to attend the US-Africa Summit in the US, shows a link between the decision and the President's positive reception at the summit.<sup>381</sup>

In Kenya, Justice Isaac Lenaola and Justice Mumbi Ngugi are both well-known for being liberal and progressive and their judgments in the *Eric Gitari* case reflect this outlook. Justice

<sup>373</sup> n 8 above.

<sup>374</sup> n 104 above.

<sup>375</sup> n 63 above.

<sup>376</sup> n 69 above.

<sup>377</sup> n 93 above.

<sup>378</sup> For brief biographies of the first bench of the newly created Constitutional Court, see N Bohler-Muller, M Cosser & G Pienaar (eds) *Making the road by walking: The evolution of the South African Constitution* (2018) 19-24.

<sup>379</sup> He for example stopped a recount of the votes in the highly politically charged Mbarara municipality parliamentary votes in 2011, which the ruling party candidate had requested in *Byanyima Winnie v Ngoma Ngime* (Civil Rev. No. 9 Of 2001) [2001] UGHC 92 (17 July 2001). Also see 'High Court judge opts to retire early' *Daily Monitor* 9 September 2014.

<sup>380</sup> See for example 'Political judge Steven Kavuma, a disgrace to justice' *The Spear* 25 February 2017. <http://thespearnews.com/2017/02/25/political-judge-steven-kavuma-disgrace-justice/> (accessed 16 January 2017).

<sup>381</sup> For the questions around the real motive behind the passing of the law see for example 'Museveni behind gay law victory?' *The Observer* 4 August 2014. For the process of hearing the petition, see Jjuuko & Mutesi, n 48 above.

Lenaola opined that human rights should be at the centre of the judicial system.<sup>382</sup> In Botswana, Justice Rannowane who decided the *LEGABIBO Registration* case is known as an independent judge who has made decisions against the ruling party's position.<sup>383</sup> Therefore, in many of the cases, the school of thought that the judge generally subscribes to is reflected in their judgments. However, despite this, where the constitution is very clear, such as the case is in South Africa, there is little wiggle-room for judges not to find in favour of LGB rights.<sup>384</sup> Even in Botswana, Kenya and Uganda, where the Constitution does not expressly protect against discrimination on the basis of sexual orientation but uses phrases like 'any person', judges have in many instances found in favour of LGB rights using such provisions. Nevertheless, there have been instances where judges have used the absence of express protection of sexual orientation as a ground of discrimination and the limitation provisions in order to justify their decisions not to realise the rights of LGB persons. This was the course of action taken by the courts in the *Lokodo* case in Uganda<sup>385</sup> and the *Kanane* case in Botswana.<sup>386</sup> At the end of the day it is the judge that interprets and therefore gives meaning to the constitution.

*g) The incidence of costs*

One of the main determinants of litigation is the issue of costs. Costs are used to penalise a party that loses or wastes the court's time. If condemned in costs, a public interest litigant can easily become insolvent, and others may fear to be involved in litigation lest they face the same fate. Costs are usually part of the pleadings, and the court deals with them in the final part of the judgment. The trends on costs in LGB litigation in Common Law Africa have not been uniform. In South Africa, the rule is that in constitutional litigation between a private party and the state, if the government loses it is to pay the costs of the other side but if the government wins, each party is to bear its own costs.<sup>387</sup> Considering that the state lost almost every one of the LGB rights cases which it opposed, costs were awarded against it which would not have been the case if the private parties were the ones to lose.<sup>388</sup> In Uganda, the rule is that costs follow the event, except where the judge decides otherwise

<sup>382</sup> Interview with Justice Isaac Lenaola, Nairobi, 27 July 2017.

<sup>383</sup> See 'Is Khama right on the Independence of our Judiciary?' *Weekend Post* 17 August 2015 [https://weekendpost.co.bw/wp-column-details.php?col\\_id=187](https://weekendpost.co.bw/wp-column-details.php?col_id=187) (accessed 16 January 2018).

<sup>384</sup> It has been established before that where the law is clear and unambiguous, it is the law that dominates and not the judge. See generally, A Orley et al 'Politics and the judiciary: the influence of judicial background on case outcomes' (1995) *Cornell Law Faculty Publications*, Paper 417.

<sup>385</sup> n 135 above.

<sup>386</sup> n 23 above.

<sup>387</sup> *Affordable Medicines Trust and Another v Minister of Health and Another* [2005] ZACC 3.

<sup>388</sup> See chapter 2, section 2.2.4(iv).

considering the circumstances.<sup>389</sup> Indeed, in *LGB SL*, despite the CSCHRCL taking a deliberate decision not to ask for costs in many of the cases, the main trend is that costs have been awarded in almost all cases where the LGB community has won, except for the *AHA* petition, where only half of the costs were given; and in the *HRAPF* case, where each party was ordered to bear its own costs. Similarly, in the *Lokodo* case, costs were awarded to the state and a minister against the petitioners. In Kenya, the rule has been that all parties settle their own costs. In Botswana, the courts did not make orders as to costs in *Kanane* and the *LEGABIBO Registration* case. However, in the *LEGABIBO Registration* appeal, costs were awarded against the state.

Apart from the Ugandan case, costs have not been awarded against unsuccessful petitioners, and yet they have been awarded against the state in most cases where the state loses. This is a good practice, and the isolated trend of awarding costs against public interest litigants should be addressed through advocacy as the effect on such litigants is usually to deter them from further litigation.

*h) The nature of advocacy and other strategies employed to support the court cases*

*SL* cases are usually supported by advocacy in order to be effective. The main way of engaging in advocacy is through the media. The media was part of the hearings in South Africa and cases were well reported. In Uganda, the Coalition usually organised press conferences at the filing of cases and delivery of judgments.<sup>390</sup> The Coalition also published its own statements on the various cases/ judgments, and social media conversations thrived on the cases and their outcomes. In Kenya, the different entities engaged the media, including social media.<sup>391</sup> Case digests also exist online on the different cases that NGLHRC has done.<sup>392</sup> In Botswana, booklets on the *LEGABIBO Registration* case were made by SALC and LEGABIBO in a bid to make the case easier to understand.<sup>393</sup> There was also a social media campaign with the hashtag #legabiboregistration. It is important to note that access to traditional media for LGBT groups is both limited and expensive. In Uganda for example, the biggest media group - the Vision Group - has a policy according to which they do not

<sup>389</sup> As above.

<sup>390</sup> Interview with Dr Chris Dolan (n 196 above). For a detailed discussion of the mobilisation efforts done during the *AHA* case, see Jjuuko & Mutesi (n 48 above).

<sup>391</sup> Interview with Eric Gitari (n 34 above).

<sup>392</sup> See for example The National Gay and Lesbian Human Rights Commission 'The National Gay and Lesbian Human Rights Commission case Digest, February 2017'

<https://www.nglhrc.com/s/NGLHRCcaseDigestFeb2017docx.pdf> (accessed 17 January 2018).

<sup>393</sup> See Southern African Litigation Centre 'A victory for the right to freedom of association: The LEGABIBO case' <https://southernafricalitigationcentre.org/2016/09/24/the-legabibo-case-a-victory-for-the-right-to-freedom-of-association/> (accessed 17 January 2018).



report on anything about homosexuality except where the source is the office of the president, Parliament or the courts.<sup>394</sup> This policy may seem to include court cases in the scope of reporting, but it is generally a polite way of banning publication of such stories except where reporting is requested or required by political leaders.

### 3.3.4 Trends at the post-litigation stage

At the post-litigation stage, the major concerns are enforcement of the judgment and appeals, or revisions. The trends observed at this stage are as follows:

#### *a) Enforcement processes*

Enforcement differs from one jurisdiction to the next. Some jurisdictions strictly enforce court decisions while others simply ignore them, and yet others implement them in accordance with what appeals to whoever is responsible for such action. Enforcement is about taking action to ensure that the court's decision is complied with. Some court decisions are self-enforcing, requiring no further action on the part of any state organ except not to act contrary to what the judgment requires. Others need proactive enforcement, for example those nullifying particular provisions of a law, which then requires Parliament to go ahead and amend the law to comply with the court decision, as well as those that require the payment of damages and costs which have to be complied with by the party against whom such damages/costs were awarded. Decisions that do not require much action on the side of the state seem easier to comply with, as the court's judgment is in itself enough to change the status quo, while for those that require action to be taken, the status quo remains the same until what the court ordered is complied with. South Africa<sup>395</sup> and Botswana<sup>396</sup> so far lead as regards compliance, while Kenya<sup>397</sup> and Uganda<sup>398</sup> are not making the same

<sup>394</sup> Vision Group (2014) 'Editorial Policy' <https://issuu.com/newvisionpolicy/docs/243661083-editorial-policy-complete> (accessed 24 July 2017).

<sup>395</sup> The legislature and the executive complied with all the court orders in LGB cases. Laws have also been amended and adopted in order to provide broader protection for LGB persons in the absence of litigation to that end, for example, currently before Parliament is the Hate Crimes Bill which has as one of its objectives to classify crimes committed against LGB persons on the basis of their sexual orientation as 'hate crimes', even though there has never been a strategic case in which such issues, including the issue of 'corrective' rape of lesbian women, had been considered.

<sup>396</sup> The Registrar finally registered LEGABIBO within a month after the appeal was dismissed. Interview with Caine Youngman (n 196 above).

<sup>397</sup> In Kenya, the Registrar is yet to register NGLHRC, perhaps waiting for the decision in the appeal. They however registered TEA.

<sup>398</sup> Uganda has so far complied with only those decisions that are self-enforcing like nullification of the AHA. The Rolling Stone tabloid closed soon after the judgment. For those requiring action like removal of section 15(6)(d) of the Equal Opportunities Commission Act from the law books, there is still some way to go since Parliament is yet to add this matter to its agenda.

progress on this front. Kenya has still not registered the NGLHRC as required by the court orders.<sup>399</sup> In Uganda, the Anti-Homosexuality Act was nullified and this did not require any action on the part of the legislature. However the legislature nevertheless responded by collecting signatures to pass the Bill again, this time vowing to pass it with the right quorum.<sup>400</sup> While the state paid the damages and costs in the *Victor Mukasa* case,<sup>401</sup> Parliament is yet to remove section 15(6)(d) from the Equal Opportunities Commission Act, two years after the Court nullified that provision.

Compliance with court decisions in LGB cases also depends on the nature of the court judgments. Decisions specifying what the legislature or executive should do are more easily complied with than those that simply make declarations. Declarations are broad and not specific, so doing something that is not in line with the judgment may not specifically be regarded as non-compliance. In situations where only declarations are made by courts, and no clear action is required on the part of the state, a decision can be said to be complied with without the state doing anything. Those, however, that specifically order the legislature or the executive to do something within a specific period of time, are generally complied with.

Compliance with court decisions also goes beyond the nature of the court orders to the state of democracy in the country. The South African and Botswana governments generally comply with court decisions and so this situation is not exceptional. The Kenyan government has also become more compliant with court orders since the 2010 Constitution came into force. The Ugandan government on the other hand generally has a history of non-compliance with court decisions requiring action on the part state.

#### ***b) Appeals***

Both activists and the state tend to favour taking the cases all the way to the highest courts, and as such there is a high number of appeals pending at those levels. In South Africa, all the cases reached their final stages without the possibility of further appeal. This may be attributed to the fact that orders by lower courts invalidating legislation have to be confirmed by the Constitutional Court, which is the highest court in the country.<sup>402</sup> In Uganda, one of the lost cases was appealed. A deliberate decision was made not to appeal the case at the EACJ as the aim of taking the case to the court had nevertheless been

<sup>399</sup> Interview with Eric Gitari (n 34 above)

<sup>400</sup> 'MPs start process to re-table gay Bill' *Daily Monitor* 3 September 2014.

<sup>401</sup> Interview with Ladislaus Rwakafuzi (n 53 above).

<sup>402</sup> Section 167(5) of the Constitution of the Republic of South Africa.

achieved.<sup>403</sup> Scott Lively appealed the language used in the judgment, even though the decision was not against him.<sup>404</sup> The *AHA* case was not appealed, despite the state filing a notice of appeal immediately after the judgment.<sup>405</sup> In Kenya, the state appealed in the *Eric Gitari* case,<sup>406</sup> while in Botswana the state appealed in the *LEGABIBO Registration* case.<sup>407</sup> Appeals help to ensure that the highest court makes a final decision. Appeals were concluded in South Africa, Kenya and Botswana, while they are still ongoing in Uganda, and perhaps this will help to finally clarify the pending issues in those cases.

In conclusion, there are a number of trends at the different levels of an SL case that stand out in all the different African Common Law countries. What however clearly emerges is that LGB SL is thriving in the different countries, with more prospects in Kenya and Botswana at the moment as there are ongoing cases, and more recent court victories. Uganda on the other hands seems to be on a downward spiral with a string of lost cases- as three of the last five court decisions have been lost. LGB litigation seems to be picking up again in South Africa more especially in the field of religion, following the *De Lange* case.

### **3.4 Number and nature of LGB strategic cases in the selected Common Law countries outside Africa where successful litigation has taken place**

In the four selected Common Law countries outside Africa where there have been court victories in LGB SL cases- Belize, Canada, Nepal, and the USA-, the trends are largely similar to those in Common Law Africa. Of the four, Canada and the USA have been able to achieve formal equality and Canada can be said to have achieved substantive equality for LGB persons, while Belize and Nepal, despite successful court cases, are still struggling. The trends in these countries are going to be studied under the same themes as those in Common Law Africa to identify the ways in which they differ from or are similar to those in Common Law Africa. The themes are: number, nature and outcomes of cases; trends at the

<sup>403</sup> The aim was to draw attention to such laws within the region, and to indicate willingness by the LGBT movement to oppose these laws up to the international courts. Interview with Ms. Patricia Kimera, n 196 above.

<sup>404</sup> See Center for Constitutional Rights 'Sexual Minorities Uganda v. Scott Lively' <https://ccrjustice.org/home/what-we-do/our-cases/sexual-minorities-uganda-v-scott-lively> (accessed 17 January 2018).

<sup>405</sup> 'Gov't Appeals against Annulment of Anti-Gay Law' *Uganda Radio Network* <https://ugandaradionetwork.com/story/govt-appeals-against-annulment-of-anti-gay-law> (accessed 17 January 2018).

<sup>406</sup> *Eric Gitari* case (n 122 above).

<sup>407</sup> *LEGABIBO Registration* case (n 5 above).

overarching strategy stage; trends at the pre-litigation stage; trends at the litigation stage; and trends at the post-litigation stage.

### 3.4.1 Number of cases

Due to the differences in the legal systems, only cases from courts that are binding on the whole country are going to be discussed. Canada, Nepal and the USA are all federal systems, and therefore only the highest courts bind all other courts in the country. In Canada, there are the federal and the provincial judicial systems. The Supreme Court of Canada is the final court of appeal in both systems.<sup>408</sup> Similarly, the USA has both state courts and federal courts. Each state has its own court system up to the Supreme Court of the state. Appeals go to the federal courts<sup>409</sup> and therefrom to the US Supreme Court, which is the highest court in the land and which brings both systems together.<sup>410</sup> LGB cases have been brought both at the state level<sup>411</sup> and the federal court level,<sup>412</sup> and in some cases have

<sup>408</sup> The Supreme Court of Canada is envisaged under Article 101 of the Constitution Act, 1867 (formerly known as the British North America Act, 1867). It was established in 1875 through the Supreme and Exchequer Court Act, SC 1875, c 11. The Act is currently the Supreme Court Act, RSC, 1985, c S-26, and it continues the court under section 3. The Court has since 1949 been the final court of appeal in Canada as it was then that appeals to the Judicial Committee of the Privy Council of the UK were abolished, and the court confirmed this status in its 1998 decision in *Reference re Secession of Quebec*, [1998] 2 SCR 217. The Court hears appeals from both the highest federal court (the Federal Court of Appeal) in case of disputes between Canada and a province or between provinces (section 35(1) of the Supreme Court Act), and the highest provincial courts (the different provincial and territorial courts of appeal) if such a court grants leave to appeal to the Supreme Court of Canada (section 37 of the Supreme Court Act). It also hears appeals *per saltum*, which are appeals from the Federal Court (which decisions are normally appealed to the Federal Court of Appeal) and from a provincial court of lower status than the highest court, but only on matters of law (section 38). Appeals to the court are by application for leave from the Supreme Court under section 40 of the Act. The Court also hears references on constitutional and other matters by the federal government under section 53 of the Act.

<sup>409</sup> The federal court system is composed of the district courts which are currently 94, and then the US Courts of Appeals which are currently 13, and then the Supreme Court of the United States. Appeals from the District Courts go to the respective Courts of Appeal which are organised into circuits and from there to the Supreme Court. Appeals from the Supreme Courts of the different states go to the Supreme Court of the United States, which is the highest court in the land.

<sup>410</sup> The Supreme Court of the United States is established under Article III section 1 of the US Constitution. Its composition, powers and jurisdiction are streamlined in the Judiciary Act, of 1789. Article III Section 2 of the Constitution and section 13 of the Judiciary Act give the court original jurisdiction on all matters concerning disputes involving states, and those concerning foreign representatives and appellate jurisdiction in all cases involving constitutional matters or federal law. The appeals come from the thirteen US Courts of Appeal (circuit courts) and from state Supreme Courts. Because of the large number of cases that the court can potentially hear, the Judiciary Act of 1925 (43 Stat. 936) (also known as the Certiorari Act of 1925) gave the court power to decide which cases to take on through issuing writs of certiorari in cases which it feels it should hear. The power of the Court to review statutes passed by the legislature (judicial review) was declared as a power that the Court had in the case of *Marbury v Madison* 5 US 137 (1803).

<sup>411</sup> Important struggles for LGBT equality have been undertaken at the state level, and some of the cases that stand out are: *Jones v Hallahan*, 501 SW2d 588 Ky. Ct. App. 1973); *Baker v Nelson*, 191 NW2d 185 (Minn. 1971); *Singer v Hara*, 522 P.2d 1187 (Wash. App. 1974), all on same-sex marriages in the state courts of Kentucky, Minnesota and Washington respectively and in all the prohibition of same-sex marriages was upheld. In *De Santo v Barnsley*, No. 81-1746, 1982 WL 1406 the Supreme Court of Pennsylvania held that a same-sex couple could not have a Common Law marriage. The more recent cases are *Commonwealth v Wasson*, 842 S.W.2d 487 (Ky. 1992); *Baehr v Lewin*, 74 Haw. 530, 597, 852 P.2d 44, 74 (1993) which legalised same-sex marriages in Hawaii, but which was met with much backlash and which eventually led to the enactment of the Defence of Marriage Act (DOMA); *Baker v State of Vermont*, 744 A2d 864 (Vt. 1999) which was brought under the Common Benefits clause

made it to the US Supreme Court, which are the cases considered here. Similarly, in Nepal, the Supreme Court is the highest court,<sup>413</sup> and there are High Courts for each state.<sup>414</sup> Belize is a centralised state just like all the Common Law African countries studied. Its judiciary is composed of the Supreme Court of Judicature (the Supreme Court),<sup>415</sup> and then the Court of Appeal<sup>416</sup> and the Caribbean Court of Justice, which is the court of final appeal. For Belize, decisions from all courts of record will be considered since they are binding on the whole country. The cases covered are from 1997 to 2017.

A total of 15 cases have been decided in all the four countries, with the US having the highest number (8 cases) over the past 20 years, followed by Canada with four, Nepal with two, and Belize with only one.

**Table 2: Number of LGB strategic cases in selected countries outside of Common Law Africa by the end of August 2018**

Country	Total number of filed cases	Completed cases	Successful cases	Unsuccessful cases	Pending cases	Cases with pending appeals
USA	8	8	6	2	0	0
Canada	4	4	4	0	0	0
Nepal	3	3	3	0	0	0
Belize	1	1	1	0	0	1
<b>Total</b>	<b>16</b>	<b>16</b>	<b>14</b>	<b>2</b>	<b>0</b>	<b>1</b>

of the Vermont Constitution, and which resulted into the first state law recognizing all rights for same-sex couples but without calling the institution 'marriage'; *Doe v Ventura*, No. MC 01-489, 2001 WL 543734 (D. Minn. May 15, 2001); *Jegley v Picado*, 80 SW3d 332 (Ark. 2002); and *Goodridge v Dept. of Public Health*, 798 NE2d 941 (Mass. 2003), which legalised same-sex marriages in Massachusetts.

<sup>412</sup> At the federal courts level, one of the cases that stands out is *Adams v Howerton*, 673 F.2d 1036, 1041-42 (9th Cir. 1982) (United States Court of Appeal for the 9<sup>th</sup> Circuit), where the court held that a same-sex partner did not qualify as an immediate relative for immigration purposes.

<sup>413</sup> Article 128(2) Of the Constitution of Nepal, 2015 establishes the Supreme Court as the highest court. It gives it the final authority to interpret the Constitution, and this interpretation is binding on all under article 128(4).

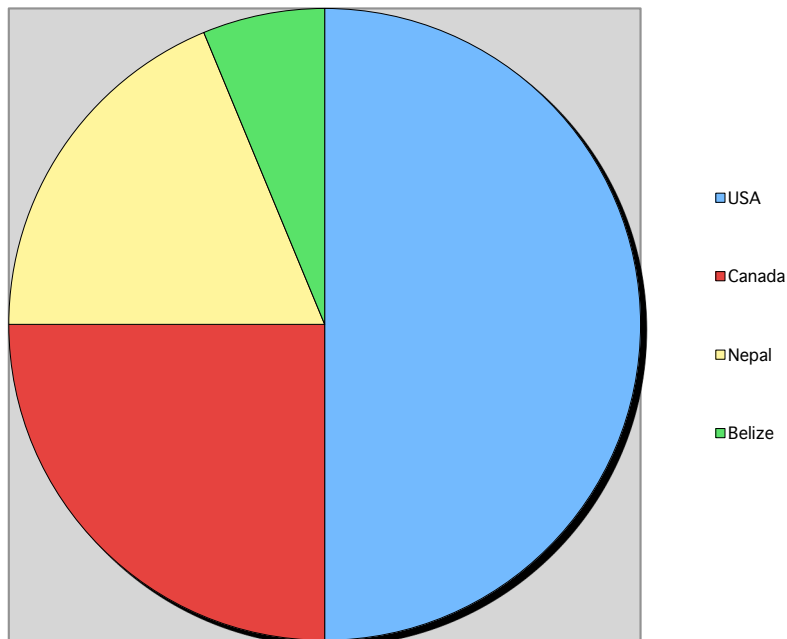
<sup>414</sup> Article 139(1) of the Constitution of Nepal, 2015.

<sup>415</sup> This is established under section 94 of the Belize Constitution. It has unlimited original jurisdiction to hear any civil or criminal matter under any law save as limited by the Constitution or any other law (section 95(1)). Under section 96(1), the court has powers to hear matters concerning constitutional interpretation. Appeals from the court lie to the Court of Appeal. It also has original jurisdiction over matters concerning the violation of fundamental rights protected under section 20(2) of the Belize Constitution.

<sup>416</sup> The Court of Appeal is a superior court of record and has the powers of such a court. It hears appeals from the Supreme Court of Judicature. Appeals from the Court lie to the Caribbean Court of Justice. It is established under article 94 of the Constitution of Belize.

50% of all cases filed were in the USA, followed by Canada with 25%, then Nepal with 18.75%, and finally Belize with 6.25%.

**Figure 2: Share of strategic litigation cases per country**



In terms of successes, 100% of the cases in Belize, Canada, and Nepal were successful, while 75% of the cases in the USA were successful.

### 3.4.2 Nature of cases

The cases discussed below are classified in the categories of cases challenging discriminatory laws; those challenging state actions; and those challenging the actions of individuals.

#### *a) Cases challenging discriminatory laws*

Just like in Common Law Africa, challenging discriminatory laws has also been the main preoccupation of LGB activists doing SL in the selected countries outside Africa over the last 20 years. Out of the 16 cases, nine challenge discriminatory statutes, regulations or the Common Law. These cases shall be categorised in accordance with the laws challenged and the trends compared with those in the selected Common Law African countries. The



categories of laws being challenged are laws criminalising consensual same-sex relations; laws that do not recognise same-sex marriages; laws on same-sex parental rights to children and adoption; laws on equality in employment in the context of religion; laws governing businesses; and those governing sharing of property at separation.

*i) Cases challenging laws criminalising consensual same-sex relations*

The decriminalisation of same-sex relations was an important concern in the three countries that were yet to decriminalise by 1998, that is, Belize, Nepal and the USA. Canada had already partly decriminalised consensual same-sex relations by statute in 1969.<sup>417</sup> Two of the cases, the one in Nepal and the USA, reached the highest courts, while the case in Belize is pending one level of appeal. All have so far been successful.

The first case was the *Lawrence* case in the USA,<sup>418</sup> which was decided on 26 June 2003. In this case, the Supreme Court struck down the State of Texas' anti-sodomy statute that banned sex between persons of the same sex. In 1973, the Texas legislature went through a review process which generally made laws governing sexual conduct more liberal.<sup>419</sup> However, the sodomy law was taken a step further to criminalise anal and oral sex between people of the same sex and to specifically include lesbians.<sup>420</sup> Several attempts to overturn the law through the legislature over the next three decades did not succeed.<sup>421</sup> The applicants in this case were arrested in a private home after the police were summoned with claims that a gun was being wielded in their apartment. Neither of them had been active in the LGB movement prior to being arrested, and they were persuaded to institute the strategic case by lawyers and activists who were part of the movement.<sup>422</sup> The case was filed and controlled by Lambda Legal.<sup>423</sup> It came at a time when most of the state courts had decriminalised sodomy and it was largely a way of ensuring that this was formally done for

<sup>417</sup> This was under the Criminal Law Amendment Act, 1968–69 which maintained the offences of 'buggery' and 'gross indecency' but provided exceptions for married persons, and anyone above the age of 21. Later, in 1989, the Act was amended to decriminalise 'gross indecency' but buggery was changed to 'anal intercourse', which remains criminalised to date with the exceptions of married persons and consenting persons above 18 years of age, provided no more than two persons are present (section 159 of the Criminal Code). The courts in different provinces have however declared section 159 of the Criminal Code to be unconstitutional, but this has never been formally repealed by the legislature, and no Supreme Court decision exists on the issue.

<sup>418</sup> n 156 above. 539 US 558.

<sup>419</sup> D Carpenter 'The unknown past of *Lawrence v Texas*' 102 *Michigan Law Review* (2004) 1471.

<sup>420</sup> As above.

<sup>421</sup> Carpenter (n 419 above) 1472.

<sup>422</sup> As above at 1478, 1517-1518.

<sup>423</sup> D Oshinsky 'Strange Justice: The story of *Lawrence v. Texas*, by Dale Carpenter' 16 March 2012 <https://www.nytimes.com/2012/03/18/books/review/the-story-of-lawrence-v-texas-by-dale-carpenter.html> (accessed 26 August 2018).

the whole country.<sup>424</sup> Writing for the majority of the Supreme Court, Justice Kennedy held that the statute violated the right to privacy and the right to due processes under the US Constitution.<sup>425</sup> The Court found no legitimate state interest protected by the criminalisation.<sup>426</sup> The Court considered developments towards decriminalisation elsewhere, including in the UK and at the international level, particularly the case of *Dudgeon v The United Kingdom*,<sup>427</sup> and overruled *Bowers v Hardwick*<sup>428</sup> as being wrong even when it was decided.<sup>429</sup>

The second was the Nepalese case of *Sunil Babu Pant and Others v Nepal Government and Others*,<sup>430</sup> where the Supreme Court of Nepal found among others that consensual sexual activity among adults fell within the ambit of the right to privacy, and LGB as well as transgender and intersex persons, were ‘natural persons’, entitled to all rights and deserving of protection, and therefore the state had to review laws that discriminated against LGB persons and create a conducive legal environment for them to enjoy their rights.<sup>431</sup> An interesting element of this case is the fact that people of the ‘third gender’ are to some extent recognised in the Nepalese society and would have a part to play as folk dancers at weddings and other traditional ceremonies.<sup>432</sup> Yet, the society is also highly conservative, marginalisation is rife and LGB persons are in need of the protection of the law.<sup>433</sup> Another unique element is the fact that the Supreme Court engaged with the issue of same-sex marriage and ordered the establishment of a committee of experts in order to investigate the development of equal marriage rights in other countries, and directed the government to act on the recommendations of the committee.<sup>434</sup>

The third case was that of *Caleb Orozco v The Attorney General of Belize (Orozco case)*.<sup>435</sup> Here, the Supreme Court declared section 53 of the 1981 Criminal Code of Belize to be in contravention of constitutional protections of equality, dignity and personal privacy. The

<sup>424</sup> Interview with Prof. Paul Smith, who argued the *Lawrence case*, Washington DC, 2 August 2018.

<sup>425</sup> The *Lawrence case* (n 156 above) 578.

<sup>426</sup> Above.

<sup>427</sup> Application no. 7525/76) (22 October 1981) European Court of Human Rights.

<sup>428</sup> 478 US 186.

<sup>429</sup> The *Lawrence case* (n 146 above), 566-578

<sup>430</sup> *Sunil Babu Pant and Others v Government of Nepal and Others* (2008) 1 Writ No 917.

2064 BS (2007 AD) 2NJALJ (2008) 261 (21 December 2007).

<sup>431</sup> As above at 283-285.

<sup>432</sup> MF Moscati ‘The third gender case decision of the Supreme Court of Nepal on the rights of gay, lesbian, bisexual, transsexual and intersex people’ 4 *Journal of Comparative Law* (2009) 292-293.

<sup>433</sup> As above at 293.

<sup>434</sup> As above at 430.

<sup>435</sup> *Caleb Orozco v The Attorney General of Belize*, Supreme Court Claim No. 668 of 2010. (10 August 2016).

court also ordered that the section should be amended to include the phrase ‘This section shall not apply to consensual sexual acts between adults.’<sup>436</sup> The court also stated that although the Belize Constitution did not protect against discrimination on the basis of sexual orientation, it ought to do so as the country had obligations under international law and therefore ‘sex’ as mentioned in section 16(3) of the Constitution, included sexual orientation.<sup>437</sup> An appeal against the case was still pending before the Court of Appeal of Belize by the end of August 2018,<sup>438</sup> and was due to be heard in September 2018.<sup>439</sup> Initially, the United Belize Advocacy Movement (UNIBAM) was a co-applicant with Caleb Orozco in the case, but the court struck them out as organisations could not be said to have suffered violations under section 53.<sup>440</sup>

Unlike most of Common Law Africa, which is still struggling with decriminalisation, all the selected Common Law countries outside of Africa, with the exception of Canada, have been able to achieve decriminalisation through court action.

## ii) *Cases concerning same-sex marriages*

Same-sex marriages were a big litigation issue in the USA during the time covered by this research. The same was true in Canada, but less so in Belize and Nepal. Only the USA had cases on this issue reach the Supreme Court, as Canada’s cases were decided at the provincial level and then a statute was passed legalising same-sex marriages for the whole country.<sup>441</sup> Three cases on the issue in the USA were instituted and have all been successful.

<sup>436</sup> As above at para 99.

<sup>437</sup> As above at para 94.

<sup>438</sup> In March 2018, the main appellant, the Catholic Church, pulled out of the appeal, but the Government of Belize resolved to continue with its partial appeal, which only concerns the judge’s decision that the non-discrimination provision of the Belize Constitution includes protection on the grounds of sexual orientation. See ‘Government to continue its partial appeal of section 53 ruling’ Lovefm.com 7 April 2018, <http://lovefm.com/government-continue-partial-appeal-section-53-ruling/> (accessed 7 April 2018).

<sup>439</sup> University of the West Indies Advocacy Project (URAP) ‘Orozco appeal scheduled for October 2018’ 13 August 2018 <http://u-rap.org/web2/index.php/component/k2/item/76-orozco-appeal-scheduled-for-october-2018> (accessed 26 August 2018).

<sup>440</sup> Above, para 5.

<sup>441</sup> The cases were: *EGALE Canada Inc. v Canada (Attorney General)*, 2003 BCCA 251, and *Halpern et al. v Canada (Attorney General)* (2003) 65 OR (3rd) 161, 225 DLR (4th) 529 (June 10, 2003) - Ontario; *EGALE Canada Inc. v Canada*, [2003] BCCA 406, 7-8 (BC) (July 8, 2003) - British Columbia; *Hendricks and Leboeuf v Quebec (Attorney General)* [2002] RJQ 2506 (CS) (Quebec) (March 19, 2004) - Quebec; *Dunbar & Edge v Yukon (Government of) & Canada (A.G.)*, 2004 YKSC 54 (CanLII) - Yukon Territory; *Vogel v Canada (Attorney General)*, [2004] MJ No. 418 (QL) - Manitoba; *Boutilier v Nova Scotia (Attorney General)* [2004] N.S.J. No. 357 (Q.L.) (September 24, 2004) - Nova Scotia; *NW v Canada (Attorney General)* 2004 SKQB 434 (CanLII) (November 5, 2004) - Saskatchewan; and they were all successful. The federal government later passed the Civil Marriage Act, 2005, which made same-sex marriages legal in the whole of Canada. The Supreme Court had earlier passed a ruling in *Reference Re Same-Sex Marriage* [2004] 3 SCR 698, 2004 SCC 79, which declared the Bill for the Act to be consistent with the Charter.

The first case is that of *United States v Windsor* (*Windsor case*),<sup>442</sup> decided on June 26, 2013. In this case, the Supreme Court found the definition of marriage in the Defence of Marriage Act (DOMA)<sup>443</sup> to be inconsistent with the Constitution.<sup>444</sup> This was on the basis that it only recognised heterosexual marriages and thus prevented persons in same-sex relationships from benefitting from federal tax exemptions for surviving spouses.<sup>445</sup> This was in violation of the US Constitution's Fifth Amendment guarantee of equal protection.<sup>446</sup> The DOMA also legislated on an area that was exclusively for states, and as a consequence imposed discrimination on all states.<sup>447</sup> The DOMA was introduced in order to stop the recognition of same-sex marriage, and it was passed with huge majorities in both houses of the US Congress. It was a reaction to the successful case of *Baehr v Lewin* in Hawaii.<sup>448</sup>

The second case, *Hollingsworth v Perry*,<sup>449</sup> was also decided on the same day as the *Windsor* case. In this case, the Court found that the applicants, who were supporters of California's Proposition 8, a referendum result approving a constitutional amendment prohibiting same-sex marriages in California, did not have standing to appeal the decision of the federal court overturning that result.<sup>450</sup> This effectively upheld the federal court's reversal of Proposition 8. This case came against the protracted struggle in California for and against same-sex marriages.<sup>451</sup>

The third case is the *Obergefell* case, which legalised same-sex marriages across the US. This case was the culmination of protracted litigation in favour of same-sex marriage, which was held at state level with differing results.<sup>452</sup> This was a decision in six cases heard together challenging the state laws in Ohio, Michigan, Kentucky, and Tennessee that banned same-sex marriages, or refused to recognise such marriages conducted in other jurisdictions. The

<sup>442</sup> 133 SCt 2675 (2013).

<sup>443</sup> Pub.L. 104-199, 110 Stat. 2419, enacted September 21, 1996, 1 U.S.C. § 7 and 28 U.S.C § 1738 C.

<sup>444</sup> As above at 2693-2695.

<sup>445</sup> As above at 2693-2695

<sup>446</sup> As above at 2695

<sup>447</sup> As above at 2690-2692.

<sup>448</sup> See for example, GN Rosenberg *Hollow hope: Can courts bring about social change?* (2008), 355, 365. Also see CM Glass & N Kubasek 'The evolution of same-sex marriage in Canada: Lessons the US can learn from their northern neighbor regarding same-sex marriage rights' (2008) 15 *Michigan Journal of Gender and Law* 143, 144. *Baehr v Lewin* (n 411 above)

<sup>449</sup> 133 SCt 2652 (2013).

<sup>450</sup> As above at 2659-2661.

<sup>451</sup> In 2004, the City of San Francisco started issuing licences for same-sex marriages. This was successfully challenged in the courts of law and the Supreme Court of California ruled that the issuance of licenses was unlawful (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055). This led to a challenge of the of the marriage laws as being unconstitutional in as far as they limited marriage to a man and a woman. The Supreme Court in *In re Marriage Cases* 183 P.3d 384 (Caln 2008), found the marriages statutes unconstitutional in as far as they did not provide for same-sex marriages. After this decision, the voters in California voted in favour of Proposition 8.

<sup>452</sup> For the state level litigation see n 411 above.

majority in the Supreme Court found that the Due Process clause protected the right to marry and also applied to same-sex couples. The right to marry was a fundamental right that also extended to individual autonomy. Exclusion of same-sex couples from marriage violated the due process clause of the Fourteenth Amendment, as there was no basis for the exclusion of same-sex couples from the rite of marriage.

After achieving the decriminalisation of same-sex relations, the next logical step for most of the countries was to address the issue of same-sex marriages. Only Belize is yet to embark on this venture as the struggle for decriminalisation is also not completely over, since there is a pending appeal. In this regard, only South Africa in the selected Common Law countries compares with the USA and Canada, and to some extent Nepal. The rest of the selected Common Law countries are more or less at the stage where Belize is, and the struggles are similar.

*iii) Cases challenging laws concerning same-sex parental rights to children and adoption*

Only the USA has had a case reaching the Supreme Court on same-sex adoption and parental rights. This is the case of *VL v EL et al*,<sup>453</sup> decided on 7 March 2016. In this case, the Court recognised adoptions of children by persons in same-sex marriages. In 2007, a superior court in Georgia had granted VL adoption rights to the three children that she had had with EL during the subsistence of their same-sex relationship. EL was the birth mother of the children. When the couple moved to Alabama and split, EL stopped VL from seeing the children. On this basis, VL applied for visitation and other parental rights. In 2015, the Supreme Court of Alabama held that Alabama did not have to recognise the adoption judgment of the Georgian Court as that court had misapplied Georgia law. The case came to the Supreme Court, and that Court reversed the Alabama Supreme Court decision. This was based on the full faith and credit clause in article 4 of the US Constitution, which is to the effect that courts in other states have to give effect to judicial proceedings of other states. The Court also found that the Georgian Court had jurisdiction to rule on the matter and, since there was no law in Georgia against such a decision, the Georgian court's decision was correctly made. This therefore confirmed that a partner in a same-sex relationship could be granted adoption of the children of that relationship and be entitled to parental rights.

<sup>453</sup> 577 US \_ (2016).

Only South Africa among the selected Common Law Africa countries has a decision on same-sex adoption, the *Du Toit* case.<sup>454</sup>

*iv) Cases challenging laws on equality in employment in the context of religion*

Only one case on employment reached the highest courts in the four selected countries in the past 20 years. This was the Canadian case of *Vriend v Alberta*, which was decided on 2 April 1998.<sup>455</sup> This was the first case on LGB rights to reach the Supreme Court after 1997, and the fourth case on LGB rights to ever reach the Court.<sup>456</sup> In this case, the Supreme Court unanimously decided that the dismissal of the applicant from his job at a Catholic school after his employer learned that he was gay was discriminatory on the basis of sexual orientation, and that the omission to protect persons based on sexual orientation under the Alberta law was itself discriminatory. Additionally, the respondents had failed to show that there was minimal impairment.<sup>457</sup> It went ahead to read 'sexual orientation' into the Alberta law.

In Common Law Africa, this is comparable to the South African case of *De Lange*,<sup>458</sup> which also concerned an employee of a religious institution. In other selected Common Law countries, this is yet to arise as an issue, and this may be because before achieving decriminalisation of consensual same-sex relations, many hide their sexual orientation or do not seek redress when they face such challenges in their employment.

*v) Cases challenging laws governing businesses*

The only case that falls in this category is the US Supreme Court decision of *Masterpiece Cakeshop Ltd v Colorado Civil Rights Commission*,<sup>459</sup> and it was unsuccessful. The case challenged the decision by the Colorado Civil Rights Commission, which found that a baker

<sup>454</sup> n 69 above.

<sup>455</sup> *Vriend v Alberta* [1998] 1 SCR 493 (2 April 1998).

<sup>456</sup> The three cases that came before it were: the 1995 case of *Egan v Canada*, n 106 above, where sexual orientation was declared as a protected ground under the Canadian Charter even if it was actually not specifically mentioned; the 1993 cases of *Canada (Attorney General) v Mossop* [1993] 1 SCR 554 where denial of bereavement leave to a person in a same-sex relationship, which leave would have been available to a heterosexual person, was not regarded as discrimination since the Canadian Human Rights Act did not include sexual orientation as a protected ground for discrimination; and the 1979 case of *Gay Alliance Toward Equality v Vancouver Sun* [1979] 2 SCR 435 (22 May 1979) which was the first case on gay rights to reach the Supreme Court of Canada. It concerned the refusal of the *Vancouver Sun* newspaper to run a classified advertisement for sexual services for gay persons, and yet the paper ran adverts for pornographic movies. The court decided the matter by holding that the advertisement service could not be classified as a service customarily available to the public, and so the issue of discrimination did not apply to it.

<sup>457</sup> Above, Paras 123-127.

<sup>458</sup> n 6 above.

<sup>459</sup> 177 S.Ct. 2290 (2017).



who had refused to make a wedding cake for a gay couple on the basis of his religious beliefs was in violation of Colorado's Anti-Discrimination Act (CADA). The Act imposed a prohibition on commercial businesses from denying services to persons based on among others, sexual orientation. The cakeshop argued that this prohibition violates the cakeshop owner's rights under the First Amendment to free artistic expression and religious belief. The respondents denied this, stating that the Act applies to all forms of discrimination and the rights do not condone discrimination. The Supreme Court, rather than deciding on the issue of religion, focused on the treatment of the applicant by the Colorado Civil Rights Commission. By a majority of 7-2, the Court found that the Commission had been hostile to the applicant's religious beliefs, and yet the state had an obligation to observe religious neutrality under the free exercise Clause of the First Amendment to the Constitution. Justice Kennedy wrote the majority decision in this case, as he did in all three major LGB right cases that preceded it.

This is another category of laws that have not been challenged up to the highest courts level in the selected Common Law African countries.

*vi) Cases challenging laws governing sharing of property at separation*

Over the 20 year period under review, the only case that dealt with this issue was the Canadian case of *M v H*,<sup>460</sup> which was decided on 20 May 1999. In this case, the Supreme Court struck down section 29 of the Family Law Act (FLA)<sup>461</sup> because it did not provide for 'spousal support' for same-sex, non-married cohabiting couples as it did for opposite sex, non-married couples. This followed a partner being locked out of the partner's business and from spousal support where the partners had lived together and shared a business.<sup>462</sup> The Court found that section 29 violated the equality rights provision in section 15(1) of the Canadian Charter of Rights and Freedoms (the Charter), and also found that the violation could not be justified under section 1 of the Charter. The Supreme Court struck down section 29 of the Act but suspended its order for six months in order to give time to the legislature to change the law. This is a matter that is yet to come before the courts in Common Law Africa.

Unlike in the selected Common Law African countries, there were no cases in the sub-categories of challenging the further criminalisation of consensual same-sex relations and

<sup>460</sup> (1996) 142 DLR (4th) 1 (Ont CA) aff'd [1999] 2 SCR 3.

<sup>461</sup> RSO 1990 c F3.

<sup>462</sup> As above at 461.

the 'promotion of homosexuality'; laws on parental rights to children and adoption; laws on fair trial; laws on estates support for a surviving spouse; laws on immigration and laws on age of consent to sexual relations. It should be noted that all the cases in these areas, with the exception of the further criminalisation cases, were from South Africa, rather than the other selected Common Law African countries. South Africa already stands out for having achieved decriminalisation ahead of the USA, Nepal and Belize, and same-sex marriages ahead of all the other countries, with the exception of Canada. It has thus been able to explore many other areas, which many other countries in Common Law Africa can only dream about. The differences therefore lie in the different contexts. While the aim is the same, the approaches to achieve the aims are different, and so is the timing. Overall, litigation in South Africa is comparable to that in the USA and Canada, while that in Belize and Nepal is more comparable to that in Botswana, Kenya and Uganda. The area of further criminalisation of same-sex relations is unique to Uganda as no other country has had litigation around this issue.

*b) Cases challenging actions of state officials*

Five cases challenging the actions of state officials over the past 20 years have been brought before courts in Canada, Nepal and USA. Of these, four have been successful. This is almost comparable to those in the selected Common Law countries in Africa, which were six.

The first and second cases were both Canadian. The first was the Canadian case of *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*,<sup>463</sup> decided on 15 December 2000. In this case, customs officials routinely held up consignments of books for a well-known gay and lesbian bookstore requiring it to prove that they were not obscene, and they took a long time to make decisions relating to their release. The Supreme Court held that the requirement for the applicant to prove that the books were not obscene violated the right to freedom of speech, and the way customs applied the law, by taking more than a year to make a decision, also violated the Charter. This case also challenged the provisions of the Customs Act,<sup>464</sup> which gave broad powers to customs officials to stop 'obscene' materials from getting into Canada. The Court ruled that the provisions indeed prima facie violated the freedom of expression provisions of the Charter but they were justified under the limitation clause of the Charter.

<sup>463</sup> *Little Sisters Book and Art Emporium v Canada (Minister of Justice)* [2000] 2 SCR 1120.

<sup>464</sup> RSC 1985 c 1 (2nd Supp.).

In the second case, *Chamberlain v Surrey School District No. 35*,<sup>465</sup> which was decided on 20 December 2002, the Supreme Court of Canada held that a school board's decision to refuse a teacher to include books depicting same-sex families in the school library on the basis that this would offend Christian parents was discriminatory on the basis of sexual orientation. The Court held that the Board had acted unreasonably and outside the requirements of the Schools Act, which emphasised tolerance and inclusion for all. The Court asked the Board to reconsider the decision.

The third and fourth cases are Nepalese. The third is *His Majesty's Government, Ministry of Home Affairs, District Administration Office, Kathmandu v Achyut Prasad Kharel (Blue Diamond Society case)*, decided in 2004.<sup>466</sup> In this case, a lawyer challenged the state's recognition of the Blue Diamond Society, an LGBT organisation which in his view promoted homosexuality, a criminal and illegal activity in Nepal. After the case being initially thrown out by the Registrar, it was reinstated by the Applicant, and heard by a single Judge of the Supreme Court. The state was named as the respondent and it opposed the petition on the basis that there was no specific law stopping the operating of LGBTI organisations. The state also stated that private consensual same-sex relations were not a criminal offence. The Court found in favour of the state and the Blue Diamond Society, as there was no law stopping the latter's operations.

The fourth case is *Rajani Shah v National Women Commission et al*,<sup>467</sup> which was decided on 11 April 2013. The Supreme Court upheld the right of a woman who had left her husband because she was attracted to other women to be released from a shelter by the state to allow her to stay with her same-sex partner rather than with her male husband, as the choice as to whom someone stays with, whether in a marriage relationship or not, was an individual choice. The Court observed that the laws were either inadequate or mute as regards same-sex relationships that are short of marriages.

Just as in Common Law Africa, these cases concerned actions that were not commensurate with the constitutional protections, and tested the limits to which state entities could go in limiting LGBT rights.

<sup>465</sup> *Chamberlain v Surrey School District No. 35* [2002] 4 SCR 710.

<sup>466</sup> Supreme Court of Nepal, Writ No. 3736 of 2061 BS (2004).

<sup>467</sup> Supreme Court of Nepal, April 11, 2013, Writ No. 069-WH-0030.

c) *Cases challenging actions of non-state actors*

There were two cases concerning the actions of non-state actors that made it to the highest courts, and both were in the USA. Only one of them was successful.

*Oncale v Sundowner Offshore Services, Inc.*<sup>468</sup> which was decided on 4 March 1998, was the first case to be decided by the US Supreme Court during the study period.<sup>469</sup> It was also the second successful case at that level after the loss in *Bowers v Hardwick* in 1979. In this case, the US Supreme Court held that the protections against workplace discrimination based on sex also applied to LGB employees. In this case, other men, including supervisors, sexually harassed a male employee in full view of other workers. The court added that the lack of protection by the applicant's employer from sexual harassment by other men was contrary to the Constitution. Therefore, Title VII of the Civil Rights Act<sup>470</sup> imposed a duty upon an employer to protect all employees from all forms of sexual harassment.

The unsuccessful case was the USA case of *Boy Scouts of America et al. v Dale*,<sup>471</sup> which was decided on 28 June 2000. In this case, the Supreme Court ruled that, within the protection of the freedom of expression, private clubs cannot be compelled to admit persons if the membership of the particular person would inhibit the organisation from advocating its viewpoints. The case concerned the dismissal of a homosexual scoutmaster from the Boy Scouts of America on the basis of his sexual orientation.

<sup>468</sup> *Inc* 523 US 75.

<sup>469</sup> Nine LGB cases had reached the US Supreme Court by 1998. These are: *Romer v Evans* (n 156 above) in which the Supreme Court overturned the referendum results in Colorado which had repealed ordinances passed in certain cities banning discrimination based on sexual orientation; *Bowers v Hardwick* (n 428 above) which confirmed the constitutionality of Georgia's statute that criminalised sodomy (including oral sex), stating that there was no right to commit sodomy in the Constitution; *Doe v Commonwealth's Attorney of Richmond*, 425 US 901 (1976), which affirmed the decision of the lower courts that Virginia's statute criminalising homosexual sodomy did not violate the equality provisions of the constitution; *Board of Education v National Gay Task Force* 470 US 903 (1985), in which the Supreme Court found a statute allowing dismissal of teachers for engaging in public homosexual activity, as well as speaking about homosexuality, not to be against the right to privacy and equal protection of the law; *New York v Uplinger* 467 US 246 (1984), where the Supreme Court dismissed the case which challenged the New York statute prohibiting loitering in a public place for immoral purposes, which certainly included homosexuality, as not being the best case to address the constitutional issues raised; *Wainwright v Stone*, 414 US 21 21-22 (1973), where the Court upheld Florida's statute criminalising the 'abominable and detestable crime against nature...' finding that was not vague as the words had been interpreted before to mean anal intercourse; *Boutilier v INS*, 387 US 118 (1967) in which the Supreme Court confirmed that homosexuality was clearly among the personalities intended for exclusion under section 212(a)(4) of the Immigration and Nationality Act of 1952 which referred to persons 'afflicted with psychopathic personality', and so the statute was not vague; and finally the first LGB case to reach the Supreme Court; *One, Inc. v Olesen* 355 US 371 (1958), in which the Court, without hearing oral arguments, awarded a writ of certiorari and reversed the decision of the lower court, which had ruled that the US mail could refuse to distribute a gay magazine after classifying it as obscene, since homosexuals could not be regarded as a segment of US society that required special protection.

<sup>470</sup> Pub.L. 88-352, 78 Stat. 241, enacted July 2, 1964.

<sup>471</sup> *Boy Scouts of America et al. v Dale* 539 U.S. 640.

These cases are comparable to the three in Common Law Africa challenging actions of non-state actors, and they all indicate the willingness of activists to go beyond the state to non-state actors who violate rights. The difference lies in the issues litigated upon, as in Common Law Africa, the cases were around hate speech in the media, extremist US evangelicals spreading hate against LGB persons in Africa, and the rights of LGB persons in religious service, whereas in the other countries, the main issues were lack of protection against harassment by employers, and exclusion from a private club. Again, this shows a difference in the contexts and what issues are important in each context.

### **3.4.3 General observations on LGB SL in the selected Common Law countries outside of Africa**

From the above, the following can be concluded about LGB litigation in the selected countries:

#### *a) Increased LGB strategic cases in the last 20 years*

As in Common Law Africa, it is also clear that LGB SL has gained prominence in other parts of the world over the past 20 years. Although the cases brought in the selected Common Law countries outside Africa were slightly more than half those brought in the selected Common Law African countries within the same period, they are still higher than those that were brought in the period before 1998. Although there was already substantial LGB litigation in Canada and the USA before 1998, cases increased after 1998.

In Canada, there were three LGB cases that had ever reached the Supreme Court before 1998.<sup>472</sup> In the USA, there were eight such cases.<sup>473</sup> In all the years of their existence, the Supreme Courts of Canada and the US had handled three cases and eight cases respectively on LGB rights before 1998, while in the 20 year period between 1998 and 2018, they handled seven cases altogether. To put it into perspective, in the 20 years preceding 1998, (1977-1997), the Canadian Supreme Court decided three cases,<sup>474</sup> and the US Supreme Court decided one case,<sup>475</sup> compared to the four and seven in the period between 1998-2018 respectively. This is

<sup>472</sup> For the complete list of cases, see n 456 above.

<sup>473</sup> For the complete list of cases, see n 469 above.

<sup>474</sup> These were: *Gay Alliance Toward Equality v Vancouver Sun* [1979] 2 SCR 435; *Canada (Attorney General) v Mossop* [1993] 1 SCR 554; and *Egan v Canada* [1995] 2 SCR 513.

<sup>475</sup> *Romer v. Evans*, n 156 above.

a slight increment in litigation, but nevertheless an increment, and it is also important to note that many cases were being brought at the province/state level on LGB rights in the USA<sup>476</sup> and Canada<sup>477</sup> respectively, which was not the case before 1998. For Belize and Nepal, there was not a single case before 1998, just like in the selected Common Law countries, and all their cases were brought in the past 20 years, with litigation starting in Nepal in 2008, while in Belize, the first case started in 2016. This period also shows increased LGB litigation in Common Law Africa as already seen above, showing that litigation movements in different parts of the Common Law world actually influence each other. However, this trend of increasing public interest litigation is not limited to LGB rights, it is actually the generation of PIL in general.<sup>478</sup>

This increment in the number of cases points to the changing attitudes towards same-sex relations, which, after the earlier disappointments, saw first victories in Canada in 1995 in the *Egan* case,<sup>479</sup> and in the USA in the 1996 case of *Romer v Evans*.<sup>480</sup> This encouraged more cases to be brought to the courts. For Belize and Nepal, activists were also moved to bring cases before court after political and social changes happening that ushered in favourable conditions for progressive litigation. In Belize, activists like Caleb Orozco<sup>481</sup> together with the University of West Indies Advocacy Rights Project (URAP), determined that the time had come to institute an LGB case from 2007 onwards.<sup>482</sup> In Nepal, the institution of an SL case on LGBT rights followed the peak of the Maoist insurgency and the resolution of a political crisis when the government transitioned from a monarchy to a republic.<sup>483</sup> There were a magnitude of security measures in place, and transgender people in particular suffered when they went through security checkpoints. These abuses inflicted by the Maoist security forces were the catalyst for the institution of a SL case in Nepal in 2007. Nepal was undergoing a political crisis, the resolution of which led to the eventual evolutionary change in government from a monarchy to a republic. Sunil Babu Pant, former leader of the Blue

<sup>476</sup> After the loss in *Bowers v Hardwick* (n 470 above), US activists shifted efforts to state courts rather than the Supreme Court. Out of the nine main cases done in state courts, five came after the loss in *Bowers*, and of these three were done after 1997. For the cases, see (n 441) above.

<sup>477</sup> For Canada, provincial courts came in handy for the same-sex marriages quest after 1997. Out of the 12 important cases done in the provincial courts, seven were done in the past 20 years, and five for all the years before. For the cases see (n 441) above).

<sup>478</sup> See generally, Chapter 2, above.

<sup>479</sup> n 474 above.

<sup>480</sup> n 156 above.

<sup>481</sup> See 'Caleb Orozco v. Attorney General of Belize: upholding human rights for all?' *Huffington Post* [https://www.huffingtonpost.com/mark-stephens/caleb-orozco-v-attorney-general-of-belize\\_b\\_3230589.html](https://www.huffingtonpost.com/mark-stephens/caleb-orozco-v-attorney-general-of-belize_b_3230589.html) (accessed 4 March 2018).

<sup>482</sup> Skype interview with Caleb Orozco, Director of UNIBAM, 17 July 2018.

<sup>483</sup> Skype Interview with Sunil Babu Pant, former leader of the Blue Diamond Society, 16 July 2018.



Diamond Society, described the events building up to the institution of the case in the following terms:<sup>484</sup>

The King of Nepal took absolute power and dismissed the Parliament in 2003. The Blue Diamond Society joined the agitating forces campaigning against the monarchy and demanding for human rights because we realised that if there is no democracy and human rights generally in the country, nothing better can be expected for the minorities. That is when we started making alliances with the political parties and other social activists. It was a very harsh time for civic leaders and politicians. We had nothing to lose coming out with courage and raising voices for democracy and human rights. We started joining the discussions and street protests. In 2006 the populist movement was at its peak. The king had to back down and reinstate parliament so things changed. With the new prime minister and new parliament, we tried to approach them to address and ensure LGBT human rights, since we were in the street protesting together. They were not listening to our voice or seeing this as a priority. By 2007 we felt a bit cheated by our democracy movement friends who were in the government now and not listening to our voice. We decided that it was time to take the matter to the courts.

At the time, international condemnation of the arrest and mistreatment of LGB people and the Supreme Court's 2004 decision to uphold the activities of the Blue Diamond Society had made significant changes in the way the state perceived LGB persons.<sup>485</sup>

Apart from changes in attitudes within changing political milieu, another reason for the increment in LGB cases lies in the international attention that had been brought to LGB issues around the world within the last 20 years.<sup>486</sup> The increased successes of the LGB lobby in Canada and the USA, and the eventual court victories there, helped to galvanise international support for legal actions in other countries, thus rendering support to both Belize and Nepal in their litigation efforts.<sup>487</sup>

<sup>484</sup> Above.

<sup>485</sup> A lawyer instituted a case in 2004 because he wanted to see the activities of the Blue Diamond Society stopped. *Blue Diamond Society case*, n 466 above. See *Astraea Lesbian Foundation for Justice 'Bridges to Justice: case study of LGBTI rights in Nepal' 2015*, 17-26.

<sup>486</sup> See discussion in section 3.2.4 above.

<sup>487</sup> In Belize, international organisations directly supported the work of Caleb Orozco, with three of them; the International Commission of Jurists, the Commonwealth Lawyers Association, and the Human Dignity Trust, joining the case as interveners. In Nepal, international organisations like Arc International, Human Rights Watch and others filed amicus briefs in the Supreme Court defending Blue Diamond Society. See *Astraea Foundation*, n 485 above. Also LGBT issues featured predominantly in Nepal's Universal Periodic Review in 2011. See UN Human Rights Council, seventeenth session, Report of the Working Group on the Universal Periodic Review of Nepal, A/HRC/17/5, March 8, 2011, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/116/42/PDF/G1111642.pdf?OpenElement>

**b) High levels of success in LGB strategic litigation cases in the past 20 years**

Related to the increased number of LGB cases in the past 20 years is the increased number of victories in such cases in the selected Common Law countries. Where there have been victories, they have been followed almost immediately by other cases, and usually other victories. In the US and Canada, which started with disappointments in the courts, there have been consistent victories since 1997. This can perhaps be attributed to changes in the perspectives of society on LGB rights in these countries, which made it easier for the courts to rule as they did.<sup>488</sup> The difference in reasoning in the US cases of *Bowers v Hardwick*<sup>489</sup> and *Lawrence v Texas*<sup>490</sup> shows how much impact the passage of time can make.<sup>491</sup> The exponential increase in victories from then onwards shows that perceptions are changing at a very fast rate in favour of LGB rights. This can also be seen in Canada, especially the speed with which same-sex marriages became legalised through courts in almost all states within a period of about three years.<sup>492</sup> In Common Law Africa, this trend is perhaps only comparable to South Africa.<sup>493</sup> Even in Nepal and Belize, which are regarded as relatively more conservative than the USA and Canada, the period has seen the first cases on LGB rights being brought to court with much success.

**c) The number of years that litigation has been taking place**

Whereas all the latest decisions on LGB equality are recent in all the countries, the use of litigation for LGB rights goes back longer in the USA and Canada than in Belize and Nepal. For the USA, litigation on LGB rights started as far back as 1951, when the first 'gay rights' case was decided by the California Supreme Court: *Stoumen v Reilly*.<sup>494</sup> In Canada, the court struggle begun after 1982 as courts before did not have jurisdiction to hear cases related to human rights or civil rights.<sup>495</sup> The first case was *Andrews v Ontario*.<sup>496</sup> For Nepal, litigation

<sup>488</sup> As above.

<sup>489</sup> n 156 above.

<sup>490</sup> 539 US 558 (2003).

<sup>491</sup> The Supreme Court of the US completely changed its reasoning on the continued criminalisation of consensual same-sex relations within a period of 17 years. This change is attributed partly to the changes in the approach of the LGBT community, which formed large coalitions and organised to ensure that the defeat was overturned, and in the process also changed people's attitudes. Also see S Quebes 'The Supreme Court, sodomy laws and the impact of the LGBT movement in America' *Transcending silence* (2004) <https://www.albany.edu/womensstudies/journal/2004/querbes.htm> (accessed 18 January 2018).

<sup>492</sup> Smith indeed regards the change as a revolution and suggests that it was deepest and farthest in Canada. M Smith 'Social movements and judicial empowerment: courts, public policy, and lesbian and gay organizing in Canada' (2005) 33(2) *Politics and Society* 327, 332.

<sup>493</sup> Both countries had constitutional changes that made it possible for such progress: Canada in 1982 and South Africa in 1994.

<sup>494</sup> 234 P.2d 969 (Cal. 1951). For a detailed history of litigation in the US before *Bowers v Hardwick* (n 384 above), see generally, PA Cain 'Litigating for lesbian and gay rights: a legal history' (1993) 79 *Virginia Law Review* 1551-1642.

<sup>495</sup> See Hon. I Cotler 'Marriage in Canada- evolution or revolution?' (2006) 44 *Family Court Review* 60, 61.

<sup>496</sup> *Andrews v Ontario*, [1988] 64 OR 2d 258 (Can.).

only begun in 2004 with the filing of the *Blue Diamond Society* case,<sup>497</sup> and Belize in 2010 with the filing of the *Caleb Orozco* case.<sup>498</sup> This indicates the importance of time as a factor in determining how courts rule in LGB cases. The fact that Belize and Nepal also had successful cases even without a long history seems to point to the times being largely in favour of LGB rights than when the struggle began in Canada and the USA. However, it is important to also acknowledge that litigation in countries that started a long time back has been able to cover far more issues than those where it has just started.<sup>499</sup> Also, the legislatures in those countries have had a longer period to react and make changes than those in countries that have just started litigation. It also shows that populations have had a longer time within which to react to these struggles for equality<sup>500</sup> and may thus explain why such countries have moved beyond formal equality towards substantive equality.<sup>501</sup>

*d) The level of backlash and counter-mobilisation against LGB rights*

The high levels of success in the courtroom have also come with considerable backlash in all the different countries. In the USA, state legislatures as well as the federal government have been used to reverse gains obtained through litigation.<sup>502</sup> The struggle for marriage equality was perhaps the most bruising, with serious backlash happening in Hawaii where courts first required the state to provide a justification for the prohibition on same-sex marriages, and eventually leading to the adoption of the Defence of Marriage Act (DOMA) at the federal level,<sup>503</sup> and 30 versions of the DOMA at state level.<sup>504</sup> In Canada, anti-gay groups vehemently presented opposition to same-sex marriages, including intervening in court

<sup>497</sup> n 466 above.

<sup>498</sup> n 435 above.

<sup>499</sup> A notable exception is South Africa, which has covered issues comparable to those countries in which litigation started long ago, but in a much shorter period of time. The fact that sexual orientation is an expressly protected ground against discrimination in the South African Constitution is the most important factor for this.

<sup>500</sup> Public opinion on gay rights has changed over time since the litigation begun in both the USA and Canada. In the USA, as organised opposition to same-sex marriages grew, public opinion went in favour of gay rights, with a 20% decline in the period 1992-1998, in the number of those who believed homosexual acts were always wrong. See PR Brewer 'The shifting foundations of public opinion about gay rights' (2003) 65 *The Journal of Politics* 1208, 1211. In Canada, the decade following the first litigation also saw much positive change in public opinion towards gay rights, with public opinion approving of same-sex marriage more than doubling between 1992 and 1996. RE Howard-Hassmann *Compassionate Canadians: Civic leaders discuss human rights* (2003) 93.

<sup>501</sup> This may also explain why South Africa still faces many issues with public opinion and violence against LGB people, despite the many legal successes. There has not been enough time for the community to appreciate all the rapid legal changes, as say compared to the US and Canada.

<sup>502</sup> For more details on this backlash and counter-mobilisation following litigation, see Rosenberg n 403, 355-419.

<sup>503</sup> The Defense of Marriage Act was a federal law that defined marriage for federal purposes as being restricted to a man and woman and allowed states to refuse to recognise same-sex marriages. It was passed into law by large majorities in both houses of congress. Its definition of marriage was struck down as unconstitutional in the *Windsor* case (n 442 above).

<sup>504</sup> Glass & Kubasek n 448 above.

cases.<sup>505</sup> In Belize, religious groups actively opposed the case in court and also went to lengths to antagonise the individual petitioner on social media and make him out to be a paedophile.<sup>506</sup> An unexpected source of counter-mobilisation came from LGB persons themselves. According to Caleb Orozco, a number of ‘closeted’ LBG people were actively supporting the state’s case and were thus complicit in their own mistreatment.<sup>507</sup> In Nepal, the 2007 decision of the Supreme Court was well-received and saw the country’s subsequent Constitution include express protection for LGB persons,<sup>508</sup> but nevertheless, there is opposition to these reforms, sometimes to the extent of groups drafting laws to re-criminalise same-sex conduct and stall same-sex marriages.<sup>509</sup>

### 3.5 Trends in LGB SL in the selected Common Law Countries outside of Africa

Different trends, some similar to and others different from those in the selected Common Law African countries, can be discerned in the selected countries outside Common Law Africa. These trends will be considered in the same phases as for Common Law Africa: the overarching strategy phase; the pre-litigation phase, the litigation phase and the post litigation phase.

#### 3.5.1 Trends at the overarching strategy phase

The trends at this phase are as follows:

##### *a) The strategic objective in pursuing the cases*

As is the case in Common Law Africa, the ultimate objective of SL in countries elsewhere is to create social change, which looks at both formal equality and substantive equality for LGB persons. The litigation aims at changing the law with the expectation that this will lead to a transformation in the attitudes of the majority population towards LGB persons. The courts

<sup>505</sup> For a detailed discussion of this opposition see L Reidel ‘Religious opposition to same-sex marriage in Canada: limits to multiculturalism’ (2009) 10 *Human Rights Review* 261-281, 273-278.

<sup>506</sup> These groups, however, withdrew their appeal to the *Caleb Orozco* case and the only remaining appellant in this case is the government. Interview with Caleb Orozco, n 483 above.

<sup>507</sup> Interview with Caleb Orozco, n 482 above.

<sup>508</sup> Nepal’s Constitution, 2005 in article 18 includes ‘sexual minorities’ among those protected from discrimination, while article 42 requires them to be included in state policy making.

<sup>509</sup> See for example ‘Nepal drafts new laws to recriminalize gay sex, stall same-sex marriage recognition’ 3 August 2014 *Gay Star News* <https://www.gaystarnews.com/article/nepal-drafts-new-laws-recriminalize-gay-sex-stall-same-sex-marriage-recognition030814/> (accessed 4 March 2018). Also see A Shakya ‘Hidden in plain view’ <http://nepalitimes.com/article/nation/LGBT-hidden-%20in-plain-%20view-nepal,1564> (accessed 4 March 2018).

are used as a catalyst for social change. In the USA and Canada, the LGB movement initially aimed at decriminalisation of sodomy nationally through the courts.<sup>510</sup> Even before this was achieved, the movement started shifting towards other objectives,<sup>511</sup> the epitome of which was marriage equality.<sup>512</sup> This goal was also finally achieved, and now the movement seems to be moving towards ensuring that other aspects of structural discrimination are dealt with through the courts of law and beyond. For Belize and Nepal, the objective is also social change. However, like Common Law Africa, these have only resorted to the judiciary recently. The major struggle in Belize has been built around the decriminalisation of consensual same-sex relations, which it achieved in 2016, and yet the struggle continues, while in Nepal the struggle is more nuanced, looking at the broader spectrum of rights, since strictly speaking, sodomy was never criminalised as such in Nepal.<sup>513</sup> The movement nevertheless considers its initial aims with SL to have been modest:<sup>514</sup>

Our argument was compelling. We were not asking for same-sex marriage. We were not asking the court to say that anal sex is natural. What we wanted was the right to life, security, protection from exclusion in terms of going to school, protection from ill-treatment when going to hospital. It is a very basic, human rights argument. No-one can argue that it is fine for an LGB person to be evicted or raped by the security forces.

Although all the countries are at different stages of achieving social change towards substantive equality for LGB persons, there are still struggles going on in all the different countries. Local conditions and circumstances dictate how the litigation is done but the aim is the same for the selected Common Law African countries, and the selected countries outside Common Law Africa.

<sup>510</sup> This was important as the continued criminalisation of sodomy was the basis of all discrimination of gays and lesbians from all aspects of life. See Cain (n 495 above) at 1587-1589.

<sup>511</sup> D Nejaime 'Before marriage: the unexplored history of nonmarital recognition and its relationship to marriage' (2014) 102 *California Law Review* 87, 104-8.

<sup>512</sup> In the case of the US, this goal was certainly not agreed upon by everyone as many saw the focus on marriage equality as propagating white interests (see for example DL Hutchinson 'Gay rights' for 'gay whites?': race, sexual identity, equal protection discourse' (2000) 85 *Cornell Law Review* 1358, 1371, while others saw it as being less important. See EB Cooper 'Who needs marriage?: equality and the role of the state' (2006) 8 *Journal of Law and Family Studies* 325, 329, and yet others saw it as aspiring for oppressive heterosexual institutions. See GM Leachman 'From protest to Perry: how litigation shaped the LGBT movement's agenda' (2013) 47 *University of California, Davis* 1667, 1718.

<sup>513</sup> What existed is criminalisation of 'unnatural sex' in paragraphs 1 and 4 of Part 14, Chapter 16 of Nepal's Civil Code of 1963 (*Muluki Ain*). Unnatural sex is not defined, and so not necessarily regarded as consensual same-sex relations. See UNDP, USAID 'Being LGBT in Asia: Nepal country report' (2014) 29.

<sup>514</sup> Interview with Sunil Babu Pant, n 483 above.

*b) The nature of strategy adopted in pursuing the cases*

In Canada and the USA, the strategy for LGB SL has been developing over a period of time and is being perfected. What emerged is an organised movement working together to achieve clear goals. The strategy was clear on what had to be achieved in the long term and how. The groups stuck to it, with little deviation, with lawyers aiming at what could easily be won through the courts. An incremental strategy was adopted which ensured step-by-step victories.<sup>515</sup> There were also multiple level engagements, with different cases brought challenging sodomy laws, while others at the same time targeted discrimination in employment, and in student organisations. It was never one battle at a time, including on the same issue.<sup>516</sup> This is similar to the approach adopted in South Africa by the NCGLE.

For Belize and Nepal, the strategy is more informal. The main aim of the strategy in Belize at the moment is to achieve decriminalisation, as in the view of UNIBAM's Caleb Orozco, the problem with the criminal laws is that they are used as 'an extortion tool, as an intimidation weapon and to harass, even if the laws aren't routinely enforced.'<sup>517</sup> Once this is achieved, then the rights and freedoms of LGB persons can be upheld.<sup>518</sup> The strategy adopted in Nepal is also informal and multi-pronged. It initially involved defending the case filed challenging Blue Diamond Society's legal status, and then focused on the Supreme Court declaring the rights of LGB persons along with people of the third gender, and upholding their status as citizens, in response to violations perpetrated mainly by the security forces. Following this case, it now looks at enforcement of the decision of the Supreme Court, through involvement in the political processes and ensuring that Parliament amends existing laws and make new laws to ensure that people belonging to minority groups on the basis of their gender identity and sexual orientation can enjoy their constitutional rights and be protected from discrimination. Nepali activists are also continually working to change mindsets.<sup>519</sup>

As in Common Law Africa, the conditions prevailing in a particular country determine the strategy that is developed for SL. Time is an important factor for the development of a strategy that brings everyone together. Generally, however, the Common Law countries that

<sup>515</sup> Above, 1723-1727.

<sup>516</sup> Cain (n 495 above) at 1589-1611.

<sup>517</sup> See Stephens (n 481 above).

<sup>518</sup> Above.

<sup>519</sup> For example LGBTI groups strategically joined politics and actively participated in the revolution that saw the monarchy being replaced by a republic. Interview with Sunil Babu Pant, n 484 above. Sunil Pant of the Blue Diamond Society got elected as a Member of Parliament. For the details of this broader strategy, see Astraea Foundation, (n 485 above) 17-27.



have so far succeeded on litigation on LGB rights outside of Africa have adopted a multi-pronged strategy that they follow.

*c) The nature of organising and collaboration*

There are differences in terms of the nature of organising for the different countries, just like it is in Common Law Africa. In all countries, different groups play different roles in the litigation. Some do it in larger coalitions within the country, while others rely on both local support and international support. For Canada and the USA, local alliances and working together without much foreign support is what stands out, while for Belize and Nepal, international support for litigation was critical. In the US, different groups played different roles which all brought attention to the court cases and the issues the movement was agitating for in the end. The litigation groups Lambda Legal Defense and Education Fund,<sup>520</sup> ACLU,<sup>521</sup> and the National Gay Rights Advocates ('NGRA')<sup>522</sup> focused on litigation, but were also well-connected to LGB lawyers and other elites who supported their cause.<sup>523</sup> Other groups engaged in mobilisation of allies, key of which were Lesbian/Gay Lawyers Association of Los Angeles ('LGLA') and International Gay and Lesbian Human Rights Commission ('IGLHRC').<sup>524</sup> At the same time, other groups were actively involved in legal mobilisation and reaching out to allies, including international allies. Other groups like Queer Nation San Francisco and Lesbian Avengers were largely opposed to litigation and instead engaged in protest and publicity campaigns,<sup>525</sup> but in the end they all led to litigation being more visible, and to emerging as the most organised strategy.<sup>526</sup> In Canada, EGALE Canada is in the lead of the litigation efforts<sup>527</sup> while the Blue Diamond Society is in the lead in Nepal, but it mobilises different actors, both local and international.<sup>528</sup> For Belize, UNIBAM is the only LGB led organisation in the country and so it generally works alone

<sup>520</sup> This was a litigation firm that was incorporated in 1973 to represent gays and lesbians facing discrimination and other legal challenges.

<sup>521</sup> The ACLU was a national civil rights organisation and at first did not work on LGBT issues until 1967. However, some of its chapters opposed this position. See Cain (n 495 above) 1584. Indeed in 1976, the ACLU Lesbian & Gay Rights Chapter of Southern California was formed to pursue litigation on the basis that the national ACLU did not do enough about LGBT litigation. Leachman (n 512 above) 1717.

<sup>522</sup> This was largely based in California. It was formed in 1987 and disbanded in 1991, but it was at one time the best funded LGBT litigation group in the country. Leachman (n 513 above) at 1717.

<sup>523</sup> Leachman (n 512 above) 1716-1718.

<sup>524</sup> As above at 1718-1719. NeJaime also noted that organisations indeed engaged in legal mobilisation. D NeJaime 'The legal mobilization dilemma' (2012) 61 *Emory Law Journal* 663, 714-736, 701-726.

<sup>525</sup> Leachman (n 512 above) 1718-1919.

<sup>526</sup> As above at 1737-1744.

<sup>527</sup> For the work of EGALE Canada in litigation, see for example M Smith 'Queering public policy: a Canadian perspective' Paper presented at the Annual Meeting of the Canadian Political Science Association, York University, Toronto, 13 June 2006.

<sup>528</sup> Astraea Foundation (n 485 above).

with several international supporters.<sup>529</sup>

Disagreements are also part of the organising as these are indeed bound to happen in any coalition. What matters most is how they are handled. In the USA, there was the issue of ‘wildcat’ suits filed by individuals without any connection to the movement, which then forced the movement to respond - either by joining the case or opposing it.<sup>530</sup> This happened in South Africa too, and is happening in Botswana, so it is a concern both in Africa and outside Africa. With a clear strategy however, the movements have always been able to effectively use those suits to achieve their objectives.<sup>531</sup> Nepal stands out for mobilising outside civil society to actively join political causes, including having members of the LGB community standing for Parliamentary positions.<sup>532</sup>

### 3.5.2 Trends at the pre-litigation phase

At this phase, the following can be discerned:

#### *a) The nature of consultation that goes into building the cases*

In all the countries, the process of going to court was largely consultative except for those cases where ‘wildcat’ suits were filed without the movement’s input.<sup>533</sup> In the USA, the litigating organisations always consulted their members, who were usually active in the legal movement themselves, and never deviated from their wishes.<sup>534</sup> However, the element of wildcat suits played an important role in the USA movement with such important cases like *Obergefell v Hodges* starting as wildcat suits.<sup>535</sup> Canada also largely followed the same trend.<sup>536</sup> For Nepal, the response to the first case was also well coordinated by the Blue Diamond Society and the subsequent case was well planned.<sup>537</sup> For Belize, since UNIBAM is the only LGBT organisation in the country, consultations were done with the members of

<sup>529</sup> UNIBAM has three international organisations joining as interveners.

<sup>530</sup> TM Keck ‘Litigation on SOGI rights: Experiences from the United States’ presentation at the Global Course on Sexual and Reproductive Rights, Harvard School of Public Health, Boston, 5 November 2014.

<sup>531</sup> As above.

<sup>532</sup> See *Astraea Foundation* (n 485 above) 28-36.

<sup>533</sup> See *Glass & Kubasek* (n 448 above).

<sup>534</sup> *Leachman* (n 509 above) 1719-1720.

<sup>535</sup> For how the case started, see generally D Cenziper & J Obergefell *Love wins: The lovers and lawyers who fought the landmark case for marriage equality* 2016.

<sup>536</sup> *Glass & Kubasek* (n 448 above).

<sup>537</sup> MF Moscati & H Phuyal ‘The third gender case’ decision of the Supreme Court of Nepal on the rights of lesbian, gay, bisexual, transsexual and intersex people’ (2009) 4:2 *The Journal of Comparative Law* 91-297.

the organisation, and with international supporters.<sup>538</sup> Consultations are thus key for the selected countries outside of Common Law Africa, unlike some of the selected countries in Common Law Africa, particularly Botswana and Kenya, where individuals or organisations have filed cases without necessarily fully consulting others.

*b) The sources of funds used in the litigation*

The USA and Canada mainly relied on resources obtained from within the country, particularly from donors and individuals supportive of LGB rights, including members of the LGB community. The US LGB movement benefitted from more funding because of the vehement opposition that it had to overcome. Groups like Lambda Legal support litigation efforts across the country.<sup>539</sup> In Canada, there was not as much funding for LGB litigation as in the USA, perhaps due to the lower levels of opposition experienced.<sup>540</sup> Nevertheless, resources were mobilised locally. In Nepal and Belize, funding for the cases came largely from foreign donors, as is the case for most of Common Law Africa.<sup>541</sup> In Nepal, costs for SL were kept low in that they used a lawyer who did not charge for his services.<sup>542</sup> Funds from USA and British foundations and a Norwegian fund were used for the transportation and meals of the lawyers. HIV funding was also crucial in raising awareness of the case and its visibility: peer educators doing their HIV prevention work on a regular day were willing to stage a demonstration at parliament or go to the court or the police. The Nepali activists believe that they were not influenced by foreign countries but nevertheless avoided giving credit to the donors because they were aware of how, in their neighbouring countries, detractors would accuse the movement of having western influences. They thereby avoided similar accusations.<sup>543</sup>

<sup>538</sup> For example, in February 2012, the Belize case was discussed as part of the 'International dialogue and training on LGBT human rights: focus on strengthening the Caribbean response and linking regional and international advocacy' in Gros Islet, St. Lucia, which was organised by Proud and Strong, St. Lucia in partnership with Arc International and Envisioning Global LGBT Rights Project.

<sup>539</sup> The Lambda Legal Defense and Education Fund, founded in 1973, describes itself as 'the oldest and largest national legal organisation whose mission is to achieve full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and everyone living with HIV through impact litigation, education and public policy work.' See Lambda Legal 'About us' <https://www.lambdalegal.org/about-us> (accessed 18 January 2018). In 2016, its overall expenditure was close to 22 Million US Dollars, with at least 10 million Dollars going to legal programs. See Lambda Legal 'Financial statements' Financial Statements (together with independent auditors' report) years ended October 31, 2016 and 2015' <https://www.lambdalegal.org/about-us/financial> (accessed 18 January 2018).

<sup>540</sup> See for example M Smith 'Federalism and LGBT rights in the U.S. and Canada: A comparative policy analysis' in M Haussman et al *Federalism, feminism and multi-level governance* (2010) 97–110, 105-106.

<sup>541</sup> For example, Nepal's LGB groups, particularly the Blue Diamond Society, benefited from the international funding available, particularly for HIV, and as a result expanded and grew rapidly. Astraea Foundation (n 437 above) 9. Also see UNDP and USAID Being LGBT in Asia country reports- Nepal (2014) 11.

<sup>542</sup> Interview with Sunil Pant, n 483 above.

<sup>543</sup> Above.

It would be safe to say that the movement in the USA and Canada was indigenous and relied on its own resources, which ensured that arguments of foreign influence and motivation could not stand. In the other countries, these concerns remain, including sustainability, just as they do for Common Law Africa.

### 3.5.3 Trends at the litigation stage

The trends at this phase are:

#### *a) The choice of forum*

As in Common Law Africa, litigators on LGB rights mainly aim at courts with the power to create precedent. Other cases have been brought before the supreme courts of 'friendly' states in countries with federal systems, aiming both at creating change in those states and at inspiring other states. For example in the USA, cases on marriage equality were brought in Hawaii and Massachusetts, while in Canada, the cases concentrated mainly on Ontario.<sup>544</sup> In Nepal, the Supreme Court was targeted in both cases. In Belize, the case had to go to the Supreme Court of Judicature first as lower courts do not hear constitutional matters, and now an appeal is pending before the Court of Appeal. The difference with Common Law Africa is that for the US, Canada, and Nepal, the apex courts have already made their decisions on issues like decriminalisation and same-sex marriage, while in Common Law Africa, it is only in South Africa that this goal has been achieved.<sup>545</sup> The other countries are more or less like Belize, which have cases pending on issues of decriminalisation.

#### *b) Timing of the filing of the cases*

In Canada, the fact that same-sex marriages had been decriminalised before laid the groundwork for future cases which were built on by the cases in the last 20 years, all of which were successful. Similarly in the USA, the subsequent cases built upon the success in the *Lawrence case* to bring the same-sex marriage cases, as well as the fact that the Obama administration was LGB friendly. By then, the groundwork had already been laid. However, the Canada timing was more appropriate than that in the USA as by then Canada had at least long achieved decriminalisation. For Belize and Nepal, the cases were brought before

<sup>544</sup> See Glass & Kubasek (n 448 above) 163-168. Also see Skype interview with Douglas Elliott, Canadian LGB activist and human rights lawyer, 29 July 2018.

<sup>545</sup> See the *Sodomy* case (n 8 above) and the *Fourie* case (n 104 above).

even achieving moderate social change, but with legal and political opportunities in sight, and it worked. According to Sunil Pant,

‘the timing was positive for Nepal after the populist movement, because the monarchy and autocracy, not having been human rights friendly, was very unpopular. Inclusion, human rights, liberty and justice was almost like a national slogan’.<sup>546</sup>

For Belize in particular, the opportunity was seized to allow the court to formulate intrinsic values for the post-independence government and to take an official stand on LGBT rights.<sup>547</sup>

c) *The extent and nature of elite and community mobilisation*

Community mobilisation is important to all the cases in all the countries compared. What differs is the extent of mobilisation. In the US, LGB groups have been acknowledged in as far as they were engaged in active community mobilisation after the loss in *Hardwick v Bowers*.<sup>548</sup> They went beyond the law to engage in community initiatives that helped to make the LGB community more visible. Canada also engaged in the mobilisation of LGB groups.<sup>549</sup> In Nepal, the Blue Diamond Society was responsible for helping LGB organisations to register and establish in various regions of Nepal. At the time of the institution of the case by the movement, three such organisations existed and all three agreed to take part in the litigation. Individuals represented the various organisations, and this is what accounts for the multiple petitioners in the *Sunil Pant* case.<sup>550</sup> The Blue Diamond Society was not able to mobilise LGB persons beyond those who were members and users of the facilities of these organisations. People who had position in society did not need their services and were thus not part of the movement.<sup>551</sup> In Belize, the case was supported by members of the LGB community and they were kept updated online.<sup>552</sup> At the time that the case was instituted, the community members did not have the courage or freedom to speak

<sup>546</sup> Interview with Sunil Pant, n 483 above.

<sup>547</sup> Interview with Caleb Orozco, n 482 above.

<sup>548</sup> For example see NeJaime (n 525 above).

<sup>549</sup> Glass & Kubasek (n 448 above).

<sup>550</sup> *Sunil Pant* case (n 430 above).

<sup>551</sup> Interview with Sunil Babu Pant, n 483 above.

<sup>552</sup> The online updates were made on UNIBAM’s website- <https://unibam.org/> (accessed 3 March 2018).

out in support of LGB rights and have their names attached to the cause in any way.<sup>553</sup> The majority of supporters restricted their involvement to social media forums.<sup>554</sup>

*d) The nature of the petitioners/applicants*

Similarly to Common Law Africa, petitioners/applicants in LGB SL cases in the other countries can be classified into: single individuals; multiple individuals; a single organisation; multiple organisations; and a combination of individuals and organisations. Single individual applicants or two individuals are the preferred ways of bringing cases in the USA and Canada. This is largely because of the restricted standing rules that allow only persons directly affected by an issue to bring a case. In the seminal *Lawrence* case in the USA for example, the two men who were arrested under the Texas sodomy law were not part of the LGB movement, but were convinced by their lawyers and members of the movement to institute a strategic case for the benefit of the LGB community.<sup>555</sup> In Belize, the *Orozco* case was instituted by Caleb Orozco and UNIBAM as joint applicants, although UNIBAM was struck off the case as the Court found that, as an 'inanimate body', it did not have constitutional rights and thus had no standing in this case.<sup>556</sup> The organisation was, however, allowed to join the case as an intervener.<sup>557</sup> In Nepal, however, multiple applicants were allowed leading to four organisations, represented by individuals, joining Sunil Pant to challenge the discriminatory legal regime.<sup>558</sup> The issue of 'repeat petitioners' also does not seem to be rife either in the US and Canada, or in Belize and Nepal, as cases are brought by different persons, the way it is in South Africa and Botswana, unlike Kenya and Uganda, where this phenomenon is common.

In Canada and the USA, just like in South Africa, the issue of race also emerges as a factor, as petitioners are mainly white. This reflects the demographics as whites form the majority in the USA, and also perhaps the issue of power - who has access to the courts - as again whites are generally more economically advanced than blacks and also have easier access to the courts. The issue of marriage equality being made the ultimate target for the US LGB movement is also criticised by others as being a goal for the more privileged white gay

<sup>553</sup> According to Caleb Orozco, he was the only person who was willing to be 'the face' of the LGBT case and not even the Board members of UNIBAM were willing to introduce themselves in the media. Interview with Caleb Orozco, n 482 above.

<sup>554</sup> As above.

<sup>555</sup> Carpenter (n 419 above) 1478, 1517-1518.

<sup>556</sup> *Orozco* case (n 435 above) para 5.

<sup>557</sup> L Tisdale 'A triumphant victory for gay rights in Belize lays foundation for domino effect throughout Caribbean' *Loyola of Los Angeles international and comparative law review* 41 (2018) 104.

<sup>558</sup> The applicants represented the Blue Diamond Society, MITINI Nepal, Cruse AIDS Nepal, and Parichaya Nepal.



persons.<sup>559</sup> In Belize and Nepal, as in most of Common Law Africa, the applicants are also a reflection of the majority races, and perhaps there too, the organisers are alive to the fact that having non-dominant races, particularly white persons, may raise similar criticisms concerning the roots of the action for this category of rights. Again, like in Common Law Africa, the petitioners are motivated by the aspiration for social change, rather than the desire for money, as there was no case found where petitioners were not affected directly by the laws or practices they challenged.

*e) The nature of respondents*

Like Common Law Africa, the majority of the cases in these countries are brought against the state or its officials. Cases against individuals in their personal capacity are rare. This is again for the same reason as in Common Law Africa: that the primary obligation to fulfil, protect and respect human rights falls upon the state rather than private individuals. Notably, in Nepal, the case challenging the recognition of the Blue Diamond Society was also brought against the state. However, in the US, there are two cases that are against private individuals: an employer and a club respectively.<sup>560</sup>

*f) Nature of interveners, amicus curiae or interested parties*

Interveners, amicus curiae, or interested parties are active in all the different countries. The terms are used differently in different jurisdictions with 'interested parties' being the operative term for Belize, 'interveners' for Canada, and amicus curiae for the USA and Nepal. The third parties are both pro- and anti-gay groups. For Belize, the *Caleb Orozco* case had seven interested parties, four of whom supported the LGB cause.<sup>561</sup> For Canada, there were interveners in every one of the four cases on LGB rights heard in the last 20 years. In *Chamberlain v Surrey School District No. 35*,<sup>562</sup> there were 10 named interveners,<sup>563</sup> with at least five being in support of LGB groups. In *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*,<sup>564</sup> there were eight named interveners.<sup>565</sup> At least seven of these were in

<sup>559</sup> See for example DL Hutchinson (n 512 above).

<sup>560</sup> See *Oncale* (n 469 above), and *Boy Scouts of America v Dale* 530 U.S. 640 (2000).

<sup>561</sup> These were: The Commonwealth Lawyers Association; the Human Dignity Trust; the International Commission Of Jurists; the Roman Catholic Church Of Belize; the Belize Church Of England Corporate Body; the Belize Evangelical Association Of Churches; and the United Belize Advocacy Movement.

<sup>562</sup> [2002] 4 SCR 710.

<sup>563</sup> These were: EGALE Canada Inc; the British Columbia Civil Liberties Association; Families in Partnership; the Board of Trustees of School District No. 34 (Abbotsford); the Elementary Teachers' Federation of Ontario; the Canadian Civil Liberties Association; the Evangelical Fellowship of Canada; the Archdiocese of Vancouver; the Catholic Civil Rights League; the Canadian Alliance for Social Justice and the Family Values Association. At least half of these were in favour of LGB groups.

<sup>564</sup> [2000] 2 SCR 1120 (15 December 2000):

favour of LGB rights. *M v H* (1996)<sup>566</sup> also had 10 named interveners,<sup>567</sup> with at least five being in favour of LGB rights. Finally *Vriend v Alberta*<sup>568</sup> had 17 interveners,<sup>569</sup> with at least twelve in favour of LGB rights. LGB organisations such as EGALÉ-Canada, usually and consistently intervene on the side of LGB rights, as well professional organisations such as the Canadian Bar Association and usually the churches such as the Evangelical Fellowship of Canada and organisations such as Focus on the Family (Canada) Association intervene on the side of the opponents.

For Nepal, Human Rights Watch appeared as amicus curiae in the *Blue Diamond Society* case,<sup>570</sup> in favour of the Blue Diamond Society. For the USA, amicus curiae briefs have become a key feature of US Supreme Court litigation in the past 20 years,<sup>571</sup> including for LGB litigation.<sup>572</sup> Indeed at the moment, the *Obergefell* case<sup>573</sup> holds the record for the highest number of amicus briefs ever filed in a case at the US Supreme Court.<sup>574</sup> The number is 148. Of these, 76 support LGB rights, 58 oppose LGB rights and five are neutral.<sup>575</sup> In *Hollingsworth v Perry*,<sup>576</sup> there were 97 amicus briefs filed,<sup>577</sup> the majority of which were in support of LGB rights. In *United States v Windsor* (26 June 2013),<sup>578</sup> there were 80 amicus

<sup>565</sup> These were: The Attorney General for Ontario; the Canadian AIDS Society; the Canadian Civil Liberties Association; the Canadian Conference of the Arts; EGALÉ Canada Inc; Equality Now; PEN Canada; and the Women's Legal Education and Action Fund (LEAF).

<sup>566</sup> 142 DLR (4th) 1 (Ont. C.A.), aff'd [1999] 2 SCR 3:

<sup>567</sup> These were; The Foundation for Equal Families, the Women's Legal Education and Action Fund (LEAF); Equality for Gays and Lesbians Everywhere (EGALÉ); the Ontario Human Rights Commission; the United Church of Canada; the Evangelical Fellowship of Canada; the Ontario Council of Sikhs; the Islamic Society of North America; Focus on the Family; and REAL Women of Canada.

<sup>568</sup> [1998] 1 SCR 493

<sup>569</sup> These were: The Attorney General of Canada, the Attorney General for Ontario, the Alberta Civil Liberties Association, Equality for Gays and Lesbians Everywhere (EGALÉ), the Women's Legal Education and Action Fund (LEAF), the Foundation for Equal Families, the Canadian Human Rights Commission, the Canadian Labour Congress, the Canadian Bar Association - Alberta Branch; the Canadian Association of Statutory Human Rights Agencies (CASHRA); the Canadian AIDS Society; the Alberta and Northwest Conference of the United Church of Canada; the Canadian Jewish Congress; the Christian Legal Fellowship; the Alberta Federation of Women United for Families; the Evangelical Fellowship of Canada; and Focus on the Family (Canada) Association.

<sup>570</sup> *Astraea Foundation* (n 485 above) 22.

<sup>571</sup> AO Larsen, & N Devins 'The amicus machine' *Virginia Law Review* (2016) 102. Also see AJ Franze & RR Anderson 'Record breaking term for amicus curiae in supreme court reflects new norm' *National Law Journal*, August 15, 2015.

<sup>572</sup> AJ Franze & Anderson, above.

<sup>573</sup> *Obergefell* case, n 156 above.

<sup>574</sup> See N Totenberg 'Record number of amicus briefs filed in same-sex-marriage cases' 8 April 2015 <https://www.npr.org/sections/itsallpolitics/2015/04/28/402628280/record-number-of-amicus-briefs-filed-in-same-sex-marriage-cases> (accessed 4 July 2018).

<sup>575</sup> Above.

<sup>576</sup> *Hollingsworth v. Perry*, 570 US

<sup>577</sup> For these see, American Bar Association 'Dennis Hollingsworth, et al., Petitioners v. Kristin M. Perry, et al' Preview, Docket No. 12-144, [https://www.americanbar.org/publications/preview\\_home/12-144.html](https://www.americanbar.org/publications/preview_home/12-144.html) (accessed 4 July 2018).

<sup>578</sup> *United States v. Windsor* 570 US (2013).

briefs, majority of which were in support of LGB rights.<sup>579</sup> In *the Lawrence case*,<sup>580</sup> there were 32 amicus briefs, with 23 in favour of LGB rights and nine against.<sup>581</sup> In *Boy Scouts of America et al. v Dale* (28 June 2000),<sup>582</sup> there were 46 amicus briefs, with 25 in favour of LGB rights and 21 against.<sup>583</sup> A wide range of groups including LGB rights groups, professional organisations such as the American Bar Association and other bar associations, American Psychiatry Association and American Psychological Association; civil rights groups such as the National Association for the Advancement of Colored People; and litigation groups such as The American Civil Liberties Union (ACLU) and Lambda Legal have been part of the groups consistently filing amicus briefs. Even state attorneys have argued cases on the side of LGB groups. On the other hand, conservative religious groups such as the United States Catholic Conference, and family associations such as the Family Defense Council have appeared on the opposing side. This shows a commitment on both sides to defend and promote what they believe in through court cases.

*g) The nature of lawyers who argue the cases*

In the USA, Canada, and Nepal, community lawyers, who are lawyers working for or being members of organisations working for LGB equality, take the lead in handling cases. Cause lawyering has become a more developed practice in these countries and such lawyers therefore take lead. They are specialised and have intimate knowledge of the cases. In the USA, the ACLU, and Lambda Legal provide lawyers for the petitioners or argue as amicus curiae. For example, Lambda Legal argued the case of *New York v Uplinger*,<sup>584</sup> where ACLU also filed an amicus brief. Paul Smith was engaged by Lambda Legal to argue the *Lawrence* case.<sup>585</sup> In Canada, community lawyers argue the cases, as well as commercial lawyers who work closely with the community. Roy Douglas Elliot is one of those lawyers who has argued in a number of LGB cases, and he was usually engaged by the Canadian AIDS Society and sometimes EGALÉ Canada.<sup>586</sup> In Nepal, Hari Phuyal, a respected lawyer, represented the LGBTI community in the *Sunil Babu Pant* case.<sup>587</sup> He previously worked at

<sup>579</sup> For details of these see, American Bar Association 'United States v. Edith Schlain Windsor, in her capacity as executor of the estate of Thea Clara Spyer, et al.' review, Docket No., 12-307, [https://www.americanbar.org/publications/preview\\_home/12-307.html](https://www.americanbar.org/publications/preview_home/12-307.html) (accessed 4 July 2018)

<sup>580</sup> n 156 above.

<sup>581</sup> As above.

<sup>582</sup> *Boy Scouts of America et al. v. Dale* 539 U.S. 640.

<sup>583</sup> Above.

<sup>584</sup> As above.

<sup>585</sup> Interview with Prof Paul Smith, n 424 above.

<sup>586</sup> For his profile see Equal Marriage Canada 'Lawyer Douglas Elliot honoured by CBA' <http://www.samesexmarriage.ca/advocacy/cba130805.htm> (accessed 18 January 2018). Interview with Douglas Elliot

<sup>587</sup> Astraea Foundation (n 485 above) 21-22.

the Office of the High Commissioner for Human Rights and took the case on because it was human rights related, though he did not have any previous experience of working on LGB issues in particular. In Belize, the lawyers who represented the claimants were senior lawyers, but commercial lawyers rather than community lawyers.<sup>588</sup> The lead lawyer was not a Belizean national, and it was difficult to find a lawyer who had the required principles, substance, heart and impact.<sup>589</sup> Therefore, community lawyers are used more in the USA and Canada, and less in Nepal and Belize.

*h) The nature of arguments in court*

In all the countries, just like in Common Law Africa, the main arguments used in the courts of law are linked to human rights principles. In the USA, emphasis is on the bifurcated due process and equal protection clauses of the Constitution,<sup>590</sup> which are also grounded in human rights. In Canada, it is section 15 of the Canadian Charter that forms the main basis of the decisions. In Nepal, the basis for the cases was the right to freedom from discrimination. The petitioners claimed that homosexuals and people of the third gender were being deprived of exercising their human rights guaranteed by the Nepali Constitution, on the basis of their sexual orientation and gender identity. The applicants also made a strong argument aimed at debunking the stigma which surrounds LGBT people and their association with sex work. As explained by Sunil Pant:

There is much stigma around LGBT people. The community only sees them doing sex work without understanding the root cause of this. There was a perception that granting rights to LGBT people would cause moral demise in the society. We had to make it clear that it is the social situation and discrimination which force LGB persons to turn to sex work in order to make a living. Discrimination is often a root cause of the questionable behaviour of a segment of society. The government and the courts have a duty to ensure that all children have a decent social and economic upbringing.

Compelling evidence of violations of rights of LGB persons, collected by the Blue Diamond Society from 2001, was also presented in court. A well-known transgender person also appeared in court in Nepal and Caleb Orozco filed an affidavit detailing his own experiences as a gender non-conforming person in Belize. In Belize, the basis of the action was the right to human dignity protected by section 3(c), the right to privacy under sections

<sup>588</sup> These were Lisa Shoman SC, Chris Hamel-Smith SC, Simeon Sampson SC and Westmin James.

<sup>589</sup> Interview with Caleb Orozco, n 483 above.

<sup>590</sup> See Cain (n 495 above) 1621-1640.

3(c) and 14(1) and the right to equal protection of the law under section 16 of the Belize Constitution. These are the same arguments relied on in Common Law Africa, with privacy being more emphasised in South Africa, than elsewhere.

Again, the opposing sides mainly base their cases on the limitation of rights within the different constitutional frameworks to deny LGB persons their rights. In the USA and Canada, before the watershed cases of *Lawrence v Texas*<sup>591</sup> and *Egan*<sup>592</sup> respectively, the fact that same-sex relations were criminalised was used to limit the rights arguments, and differences were also drawn between heterosexual relations and homosexual relations. The criminalisation argument is still used in most of Common Law Africa where homosexuality is still criminalised. The limitations are based on morality arguments. However, in most cases, these arguments have not succeeded, as the Constitutions being interpreted usually require equality for all.

*i) The nature of the remedies prayed for*

The parties to LGB cases in all the different countries do ask for a wide range of remedies. In Belize, Caleb Orozco prayed for a declaration that the provision of the Penal Code is declared null and void, and that some words be struck out of the provision, and other general remedies. In Canada, the applicants also sought declarations that the laws were null and void, but this was mainly because their system provides that the court only advises the legislature on what to do. Nepal perhaps has the widest prayers of all as the petitioners there requested the court to order for general reforms that would see an end to legal discrimination. The petitioners requested the Court to protect the fundamental rights of lesbians, gays, bisexuals and transgender people by according them equal social recognition through the appropriate legal provisions. They also requested of the Court to order for legal provision to be made for the recognition of the gender identity of intersexual and transgender persons: people of a third gender. Activists in the USA also make wide prayers for remedies, which go beyond declarations, as was done in the *Lawrence* case,<sup>593</sup> where an order nullifying the sodomy statutes was requested, and in the *Obergefell* case,<sup>594</sup> where the prayer was to declare statutes prohibiting same-sex marriages to be unconstitutional.

<sup>591</sup> n 156 above.

<sup>592</sup> n 156 above.

<sup>593</sup> n 156 above.

<sup>594</sup> n 156 above.

*j) The nature of judges who decide the cases*

The judges who have decided the cases in all these countries reflect their value systems just as it is for Common Law Africa. In the USA, the landmark decisions on LGB rights have all been contested and won on narrow margins. This shows the importance of the disposition of the judges who decide them. The Supreme Court justice who has written majority judgments in LGB strategic cases is Justice Anthony Kennedy.<sup>595</sup> He generally sides with conservative positions of the Court, but has been a trailblazer for LGB rights. In Canada, Justice La Forest, who wrote the majority judgment in *Egan v Canada*,<sup>596</sup> is a very well-respected jurist. Justice Cory, who co-authored the *M v H* judgment, is another well-respected judge who was also a human rights lawyer, having worked in the Ontario Civil Liberties section of the Canadian Bar Association. Chief Justice Benjamin of the Supreme Court of Belize decided the Belize case, and although his judgments have not come under scrutiny since he assumed office, the judgment in the *Orozco* case<sup>597</sup> was noteworthy. Caleb Orozco noted that, had it not been for the fact that the Chief Justice was awake to the international law obligations which Belize had undertaken, the case may not have been decided in favour of LGB rights.<sup>598</sup> In Nepal, former Justice Balram KC is a very well-respected justice, an anti-corruption icon and known to be liberal.<sup>599</sup> Nevertheless, in the *Sunil Pant* case, a deliberate choice was made not to argue that homosexuality 'is a natural thing'. The applicants and their legal team thought it best not to divide the bench on a philosophical, psychological debate that would get into the detail of sexual practices and sexuality. Despite the fact that the judges were liberal-minded, they were also all in their fifties and their upbringing and generation had to be considered. The movement in Nepal had faith in the court since it remained enlightened and just even during times of the autocratic governance. Overall, just like in the selected Common Law African countries, the judges who make positive judgments in favour of LGB persons are usually progressive, forward looking and well-respected.

*k) The incidence of costs*

On the issue of costs, the courts have adopted general principles on how to award costs in PIL cases. In the USA, the one-way rule where each party settles its own costs, but where

<sup>595</sup> He wrote the majority judgment in *Lawrence v Texas* (n, 146 above); *Romer v Evans* (n 146 above), the *Windsor* case and in the *Obergefell* case (n 156 above).

<sup>596</sup> n 156 above.

<sup>597</sup> n 335 above.

<sup>598</sup> Interview Caleb Orozco, n 432 above.

<sup>599</sup> See for example his views on corruption 'Time has come to form expert panel to recommend reforms in judiciary' *Kathmandu Post* 15 January 2018 <http://kathmandupost.ekantipur.com/news/2018-01-15/time-has-come-to-form-expert-panel-to-recommend-reforms-in-judiciary.html> (accessed 3 March 2018).



successful parties can recover reasonable attorney fees, also applies to LGB cases.<sup>600</sup> In Canada, the courts usually order the successful litigants to be awarded special costs, and excuse the unsuccessful party from adverse costs.<sup>601</sup> In Belize, the costs were also awarded to the claimant.<sup>602</sup> This is a good costs regime that encourages PIL, as condemning persons acting in the public interest in costs discourages such actions.<sup>603</sup> In Nepal, no order as to costs was made in the three cases. The trends on costs therefore also differ from country to country, but it is rather clear that the costs regimes encourage rather than discourage PIL.

#### *D) Advocacy and other strategies employed to support the court cases*

The mass media has been engaged in LGB cases in all countries. Litigation has the potential to attract the media,<sup>604</sup> and this has worked in favour of LGB groups in all the different countries. In addition to the traditional media, social media has also been actively used in all countries. In the hostile environment of Belize, the use of social media was essential for the establishment of an LGB movement. According to Caleb Orozco,

When you get people in the closet, even a community coming together and utilizing social media to document, monitor and evaluate opportunities to engage, it becomes a powerful tool for organizing even if it is just virtual.<sup>605</sup>

Canada has gone one step ahead of all the other countries in terms of engaging the legislature, which has made changes every time a court decision is made and also introduced legislation even without express court judgments,<sup>606</sup> as it is in South Africa. In Belize, the Parliamentarians for Global Action (PGA) was established, which is a network of politicians who facilitate dialogue on LGBT issues. Nepalese activists also ensured that LGB rights are protected within the constitution, to the extent that they got Justice Edwin Cameron from South Africa to share the South African experience at a conference in Kathmandu.<sup>607</sup> In the USA, the media took much interest in LGB issues and constantly

<sup>600</sup> C Tollefson 'Costs in public interest litigation revisited' (2011) 39 *The Advocates' Quarterly* 197.

<sup>601</sup> As above at 197, 200.

<sup>602</sup> *Orozco case* (n 435 above) para 100.

<sup>603</sup> See C Tollefson, 'When the 'public interest' loses: the liability of public interest litigants for adverse costs awards' (1995) 29 *University of British Columbia Law Review* 303. Also see G Mayeda 'Access to justice: The impact of injunctions, contempt of court proceedings, and costs awards on environmental protestors and first nations' (2010) 6 *McGill International Journal of Sustainable Development Law & Policy* 143.

<sup>604</sup> See Leachman (n 513 above).

<sup>605</sup> Interview with Caleb Orozco, n 482 above.

<sup>606</sup> Glass & Kubasek (n 448 above).

<sup>607</sup> *Astraea* (n 485 above) 30.

reported about them. LGB litigation in particular attracted much media attention, and this may have helped to change mindsets.

### 3.5.4 Trends at the post-litigation stage

The trends at this stage are:

#### a) *Enforcement processes*

Enforcement of court decisions has faced a few hurdles in almost all countries. Despite a culture of following court decisions in the US, legislatures have actually acted to reverse the court decisions<sup>608</sup> as has the executive, especially when the more conservative Republican Party was in power.<sup>609</sup> Canadian officials have been more compliant with the court decisions, with the parliament and executive acting in line with them. Indeed, the government even went to the point of asking for certification of the Civil Marriages Act before it was tabled to ensure that it would be constitutional.<sup>610</sup> Nepali activists have mobilised to have the Supreme Court decision enforced despite the challenges, including joining politics themselves.<sup>611</sup> While the Nepali Constitution now ensures the security and legal rights and protection of LGBT persons, the mapping out of discriminatory policies and laws done by the law ministry was based on the old Criminal Code. The new Civil Code and Criminal Code do not discriminate, but they also do not recognise same-sex marriages either. According to Sunil Pant, the community was led to believe that a special law would be drafted for them, but what actually happened is that they were left out of the general law altogether.<sup>612</sup> The same-sex committee has recommended a full-fledged marriage law, which the government has accepted but they have not done anything about it. There remains a need for active advocacy to ensure the enforcement of the judgment. In Belize, the court 'read into' the provisions, and so there is no need for enforcement as it is self-enforcing.<sup>613</sup> Belizean activists are nevertheless of the view that ongoing advocacy is needed to ensure that reforms are actually happening, otherwise people would need to return to court over the same issues.<sup>614</sup>

<sup>608</sup> For example, the enactment of the DOMA which was as a result of the *Bahr v Lewin* case in Hawaii.

<sup>609</sup> For details see Rosenberg (n 448 above)

<sup>610</sup> *Reference Re Same-Sex Marriage* [2004] 3 SCR 698, 2004 SCC 79.

<sup>611</sup> *Astraea* (n 485 above) 28-36.

<sup>612</sup> Interview with Sunil Babu Pant, n 479 above.

<sup>613</sup> *Orozco* case (n 435 above).

<sup>614</sup> Interview with Caleb Orozco, n 482 above.

The interesting trend here is the role of the courts in the enforcement of their decisions. The courts in Nepal not only issue judgments but they also make specific orders to be followed during enforcement of the judgment, including giving specific direction on what is to be done. For the USA and Canada, the courts do not issue specific orders, but the process has developed in such a way that compliance is expected.

#### *b) Appeals*

Appeals are common in all countries by the activists bringing cases, when they lose, but those by the state when it loses are rare. Indeed, in many cases, the state loses interest in defending the case and in some cases joins the applicants, and this happens in all the countries depending on the nature of the case and the level of mobilisation. In Belize, the appeal in the *Orozco* case is ongoing, and for all the other countries, all the different cases highlighted have been appealed all the way to highest courts in the land.

### **3.6 Conclusion**

SL on LGB rights is slowly gaining ground in Common Law Africa. Not all countries in Common Law Africa besides the four considered here, together with Malawi and Nigeria, are engaged in such litigation, but what cannot be denied is the fact that litigation is increasing. Courts are therefore increasingly becoming more legitimate avenues through which to achieve social change in the world. The growing democratisation in Africa and elsewhere has a big connection to this growing trend, as it gives space for activists to bring cases, and for the courts to make decisions that may otherwise be regarded as controversial. In more developed democracies, such as the USA and Canada, LGB litigation has already taken root, and in such countries, litigation has been more successful. In the context of a newer democracy, there have been overwhelming successes in South African courtrooms. That success has spurred legislative change, which is mainly attributable to the special circumstances that South Africa went through in its struggle to achieve democracy. Activists in the rest of the countries are developing their litigation as their democracy also grows and matures. Developments in one country influence developments in others, and therefore LGB litigation in Common Law Africa is on the increase, spurred by developments in South Africa, the USA, Canada and elsewhere. As regards strategising, planning, and pursuing cases, there do not seem to be major differences between Common Law Africa and other countries. What seems to make a difference is the number of years that litigation has been

pursued, and the level of democratisation in each country, as well as the extent to which public opinion or the legislature has moved towards the protection of LGB rights. This may explain why, despite the fact that litigation is done in more or less comparable ways, it has a greater impact in some countries than in others.

## CHAPTER 4

# THE CONTRIBUTION OF STRATEGIC LITIGATION TO SOCIAL CHANGE ON LGB RIGHTS IN THE SELECTED COUNTRIES

### 4.1 Introduction

During the twenty year study period, LGB persons, lawyers and activists in the different countries under study have engaged extensively, sometimes even aggressively, in strategic litigation (SL) for LGB rights and recognition. The main intention for this litigation is to create social change leading to wide acceptance of the existence and equality of LGB persons through legal reform. This chapter examines the changes in the lives of LGB persons that have taken place in the selected Common Law African countries in the past 20 years. It draws a rough picture of the direction and magnitude of that change and analyses the impact of LGB SL in creating that social change. Rather than being a deep analysis of the causal relations, the study simply utilises the findings of opinion polls, existing studies and other publicly available information to draw and make rough conclusions on the incidence and direction of social change.

It starts with an examination of the direct changes in laws and policies that have taken place as a result of LGB SL in the different study countries both within and outside Common Law Africa in the last twenty years. It then goes on to examine the changes in the political climate, including political positions taken by leaders and the recognition or respect for the rights of LGB persons by political leaders. It also considers the changes in social status of LGB persons, including how they are regarded, perceived and treated in public spaces: on the streets, at school, and by businesses; as well as how they are depicted in popular culture. Finally, it looks at the changes in the economic conditions of LGB persons, including their general standards of living and access to employment opportunities. The chapter considers these changes in light of the passage of time. As such it considers the period before 1998 and the period after 1998 up to the end of August 2018. It then discusses the extent to which these changes can be attributed to SL as compared to other factors. It then briefly considers

the changes in the four selected countries outside Common Law Africa, and assesses the role that SL has played in creating or contributing to these changes. The chapter ends with some conclusions on the role of SL in creating social change on LGB rights in the selected Common Law countries in Africa.

#### 4.2 The extent of social change on LGB rights in Common Law Africa

Measuring social change and how it has happened is a difficult task.<sup>1</sup> It involves not only measuring the extent of the change but also showing to what extent that change can be attributed to the factor being studied. Therefore, to study social change, one must look at different aspects, key among which are: the occurrence of change, followed by the direction of change, and finally the magnitude of change. In this section, all these aspects are considered as regards the legal, political, social and economic conditions of LGB persons in an approach that differs only slightly from Goodwin's definition of social change.<sup>2</sup> Specifically for LGB rights, Kretz has identified seven different stages that a country has to go through to be said to have achieved significant social change. These are: 'total marginalization', where there are bans on advocacy and visibility of LGB persons; then 'criminalization of status and behaviour', which makes both the sexual act and the LGB identity criminal acts; then 'decriminalization' which is when the criminal laws are repealed; then 'codification of Anti-Discrimination laws,' where discrimination is prohibited in the laws; then 'establishment of positive rights' which is about accessing rights and benefits that are given to other persons in the same situation, for example married couples; then 'full legal equality' which is a situation where there is not more legal distinction between gay persons and others; and finally, 'cultural integration' which requires widespread social acceptance of LGB persons: significant social change.<sup>3</sup> Therefore, positive legal change would be able to occur if the country in question was moving from the first step to the seventh, and magnitude would be determined by the period within which the changes occur. There is no doubt that change is happening and therefore it is which direction on the spectrum for which countries, and how fast, that will be the focus of this study.

<sup>1</sup> See Chapter 2, section 2.3 above.

<sup>2</sup> Goodwin focuses on the political, economic and social changes. (R Goodwin *Changing relations: Achieving intimacy in a time of social transition* (2009) 2.) This study however, being concerned with the law, also includes changes in the law as a separate category.

<sup>3</sup> A Kretz 'From 'kill the gays' to 'kill the gay rights movement': The future of homosexuality legislation in Africa' (2013) 11 *Northwestern Journal of International Human Rights* 207, 211-216.



#### 4.2.1 Changes in the legal environment

Ideally, positive decisions on LGB rights made by the highest courts of a country ought to direct policy-making in favour of LGB persons. This is because of the coercive nature of the law.<sup>4</sup> Policies that emerge as a result of SL would in turn lead to an improved political, social and economic environment for LGB persons, or, on the flipside, lead to backlash from the government in the form of damaging political pronouncements and the adoption of even stricter anti-LGB laws.<sup>5</sup> On the one hand, negative decisions may have the effect of legitimising discrimination against LGB persons, while in other cases, they may spur further agitations and demands for equality, including drawing sympathy from the public.<sup>6</sup> All these things help to create both negative and positive social change through direct and indirect impact.<sup>7</sup>

The first six stages on Kretz's spectrum above are all about legal change. Only the seventh and last one is about social acceptance. Therefore, legal change is a major indicator of how far changes happen. Just like social change, legal change is measured by looking at three aspects: the occurrence of change, the direction of change, and the magnitude/rate of the change.<sup>8</sup> These are going to be used to show the extent of legal change during the past 20 years in the selected countries insofar as the legal recognition of LGB persons is concerned.

There is no doubt that considerable legal change has happened in the laws of the different Common Law African countries where there has been successful SL since 1996. No single country still has the same exact legal position on LGB rights as they had before 1998. These changes are both positive and negative, with some countries having adopted very negative changes in the law, while others have embraced the positive. The country with the most positive changes is South Africa, which has made progress on almost every legal issue concerning LGB rights, while the one with least is Uganda, with more negative changes in the law than positive ones. Botswana and Kenya are making considerable positive progress. In terms of magnitude, some of the changes are drastic and revolutionary, while in other countries the changes are far slower. South Africa again leads in terms of drastic legal

<sup>4</sup> J Oloka-Onyango 'Human rights and public interest litigation in East Africa: A bird's eye view' (2015) 47 *The George Washington International Law Review* 763, 766.

<sup>5</sup> GN Rosenberg *Hollow hope: Can courts bring about social change?* (2008) 339-429, MJ Klarman *From Jim Crow to civil rights: The Supreme Court and the struggle for racial equality* (2006) 385, 441-442; and MJ Klarman (1994) "Brown, racial change, and the civil rights movement," 80 *Virginia Law Review* 7-150.

<sup>6</sup> SA Scheingold *The politics of rights: Lawyers, public policy, and political change* (1974) 131.

<sup>7</sup> M Galanter 'The radiating effects of courts' in K Boyum & L Mather (eds) *Empirical theories about courts* (1983) 117, 125-26.

<sup>8</sup> GL Priest 'Measuring legal change' (1987) 3:2 *Journal of Law, Economics, & Organization* 193, 203.

change while the other countries are experiencing slower change. All the changes in status will be discussed with regard to: same-sex marriages; criminalisation of consensual same-sex relations; age of consent to same-sex relations; recognition of gay persons as suitable to adopt children; LGB persons in employment; protections against discrimination in civil society activities; LGB persons donating blood; non-discrimination in access to health services; non-discrimination in access to justice and treatment of LGB immigrants.

*a) Same-sex marriages*

Marriage is a very important institution from which emanates a number of rights and obligations, including the right to maintenance, succession, joint adoption of children and post-divorce rights.<sup>9</sup> However, the traditional Common Law understanding of marriage regards it as a union between a man and a woman, and this therefore excludes same-sex couples from all the accruing benefits. This is 'not a small and tangential inconvenience,'<sup>10</sup> but rather an important matter that greatly affects the social status and lives of those excluded.

By 1998, no single country among the selected African Common Law countries recognised same-sex marriages, whether officiated within the country or solemnised elsewhere.<sup>11</sup> The formal marriage laws in all these countries only recognised marriages between persons of opposite sexes,<sup>12</sup> and regarded marriages between persons of the same-sex as invalid. By the end of August 2018, some changes in respect of this status had happened in all the countries. On one extreme, exemplified by South Africa, same-sex marriages had become legalised while at the other extreme, exemplified by Uganda, same-sex marriages had been specifically prohibited in the Constitution. Kenya, also expressly limited marriage to men and women. It is only Botswana that has had no wide sweeping changes in this regard.

In South Africa, before the 1996 Constitution, section 30(1) of the Marriage Act, 1961<sup>13</sup> contained the marriage formula, which referred to husband and wife, and which was in line with the Common Law definition of marriage that regarded marriage as a union of one man

<sup>9</sup> See P de Vos and J Barnard 'Same-sex marriage, civil unions and domestic partnerships in South Africa: critical reflections on an ongoing saga' (2007) 124 *South African Law Journal* 795, 804.

<sup>10</sup> Per Sachs J in the South African case of *Minister of Home Affairs and Another v Fourie and Another; and Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* 2005 ZACC 19 paras 552G-553C. (*Fourie* case), para 71.

<sup>11</sup> This is with the exception of customary marriages, some of which were woman to woman marriages and were recognized, but not by the courts. See discussion on woman to woman marriages in Kenya below.

<sup>12</sup> Customary marriage laws were subtler with some customs in countries like Kenya allowing woman to woman marriages, but without this ever receiving official recognition.

<sup>13</sup> No. 25 of 1961

with one woman, to the exclusion of others, while it lasts.<sup>14</sup> This formula and the Common Law definition thus expressly excluded same-sex couples. This position of the law was found to be unconstitutional in the *Fourie* case as it discriminated against same-sex couples, thus violating the prohibition of discrimination based on sexual orientation in section 9 of the Constitution.<sup>15</sup> However, the Constitutional Court suspended its declaration of invalidity for 12 months to give the legislature time to come up with legislation to redress the inconsistency. The legislature did so and the Civil Unions Act,<sup>16</sup> which allowed same-sex persons to marry in all but name, was passed.<sup>17</sup> It in effect introduced two systems where one could either contract a marriage under the Marriage Act, which is still heterosexual, or contract a civil union, which accommodates both opposite sex and same-sex couples.<sup>18</sup>

Some scholars have criticised the law for not according marriage to same-sex couples and for allowing marriage officers to conscientiously object to officiating civil partnerships while this is not allowed for heterosexual marriages, implying that heterosexual marriages are 'superior' to civil partnerships.<sup>19</sup> The Act therefore makes provision for discrimination against homosexual couples. Despite the criticism, this was a huge and revolutionary change, moving from no same-sex marriages to recognition that same-sex persons could enter into permanent relationships with all the rights and obligations that accrue from a marriage. These partnerships have been formally recognised in laws that provided for married persons including section 1(vii)(b) of the Domestic Violence Act 1998,<sup>20</sup> which defines a domestic relationship to include a same-sex relationship in which the parties live in a way that is akin to marriage, and therefore covers domestic violence in such relationships; and section 1 of the Revenue Laws Amendment Act 2000,<sup>21</sup> which amends section 1 of the Estate Duty Act 1955,<sup>22</sup> by inserting a new definition of 'spouse' to include persons who are in a permanent same-sex relationship.

<sup>14</sup> See JD Sinclair & J Heaton) *The law of marriage* (1996) 311-312.

<sup>15</sup> *Fourie* case, n 10 above.

<sup>16</sup> Act No. 17 of 2006.

<sup>17</sup> The civil union at least formally embodies all the positive and negative aspects of marriage. See De Vos & Barnard (n 9 above) 820.

<sup>18</sup> See the judgment of Binns-Ward J in *KOS and Others v Minister of Home Affairs and Others*, Case number: 2298/2017 (High Court, Western Cape Division, Cape Town) 6 September 2017. Also see De Vos & Barnard (n 9 above) 795.

<sup>19</sup> De Vos & Barnard (n 9 above) 821-824. Skype interview with Prof David Bilchitz, LGBT activist and director of the Southern African Institute for Advanced Constitutional, Human Rights, Public and International Law, University of Johannesburg, 10 July 2018.

<sup>20</sup> Act No. 116 of 1998.

<sup>21</sup> Act No. 50 of 2000.

<sup>22</sup> Act No. 45 of 1955.

On the other extreme end, Uganda amended its Constitution in 2005 to specifically prohibit same-sex marriage,<sup>23</sup> which, coincidentally or intentionally, came shortly before the South African Constitutional Court's decision legalising the same in the *Fourie* case.<sup>24</sup> This amendment, which was part of an omnibus bill brought, among other things, to lift presidential term limits, did not receive much attention and was also passed in a way that did not reflect all people's views and opinions as these were not sought.<sup>25</sup> Mujuzi comprehensively discusses the process of passing this amendment and demonstrates that this was a way of completing the task begun in 1994 when the Constituent Assembly (CA) first debated the marriage clause of what would become the Constitution of the Republic of Uganda 1995. At that time the idea of same-sex marriages was 'laughable' but nevertheless, it was made clear that there was a need to show that marriage was only between a man and a woman in order to prevent same-sex marriages. It also had to be made clear that, since agitations for LGB equality had crept up, there was need to have certainty once and for all.<sup>26</sup> As a corollary, Uganda does not recognise same-sex marriages contracted elsewhere.<sup>27</sup>

Although less specific than Uganda, the Constitution of the Republic of Kenya, 2010 (2010 Constitution) impliedly denied the right to marry to same-sex couples by limiting marriages to persons of the opposite sex.<sup>28</sup> This was a new development, as before there was actually no explicit right to marry in the Constitution of the Republic of Kenya 1963 (the 1963 Constitution). Marriage was provided for under different laws, *viz.*, the Marriage Act Cap 150; the African Christian Marriage and Divorce Act Cap 151; the Matrimonial Causes Act Cap 152; the Subordinate Court (Separation and Maintenance) Act Cap 153; the Mohammedan Marriage and Divorce Registration Act Cap 155; the Mohammedan Marriage

<sup>23</sup> This was in section 10(b) of the Constitutional Amendment Act (No.2) 21 of 2005, which introduced article 31(2a) of the Constitution, which provides that 'Marriage between persons of the same sex is prohibited'.

<sup>24</sup> n 10 above. This indicates that fears of same-sex marriages being legalised through constitutional challenges partly led to this amendment. However, Mujuzi shows that the intentions to amend the provision came from the government itself, were endorsed by the Constitutional Review Commission, then once again the government, then parliament. The process started in 2002 with the mandate being given to the Constitutional Review Commission. See JD Mujuzi 'The absolute prohibition of same-sex marriages in Uganda' (2009) 23 *International Journal of Law, Policy and the Family* 278, 282-283. Nevertheless, the influence of the *Fourie* case cannot be ruled out as it was going on around the same time that the amendment was adopted. The case was filed in the High Court in 2012 and, although initially dismissed, (*Fourie and Another v Minister van Binnelandse Sake and Another (Lesbian and Gay Equality Project as Amicus Curiae)* (17280/02) [2002] ZAGPHC 1 (18 October 2002)), succeeded on appeal to the Supreme Court of Appeal (*Fourie and Another v Minister of Home Affairs and Another* (232/2003) [2004] ZASCA 132 (30 November 2004)) and was referred to the Constitutional Court for confirmation.

<sup>25</sup> This issue was not among the issues formally raised for the Constitutional Review Commission to seek people's views on. Government adopted it as one of its decisions, and then sent it on to parliament, which also adopted it. See Mujuzi (n 24 above) 282-285.

<sup>26</sup> Mujuzi (n 24 above) 280-285

<sup>27</sup> Mujuzi (n 24 above) 284.

<sup>28</sup> Article 45(2).

Divorce and Succession Act Cap 156; and the Hindu Marriage and Divorce Act Cap 157. None of these laws, however, specifically limited it to persons of the opposite sex except for the marriage formula in Section 29(2) of the Marriage Act, which referred to 'man and wife,' and the Common Law understanding of marriage as a union of one man with one woman, to the exclusion of others, while it lasts. Strictly speaking therefore, one would regard the Kenyan law before 2010 as allowing for different forms of marriage in accordance with the customs and rites of the different communities. As such, marriages between persons of the same sex could be recognised as valid if contracted in accordance with the rites and customs of the community in question. This matter came before the courts in the case of *The Matter of the Estate of Cherotich Kimong'onny Kibsera* (Deceased),<sup>29</sup> which involved an alleged woman to woman marriage in accordance with Nandi customs. According to the Nandi, a childless woman could marry another woman for purposes of bearing her children who would be her heirs.<sup>30</sup> The High Court of Kenya recognised such a marriage and the wife was thus able to secure letters of administration to the estate of the deceased, and her children could inherit the deceased's estate. This to all intents is a marriage, giving rise to all obligations.

However, with the coming into force of the 2010 Constitution, and of the Marriage Act 2014, the question as to whether woman-to-woman marriages would still be recognised is more open. Discussions have been held about same-sex marriages and some scholars opine that the 2010 Constitution allows same-sex marriages as it provides for the right to equality for everyone.<sup>31</sup> The Marriage Act, 2014<sup>32</sup> which repeals all the other marriage laws including the Marriage Act Cap 150 and consolidates them into one law, only provides for marriages between persons of the opposite sex.<sup>33</sup> Whereas the Act continues to recognise customary marriages contracted under the customs of the community in question, the overarching nature of the definition of a marriage in section 3 and of article 45(2) of the Constitution now throws into question the legality of woman-to-woman marriages, which are common among the Nandi and other Kenyan communities. However, despite the new constitutional framing, the courts still continue to recognise woman-to-woman marriages.<sup>34</sup> This may not

<sup>29</sup> Succession Cause No. 212 of 2010 (High Court, Kenya, 2011).

<sup>30</sup> See for example S Oboler 'Is the female husband a man? Woman/woman marriage among the Nandi of Kenya' (1980) *Ethnology Journal* 69.

<sup>31</sup> See for example 'Why Kenya's new Constitution protects gays' *Daily Nation* 11 December, 2010.

<sup>32</sup> No. 4 of 2014, Laws of Kenya, Revised Edition 2016.

<sup>33</sup> Section 3(1) of the Marriage Act, 4 of 2014 defines marriage as 'the voluntary union of a man and a woman...'

<sup>34</sup> See for example 'Wife wins 10-year battle to bury her female 'husband'' Standard Digital 4 August 2018 <https://www.standardmedia.co.ke/article/2001290676/wife-wins-10-year-battle-to-bury-her-female-husband> (accessed 26 August 2018).

be contradictory to the Constitution, as it should be understood that the traditional understanding of woman-to-woman marriages was not as sexualised as the current understanding of same-sex marriages. For example among the Nandi, the marriages were intended to secure for an older barren woman a male heir to inherit her property, as the children that the female wife would have would belong to the female husband.<sup>35</sup> Cardigan discusses the importance of such marriages and why the different parties engage in them, and they all rotate around property and succession, and women negotiating patriarchy.<sup>36</sup> Oboler states emphatically that the marriages do not actually involve sexual intercourse.<sup>37</sup> According to Amadiume, the women would actually find the assertion that these were lesbian relations to be offensive, and decries some western academics' approach of viewing such relationships through westernised sexualised lenses.<sup>38</sup>

Botswana's marriage laws have remained largely the same since independence in 1966. The Constitution does not provide for the right to marry. The Marriage Act 1970,<sup>39</sup> which was repealed by the Marriage Act 2001, did not define marriage. The only change in the marriage laws so far came in the Marriage Act 2001, but the law does not define marriage, only making it clear through the marriage formula in section 10 that marriage is between persons of the opposite sex as it refers to 'bride' and 'bridegroom'. The Court of Appeal in the case of *Kanane v The State* (The *Kanane* case)<sup>40</sup> discussed same-sex relationships at length and concluded that they were not protected within the Constitution. The Court also concluded that 'gay men and women do not represent a group or class which at this stage has been shown to require protection under the Constitution.' The Court therefore left it open that perhaps in future, protection would extend to this group. Indeed, the Court of Appeal has extended protection to LGB groups, as far as the registration of organisations working on LGB issues is concerned.<sup>41</sup> No case has so far been brought to the courts on same-sex marriage, and neither had a law been put in place on same-sex marriages by the end of 2017.

<sup>35</sup> Oboler n 30 above, 69.

<sup>36</sup> Also see RJ Cadigan 'Woman-to-woman marriage: Practices and benefits in Sub-Saharan Africa' (1998) *Journal of Comparative Family Studies* 94.

<sup>37</sup> Above, 69.

<sup>38</sup> For a more detailed discussion of this position see I Amadiume, *Male Daughters, Female Husbands: Gender and Sex in an African Society* 1987, 7.

<sup>39</sup> The Marriage Act Cap 29:01

<sup>40</sup> [2003] 2 BLR 67 (CA). For a complete discussion of how the decision dealt with this issue, see generally EK Quansah 'Same-sex relationships in Botswana: Current perspectives and future prospects' (2004) 4 *African Human Rights Law Journal* 201-217.

<sup>41</sup> *Attorney General v Thuto Rammoge & 19 Others* (2014) CACGB-128-14 (CA) (*LEGABIBO Registration* case).



*b) Criminalisation of consensual same-sex relations*

Before 1998, all the selected African Common Law countries criminalised consensual same-sex relations. However, by August 2018, South Africa had already decriminalised consensual same-sex relations, Botswana had had an unsuccessful case and there were two pending cases on the same issue in Kenya. Only Uganda had no such case going on by the end of August 2018 and had instead further criminalised consensual same-sex relations via the Anti-Homosexuality Act, although this was later reversed.<sup>42</sup> The criminalisation of consensual same-sex relations, even when the laws are not implemented, is the ultimate signification that homosexuals are ‘unapprehended felons’<sup>43</sup> and unwanted persons in society, who ought to be gotten rid of.<sup>44</sup>

For South Africa, same-sex acts between men in public were criminalised with a punishment of up to 7 years in prison under section 20A of the Sexual Offences Act, 1957<sup>45</sup> as well as the common law offence of commission of an unnatural sexual act. It was also included in the schedule to the Criminal Procedure Act, 1977<sup>46</sup> and the Security Officers Act, 1987.<sup>47</sup> These provisions were enforced through the police raiding places where persons suspected of engaging in same-sex relations were present, mainly if they were white.<sup>48</sup> One outstanding example occurred in 1966 when the police raided a gay party in Forest Town and arrested the white persons in attendance.<sup>49</sup> This created a moral panic that led to the eventual passing of the Immorality Amendment Act, 1969<sup>50</sup> which introduced section 20A of the Sexual

<sup>42</sup> This was in the case of *Prof J Oloka Onyango & 9 others v Attorney General*, Constitutional Petition No 8 of 2018 (The AHA case).

<sup>43</sup> This term was popularised by, among others, Richard D. Mohr, who discussed the ill-treatment of LGB persons by the law in the US. See RD Mohr *Gays/justice: A study of ethics, society, and law* (1988).

<sup>44</sup> See the discussion of the effects of criminalisation by the South African Constitutional Court in *The National Coalition for Gay and Lesbian Equality v the Minister of Justice* 1999 1 SA 6 (CC), by Ackermann J in para 28, and Sachs J in para 128. Also see DM Kahan ‘The secret ambition of deterrence’ 113 (1999) *Harvard Law Review* 413, 421 on how sodomy laws express ‘contempt’ for LGB persons, even when unenforced.

<sup>45</sup> Act 23 of 1957. This provision was introduced through the Immorality Amendment Act, 1969 (Act No. 57 of 1969). It also prohibited sex toys and changed the age of consent to same-sex acts from 14 to 19.

<sup>46</sup> Act 51 of 1977. This implied that within the terms of the Criminal Procedure Act, persons suspected of committing the offence of sodomy could be arrested at any time by anyone with or without a warrant; be subjected to taking of their fingerprints, palm prints or footprints once served with summons; allow the killing of such suspect if they tried to flee and there were no other ways of apprehending them; be denied bail basing on the ‘disposition to commit sodomy’; have witnesses against such a person protected; have their communications intercepted and disqualifying them or their surviving dependents from getting a pension in case of a conviction for sodomy.

<sup>47</sup> Act 92 of 1987. This implied that any person convicted of sodomy could not be registered as a security officer; could have his/her registration withdrawn; or be found guilty of improper conduct.

<sup>48</sup> Homosexuality among black people, particularly those in the mines, had largely been accepted as being crucial to the proper running of the mines. See for example, TD Moodie et al ‘Migrancy and male sexuality on the South African goldmines’ (1988) *Journal of Southern African Studies*.

<sup>49</sup> M Gevisser ‘A different fight for freedom: a history of South African lesbian and gay organisation from the 1950s to the 1990s’ in M Gevisser and E Cameron (eds), *Defiant desire: Gay and lesbian lives in South Africa* (1994) 30.

<sup>50</sup> Act No. 57 of 1969.

Offences Act 1957,<sup>51</sup> and also prohibited sex toys and changed the age of consent to same-sex acts from 14 to 19. This criminalisation led to LGB persons being regarded as less important than heterosexuals and largely subjected them to humiliating treatment at the hands of law enforcement officials.<sup>52</sup>

The change came in 1998, when the Constitutional Court declared unconstitutional all laws criminalising consensual same-sex relations.<sup>53</sup> In *National Coalition for Gay and Lesbian Equality v the Minister of Justice (Sodomy case)*.<sup>54</sup> The legislature later adopted the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007,<sup>55</sup> which made rape gender neutral<sup>56</sup> and protected all children, male and female, from sexual exploitation by persons of any sex.<sup>57</sup>

All the other countries considered in this study still criminalise consensual same-sex relations, the same way it was before 1998, with some minor modifications from country to country. In Botswana, section 164 of the Penal Code criminalises ‘carnal knowledge against the order of nature’, section 167 criminalises ‘committing indecent practices between males’ and section 165 criminalises attempts to commit unnatural offences. These provisions were rarely used to arrest LGB persons. The provisions on carnal knowledge against the order of nature were challenged in the *Kanane* case,<sup>58</sup> and found to be constitutional. In 1998, the state carried out a law reform process, which was aimed at making the offences in the Penal Code gender neutral.<sup>59</sup> In this process, the laws criminalising consensual same-sex acts were extended the criminalisation to same-sex acts among women.<sup>60</sup> The state supported the amendment, arguing that the provisions were originally discriminatory on the basis of gender.<sup>61</sup> The criminal laws were once again contested before the courts in the case of *LM v Attorney General*,<sup>62</sup> which challenges the constitutionality of section 164(a) and (c) of the

<sup>51</sup> n 45 above.

<sup>52</sup> For a detailed discussion of the effect of this, see E Cameron ‘Unapprehended felons: Gays and lesbians and the law in South Africa’ in Gevisser & Cameron (n 49 above) 89.

<sup>53</sup> n 46 above.

<sup>54</sup> *National Coalition for Gay and Lesbian Equality v the Minister of Justice* 1999 1 SA 6 (CC) (The *Sodomy* case).  
<sup>55</sup> Act No. 32 of 2007.

<sup>56</sup> Above, section 3 and 4.

<sup>57</sup> Above, section 15 and 16.

<sup>58</sup> n 40 above.

<sup>59</sup> Penal Code (Amendment) Act, 5 of 1998 (Botswana).

<sup>60</sup> For example section 164(c) originally only punished permitting a male person to have carnal knowledge of oneself against the order of nature, now applied to ‘any person’.

<sup>61</sup> See A Jjuuko & M Tabengwa ‘Expanded criminalisation of consensual same-sex relations in Africa: Contextualizing the recent developments’ (Accepted for Publication in N Nicol et al ‘*Envisioning global LGBT human rights: (Neo)colonialism, neoliberalism, resistance and hope*’ 2018 (upcoming)).

<sup>62</sup> *LM v Attorney General*, MAHGB- 000591-61.

Penal Code. The case was still pending determination by August 2018. By and large, Botswana does not enforce the criminal laws, with few arrests of LGB persons reported in the country, and the last reported one happening in 1994.<sup>63</sup> There has also been no prosecution since the *Kanane* case.<sup>64</sup> This, however, does not mean that no arrests occur, as some people may be taken to traditional courts and arrests may go unreported, especially where the arrestees are released without charge.<sup>65</sup> The greatest impact of the criminal laws lies in the exclusion of LGB persons from protection by the law.<sup>66</sup>

Kenya continues to criminalise consensual same-sex relations just as was the case before 1998. Section 162(a) of the Penal Code Act, 1948<sup>67</sup> criminalises ‘carnal knowledge against the order of nature’, while section 162(c) criminalises someone permitting a male person to have carnal knowledge of him or her against the order of nature. Section 163 criminalises attempts to commit carnal knowledge against the order of nature, while section 165 criminalises indecent practices between males. Two cases have been brought to challenge these provisions, the first being *Eric Gitari v Attorney General*,<sup>68</sup> *John Mathenge & Others v Attorney General*,<sup>69</sup> which also challenged section 162(a) and (c) as well as section 165 of the Penal Code. Beyond the existence of the laws making every gay Kenyan an unapprehended felon, Kenya actually enforces these laws with arrests reported as recently as January 2018 when a catholic priest was arrested for allegedly ‘sodomising’ an 18 year old man.<sup>70</sup> Also, several convictions have been recorded under this provision.<sup>71</sup> The arrests also occasion violations of, among others, the rights to privacy and dignity of persons, as they are usually arbitrary and the police usually conduct anal examinations to find evidence of same-sex

<sup>63</sup> Human Rights Watch ‘More than a name: State-Sponsored Homophobia and Its Consequences in Southern Africa’ (2002) 87 <https://www.hrw.org/report/2002/12/31/more-name/state-sponsored-homophobia-and-its-consequences-southern-africa> (accessed 24 April 2018).

<sup>64</sup> See M Tabengwa & N Nicol ‘The development of sexual rights and the LGBT movement in Botswana’ in C Lennox & M Waites (eds.) *Human rights, sexual orientation and gender identity in the commonwealth: Struggles for decriminalisation and change* (2013) 339, 347.

<sup>65</sup> Above.

<sup>66</sup> Botswana’s laws only specifically protect LGB persons from discrimination in employment, section 23(d) of the Employment (Amendment) Act, 2010, No. 10 of 2010.

<sup>67</sup> No. 81 of 1948, Cap 63 Revised Edition 2014.

<sup>68</sup> Petition 150 of 2016 (High Court of Kenya).

<sup>69</sup> Petition No. 234 of 2016 (High Court of Kenya).

<sup>70</sup> ‘Police: Kenyan Catholic priest arrested for sodomy’ News24.com <https://www.news24.com/Africa/News/police-kenyan-catholic-priest-arrested-for-sodomy-20180116> (accessed 25 March 2018).

<sup>71</sup> For example in *Francis Odingi v Republic* (2006) 2011 eKLR (C.A. Nakuru), where conviction of a man and a sentence of six years imprisonment for having had carnal knowledge of another person against the order of nature were upheld.

conduct. Such examinations have now been ruled unconstitutional by the Court of Appeal.<sup>72</sup> Nevertheless, the police continue to arrest people and charge them under different provisions of the law, and subject individuals to blackmail.<sup>73</sup> LGB persons are also subjected to discriminatory treatment, which is justified by the criminalisation.<sup>74</sup>

In Uganda, section 145(a) of the Penal Code Act<sup>75</sup> criminalises carnal knowledge against the order of nature while section 145(c) criminalises ‘permitting a male person to have carnal knowledge of someone.’ These carry a punishment of life imprisonment. Section 146 criminalises attempts to commit carnal knowledge against the order of nature, while section 148 criminalises indecent practices among males, which are both punishable by seven years’ imprisonment. The punishments were enhanced at the height of the HIV/AIDS scourge with the punishment for ‘carnal knowledge against the order of nature’ being increased from fourteen years’ to life imprisonment.<sup>76</sup> The High Court had earlier stated in passing that section 145 only criminalised particular acts and not the whole status of being gay.<sup>77</sup> Later however, another judge held that the Penal Code provision did not only apply to those who commit the offence, but also to those who aid and abet the commission of the offence, including those who organise workshops on safe sex for LGBT persons and skills training.<sup>78</sup>

The real change that happened in the past 20 years was the further-criminalisation of same-sex relations through the Anti-Homosexuality Act, 2014, which created the new offence of ‘homosexuality.’ The offence extended the definition beyond the ‘carnal knowledge against the order of nature’ framing in the Penal Code to a stand-alone offence that was so wide as to include touching with the intent to commit homosexuality.<sup>79</sup> It also created the offence of aggravated homosexuality, which referred to the offence of ‘homosexuality’ committed in circumstances where there was an aggravating factor, such as where the accused was a ‘serial offender’, or where the ‘victim’ had a disability, or the offender was HIV positive. In the first version of the Bill, this was punishable by death but later it changed to life

<sup>72</sup> *COL & GMN v Resident Magistrate Kwale Court, DCIO Msabweni Police Station, Coast Provincial General Hospital, Director of Public Prosecutions, and Cabinet Secretary Ministry of Health Civil Appeal 56 of 2016* (decided 22 March 2018).

<sup>73</sup> UHAI-EASHRI *Lived realities, imagined futures: Baseline study on LGBTI organizing in Kenya* (2011) 25. [www.uhai-eashri.org/ENG/resources?download=6:uhai-lived-realities-imagined-futures](http://www.uhai-eashri.org/ENG/resources?download=6:uhai-lived-realities-imagined-futures) (accessed 15 April 2018)

<sup>74</sup> Above at 4-6.

<sup>75</sup> Cap 120 (1950).

<sup>76</sup> Penal Code Amendment Act, 1990.

<sup>77</sup> *Kasha Jacqueline Nabagesera, David Kato Kisuule & Pepe Julian Onziema v The Rolling Stone Newspaper* Miscellaneous Cause No. 163 of 2010 ( *Rolling Stone* case).

<sup>78</sup> *Kasha Jacqueline Nabagesera & 3 Others v The Attorney General and Hon. Rev. Fr. Simon Lokodo* High Court Miscellaneous Cause No. 33 of 2012 (*Lokodo* case).

<sup>79</sup> Anti-Homosexuality Act 2014, section 2.

imprisonment.<sup>80</sup> The Act also provided for the protection of ‘victims’ by making ‘victims’ of homosexuality immune to prosecution for crimes committed while involved in or defending themselves against homosexuality.<sup>81</sup> It classified houses or rooms occupied by homosexuals as brothels.<sup>82</sup> It also criminalised ‘aiding and abetting’,<sup>83</sup> and the promotion of homosexuality,<sup>84</sup> and these covered a broad range of acts, which basically meant that any support for LGB rights would be criminal. The Act was in force between 10 March 2014 and 1 August 2014, when the Constitutional Court declared it unconstitutional, on the basis that it was passed without following the constitutionally mandated procedure.<sup>85</sup> Therefore, in a period of five months, Uganda moved from a country that criminalised only ‘carnal knowledge against the order of nature’ to one that criminalised the whole aspect of being homosexual, as well as any actions done to support LGB persons, and back to a country that only criminalised carnal knowledge against the order of nature. For now, the Penal Code provisions remain the only laws expressly criminalising consensual same-sex acts in Uganda. However, provisions on being idle and disorderly, and being rogue and vagabond, which are in section 167 and 168 of the Penal Code respectively, are often used to charge LGB persons who have been arrested in circumstances under which it would be difficult to charge them with ‘carnal knowledge against the order of nature’. These provisions are so broad they can cover any conduct/set of circumstances, since it is largely left to the discretion of the arresting officer to determine what amounts to suspicious or otherwise disorderly conduct.<sup>86</sup>

The criminal provisions not only make all LGB persons in Uganda unapprehended felons, they are also actively enforced - perhaps more so than any other of the countries covered in this study. In the year 2016, there were 31 documented arbitrary arrests of lesbian, gay, bisexual and transgender (LGBT) persons in Uganda.<sup>87</sup> Usually, those persons are charged with carnal knowledge against the order of nature, and some are charged with ‘being a rogue and vagabond.’<sup>88</sup> Those charged with ‘carnal knowledge against the order of nature’ are usually subjected to anal examinations, even when the conduct they are suspected of

<sup>80</sup> Above, section 3.

<sup>81</sup> Section 5.

<sup>82</sup> Section 12.

<sup>83</sup> Section 7.

<sup>84</sup> Section 13.

<sup>85</sup> *AHA* case, n 42 above.

<sup>86</sup> For details on how these provisions are used against LGBT persons in Uganda, see generally Human Rights Awareness and Promotion Forum ‘The implications of the enforcement of ‘idle and disorderly’ laws on the human rights of marginalised persons in Uganda’ (2016).

<sup>87</sup> Human rights Awareness and Promotion Forum & Consortium on Monitoring Violations Based on Sex Determination, Gender Identity and Sexual Orientation ‘LGBT violations report 2016’ (2017) 29.

<sup>88</sup> Above.

happened years ago, among other violations.<sup>89</sup> In 2016, there was only one person reported to have been subjected to anal examinations, but in 2015, there were five such cases.<sup>90</sup> A magistrate's court in 2015 condemned the subjection of persons to anal examinations in cases of consensual same-sex relations years after the alleged illegal activity had taken place because, reasonably, it cannot be expected to find any relevant evidence after such a long period of time.<sup>91</sup>

The existence of the laws in Uganda has also been used as a justification for denial of all other rights, including as a justification for refusal to register organisations, as was seen with the refusal to register Sexual Minorities Uganda (SMUG), which was unsuccessfully challenged in the case of *Frank Mugisha, Dennis Wamala & Ssenfuka Warry Joanita v Uganda Registration Services Bureau (URSB) (SMUG Registration case)*.<sup>92</sup> The laws have also been used to block LGB activities, and over eight such events have been stopped in the last ten years. The first one was on 18 June 2012, when a skills training workshop for LGBTI human rights defenders organised by the East and Horn of Africa Human Rights Defenders Project (EHAHRDP) was raided by the police on the orders of the Minister of Ethics and Integrity, Hon. Simon Lokodo, and some the participants were briefly detained.<sup>93</sup> In August 2012, 'The River and the Mountain', a play by British playwright Beau Hopkins portraying a struggle to come to terms with one's homosexuality, was not shown at the National Theatre as scheduled. The theatre rescinded the contract and claimed to have been instructed not to show the play by the Media Council, which is the regulatory authority for media in the country.<sup>94</sup> Later, the play was shown at two locations, but its producer, David Cecil, was arrested, charged,<sup>95</sup> and deported.<sup>96</sup> On 7<sup>th</sup> November 2012, a plain clothed person who did

<sup>89</sup> Violations that occurred in one case are being challenged before the Uganda Human Rights Commission in the case of *Mukasa Jackson & Mukasa Kim v Attorney General*, UHRC No. CTR/24 of 2016 which challenges illegal detention by the Police for more than two weeks and abuses of the right to liberty, and the right to freedom from inhuman and degrading treatment, including anal examinations and forced HIV tests.

<sup>90</sup> The Consortium on Monitoring Violations Based on Sex Determination, Gender Identity and Sexual Orientation 'LGBT violations report 2015' Human Rights Awareness and Promotion Forum (HRAPF) (2016) 37.

<sup>91</sup> *Uganda v Christopher Mubiru Kisingiri* Criminal Case No 0005/2014 (Buganda Road Chief Magistrates Court).

<sup>92</sup> Miscellaneous Cause No. 96 of 2016.

<sup>93</sup> East and Horn of Africa Human Rights Defenders Project (EHAHRDP) 'Space for civil society shrinking in Uganda, say national and global CSOs' [https://www.defenddefenders.org/press\\_release/space-for-civil-society-shrinking-in-uganda-say-national-and-global-csos/](https://www.defenddefenders.org/press_release/space-for-civil-society-shrinking-in-uganda-say-national-and-global-csos/) (accessed 31 August 2018).

<sup>94</sup> See 'Play about homosexuality cancelled in Uganda after regulators step in' *The Guardian* 29 August 2012 <https://www.theguardian.com/world/2012/aug/29/play-homosexuality-cancelled-uganda-regulators> (accessed 4 February 2018).

<sup>95</sup> See 'British producer arrested over play about gay man' *Daily Monitor* 13 September 2012 <http://www.monitor.co.ug/News/National/British-producer-arrested-over-play-about-gay-man/688334-1506468-y5rdciz/index.html> (accessed 4 February 2018).

<sup>96</sup> 'Uganda 'deports' David Cecil, producer of gay play' 12 February 2013 <http://www.bbc.com/news/world-africa-21423496> (accessed 4 February 2018).



not identify himself ordered an album launch by the Talented Ugandan Kuchus (TUK), a group of LGB youth, to be stopped at the National Theatre an hour after it had started.<sup>97</sup> On 14 February 2012, Hon. Lokodo personally stopped a capacity building workshop organised by Freedom and Roam Uganda (FARUG), an organisation working on issues of Lesbian, Bisexual and Queer women, calling it illegal as it was contrary to the laws of Uganda.<sup>98</sup> On 4 August 2016, the police raided the Mr, Ms and Mx Beauty Pageant organised as part of the 2016 Pride festivals, and arrested 16 of the revellers, including the organisers. The Police later claimed that the event had been held in violation of the Public Order Management Act, 2013 since the organisers had no police permission to hold it.<sup>99</sup> These violations were later challenged in *Shawn Mugisha and 6 Others v Attorney General and the District Police Commander (DPC), Kabalagala Police Station*.<sup>100</sup> On 6 August 2016, the scheduled Pride parade for the year 2016 was not held as the Minister threatened to mobilise the public and the police to forcefully stop the event. Later, on 8 August 2016, the Minister issued a statement titled 'Government position on the activities of lesbian, gay, bisexuals & transgender persons in Uganda,' in which he stopped such events, regarding them as promotion of homosexuality, which would not be tolerated.<sup>101</sup> On 16 August 2017, the Minister directed the Sheraton Hotel in Kampala not to host the Pride 2017 gala.<sup>102</sup> On 8<sup>th</sup> December 2017, the Minister went to the offices of Chapter Four Uganda where additional celebrations for the Pride Gala were being held and threatened to close the event.<sup>103</sup> The situation was made worse when the High Court upheld the stopping of the FARUG event in the *Lokodo* case.<sup>104</sup> The Court extended the reach of section 145 of the Penal Code to cover organising events that reached out to LGB persons by holding that this amounted to incitement to commit a crime as well as conspiracy, which is criminalised under sections 21, 390 and 391 of the Penal Code Act. The laws also extend to media houses, which have been fined for hosting LGB persons. For

<sup>97</sup> See Global Forum on MSM 'Uganda: SMUG & TUK condemn police raid of talented Ugandan Kuchus album launch at the National Theatre in Kampala' <http://msmgf.org/uganda-smug-tuk-condemn-police-raid-of-talented-ugandan-kuchus-album-launch-at-the-national-theatre-in-kampala/#ixzz569dpyvI2> (accessed 2 February 2018).

<sup>98</sup> This is what led to the unsuccessful *Lokodo* case, n 75 above.

<sup>99</sup> See 'Polly Namaye speaks out on the Pride event' *Uganda Media Centre* 6 August 2016 <https://ugandamediacentreblog.wordpress.com/2016/08/06/polly-namaye-speaks-out-on-pride-event-as-per-the-provisions-of-the-public-management-act-such-an-event-would-require-that-the-organisers-notify-the-police/> (accessed 14 April 2018)

<sup>100</sup> CTR/06/2017 (Uganda Human Rights Commission).

<sup>101</sup> 'Government position on the activities of lesbians, gay, bi-sexuals & transgender in Uganda' 8 August 2016 <https://ugandamediacentreblog.wordpress.com/2016/08/08/government-position-on-the-activities-of-lesbians-gay-bi-sexuals-transgender-lgbt-in-uganda/> (accessed 14 April 2018).

<sup>102</sup> 'No gay promotion can be allowed': Uganda cancels pride events' 21 August 2017. <https://www.theguardian.com/global-development/2017/aug/21/no-gay-promotion-can-be-allowed-uganda-cancels-pride-events-lgbt> (accessed 14 April 2018).

<sup>103</sup> Interview with Nicholas Opiyo, 19 March 2018, Kampala.

<sup>104</sup> n 78 above.

example, in 2004, Radio Simba was fined for hosting LGB activists, as according to the Broadcasting Council this was a breach of the minimum broadcasting standards, as enshrined in section 8 of the Electronic Media Act,<sup>105</sup> which stops a broadcaster from, among others, publishing information which is contrary to public morality,<sup>106</sup> and is not compliant with existing law.<sup>107</sup> Radio presenter Gaetano Kaggwa of Capital FM also had his licence suspended by the Broadcasting Council when he hosted LGB activist Victor on his show in 2007.<sup>108</sup>

Therefore, far from decriminalising consensual same-sex relations, Uganda is extending the application of the current law, both through the courts, and through actions of government officials. This is a negative change.

*c) Ages of consent to same-sex relations*

Where consensual same-sex relations are not criminalised, there is usually a difference in the ages of consent, with homosexual sex requiring a higher age of consent than heterosexual sex. Among the selected countries, only South Africa did not criminalise same-sex relations in private and so had a different age of consent for same-sex relations, which was 19, and yet that for heterosexual relations was 16. This discrimination was contained in sections 14(1)(b) and 14(3)(b) of the Sexual Offences Act, 1957.<sup>109</sup> The provisions were found to be unconstitutional in *Geldenhuys v National Director of Public Prosecutions & Others*.<sup>110</sup> However, by then the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007,<sup>111</sup> which came into effect on 16 December 2007, had already repealed these provisions, and the decision only applied to those convictions obtained before the amendment came into force. For Botswana, Kenya and Uganda where consensual same-sex relations are criminalised, consent does not matter and therefore age of consent issues do not arise.

*d) Recognition of gay persons as suitable to adopt children*

LGB persons are usually not allowed to adopt children as a couple. This is because their relationships are not recognised in law, and they are usually not seen as 'fit and proper'

<sup>105</sup> The Electronic Media Act, Cap 104, schedule 1, a(i).

<sup>106</sup> See 'Simba Radio fined for homos' *The New Vision* 2 October 2004.

<sup>107</sup> n 106 above, Schedule 1, para a(v)

<sup>108</sup> See 'Gaetano suspended over homo talk show' *The New Vision* 17 August 17 2007.

<sup>109</sup> Sexual Offences Act 23 of 1957.

<sup>110</sup> 2009 5 BCLR 435 (CC).

<sup>111</sup> Act 32 of 2007.

persons to bring up children.<sup>112</sup> This is true even when one of them is the parent of the child. Before 1998, adoptions by LGB couples were largely unheard of in the selected Common Law African countries. Not much has changed from then, except of course for South Africa. The other countries' laws largely remain as they were 20 years ago.

For South Africa, the law initially did not allow adoptions by gay persons or joint adoption for persons in same-sex relationships. Sections 17(a), 17(c) and 20(1) of the Child Care Act, 1983<sup>113</sup> and section 1(2) of the Guardianship Act, 1993<sup>114</sup> only provided for the joint adoption and guardianship of children by married persons. This was declared unconstitutional in *Du Toit & Another v Minister of Welfare and Population Development & Others*,<sup>115</sup> and the Court read into the provisions words importing persons of the same-sex in a permanent relationship. The Child Care Act was later replaced by the Children's Act, 2005 which allows joint adoption by 'partners in a permanent domestic life-partnership'<sup>116</sup> as well as stepparent adoption by a 'permanent domestic life-partner' of the child's parent.<sup>117</sup> It also allows any person, including unmarried persons, to adopt a child, provided they are 'fit and proper' to be entrusted with parental responsibilities, they are willing to take on such responsibilities, are over 18 years and have been properly assessed by an adoption social worker.<sup>118</sup> Sexual orientation is therefore not an issue in adoption of children anymore in South Africa.

The other three countries studied do not provide for joint adoptions by same-sex couples, although the laws are vague about a single person who identifies as gay, lesbian or bisexual. For Botswana, the law only provides for joint adoption by married couples of the opposite sex.<sup>119</sup> It also requires that the court must be satisfied that such persons, including single persons, are, among others, 'fit and proper' to be entrusted with the child.<sup>120</sup> In the *Kanane* case,<sup>121</sup> the Court held that the criminalisation of same-sex relations was not unconstitutional

<sup>112</sup> The 'fit and proper person' test is used in almost all Common Law jurisdictions to determine whether a person is suitable to adopt a child, and it is based on subjective rather than objective grounds. Despite evidence showing that LGB persons can be 'fit and proper' persons to adopt and bring up a child just like anyone else, and that children brought up in same-sex families are no worse off than other children, homophobia and bias against LGB persons forces many courts to regard them as not being 'fit and proper' persons to adopt children. For a deeper discussion of this see E Haney-Caron and K Heilbrun 'Lesbian and gay parents and determination of child custody: The changing legal landscape and implications for policy and practice' (2014) 1:1 *Psychology of Sexual Orientation and Gender Diversity* 19.

<sup>113</sup> No. 74 of 1983.

<sup>114</sup> No. 192 of 1993.

<sup>115</sup> 2002 ZACC 20.

<sup>116</sup> Children's Act, 2005, section 231(1)(a)(ii).

<sup>117</sup> Above, section 231(1)(c).

<sup>118</sup> Section 231(2).

<sup>119</sup> Section 3 of the Adoption Act [Cap 28:01] Law of Botswana.

<sup>120</sup> Above, section 4(b).

<sup>121</sup> n 40 above.

as the majority of the Batswana supported the criminalisation on moral grounds. Despite the latter judgments which upheld the right to freedom of association despite the criminalization of same-sex relations,<sup>122</sup> the courts may still be inclined not to allow adoption of a child by a known homosexual. According to Sigweni, the law does not specifically rule out individual LGB persons from adopting a child.<sup>123</sup> Although this question has never come before the courts, the interpretation in the *Kanane* case<sup>124</sup> may make the court turn down such an application on grounds that such a person would not be 'fit and proper.' He points out that the requirement that a person cannot individually adopt a child of the same sex,<sup>125</sup> as well as the requirement that the adoptive parent should be at least 25 years older than a child who is 16 years or older, are based on the fear of sexual abuse.<sup>126</sup>

For Kenya, the law provides for both joint adoptions and individual adoptions. Adoptions are allowed where the applicants, or at least one of them in case of joint adoptions, is 25 years of age and above, and is at least 21 years older than the child but when he/she is not yet 65 years old; or is a relative or father or mother of the child.<sup>127</sup> The law, however, expressly prohibits adoptions where the applicant or one of the joint applicants is a 'homosexual,' and this is one of those instances where the law does not give the court any discretion.<sup>128</sup>

In Uganda, the Children Act 1996,<sup>129</sup> which regulates adoptions, has been in place since 1996. It allows both joint adoptions and individual adoptions, but joint adoptions are only available to 'spouses'. For both spouses jointly adopting and single persons adopting individually, the applicant/s must be 25 years of age and above, and at least twenty-one years older than the child;<sup>130</sup> and if it is an adoption by one of the spouses, the other must have consented.<sup>131</sup> It does not allow an individual to adopt a child of the opposite sex.<sup>132</sup> The law thus does not specifically prohibit but rather remains ambiguous about an openly gay, lesbian or bisexual person adopting a child. The courts are more likely however to find such

<sup>122</sup> *LEGABIBO Registration* case, n 41 above.

<sup>123</sup> See SF Sigweni 'Adoption laws and procedures of Botswana: Questioning their effectiveness and compliance with regional and international human rights standards' Masters Dissertation, School for Advanced Legal Studies, University of Cape Town, July 2014, 43.

<sup>124</sup> n 40 above.

<sup>125</sup> n 116 above, section 3(2).

<sup>126</sup> Sigweni, n 123 above.

<sup>127</sup> Children Act, No, 1 of 2010, Section 158(1).

<sup>128</sup> Above, section 158(3)(c).

<sup>129</sup> The Children Act, Cap 59, Statute 6 of 1996.

<sup>130</sup> Above, section 45(1)(i).

<sup>131</sup> Above, section 45(1)(ii).

<sup>132</sup> Above, section 45(1)(4).

persons not to be 'proper and fit' on the basis of the criminalisation of same-sex relations. Indeed, the adoption process in Uganda requires one to first appear before the National Alternative Care Panel at the Ministry of Gender, Labour and Social Development in order to be considered a fit and proper person to adopt.<sup>133</sup> This panel has already found an out lesbian, international award winning LGB rights activist, Jacqueline Kasha Nabagesera, not to be a fit and proper person to adopt a child based on her sexual orientation.<sup>134</sup>

*e) LGB persons in employment*

Employment is another area where LGB persons suffer discrimination. This discrimination has a direct impact on their livelihoods and the quality of lives they live. Before 1998, there was not much protection for LGB persons in employment. Twenty years later, only Botswana and South Africa expressly protect against discrimination in employment on grounds of sexual orientation. For Kenya and Uganda, the situation is still the way it was before 1998.

In South Africa, before 1998, the law did not provide for equality and non-discrimination. However, the Employment Equity Act<sup>135</sup> under section 6(1) now protects against discrimination in employment on the ground of sexual orientation, as does section 187(1)(f) of the Labour Relations Act<sup>136</sup> on unfair dismissals. The Constitutional Court held in *Satchwell v President of the Republic of South Africa and Another*, (the *Satchwell* case)<sup>137</sup> that sections of the Judges' Remuneration and Conditions of Employment Act, 47 of 2001, and regulations made thereunder, which only covered 'spouses' and excluded partners of judges in permanent same-sex relationships, were inconsistent with the Constitution. The Court read into the laws the words 'or partner in a permanent same-sex life partnership,' to be inserted after the word 'spouse'. This made the rules applicable to even judges who were in permanent same-sex relationships. In *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park*,<sup>138</sup> the Equality Court found that the complainant had been unfairly dismissed as the dismissal was based on his sexual orientation. In *Langemaat v Minister of Safety & Security &*

<sup>133</sup> The panel was established under the National Alternative Care Framework, 2012 and Action Plan, (2016/17-2020/21).

<sup>134</sup> See 'Ugandan activist's heartbreak as she's blocked from adopting because she's lesbian' 25 January 2015 <http://www.mambaonline.com/2017/01/25/ugandan-lgbt-activists-heartbreak-shes-denied-adoption/> (accessed 11 April 2018).

<sup>135</sup> Act No. 55 of 1998.

<sup>136</sup> Act No. 66 of 1995

<sup>137</sup> 2004 1 BCLR 1 (CC) (17 March 2003).

<sup>138</sup> ZAGPHC 269, ZAEQC 1; 30 ILJ 868.

*Others*,<sup>139</sup> the High Court held that a decision not to pay benefits to a deceased employee's same-sex partner on the basis that the South African Police Services' Regulations and rules defined dependents as legal spouses and children had to be revisited. The court held that the relationship between the partners in a permanent same-sex relationship created a legal duty to support each other. Other such schemes have thus all been made to include protections on the basis of sexual orientation.

For Botswana, this is in section 23(d) of the Employment (Amendment) Act, 2010,<sup>140</sup> which prohibits dismissals based on, among other grounds, one's sexual orientation.

Kenya and Uganda have no such specific protections. Both countries have a closed list of grounds upon which one cannot be discriminated against in employment, which include sex but not sexual orientation.<sup>141</sup>

*f) Protections against discrimination in civil society activities*

Another area where LGB persons are usually excluded by law from participation is in the area of civil society activities. Before 1998, all the countries had more restrictive civil society laws. These laws have changed over time.

In South Africa, before 1998, the Fund-raising Act, 1978<sup>142</sup> restricted organisations involved in political activism, including legal reform, from accessing government funding.<sup>143</sup> Organisations generally faced hostility, including those agitating for LGB rights.<sup>144</sup> The Final Constitution, 1996, however, includes the right to freedom of association, and this is a right that accrues to 'everyone'.<sup>145</sup> According to Currie & De Waal, this right protects organisations from undue state control, except perhaps for criminal associations and associations that directly threaten the constitutional order.<sup>146</sup> It is indeed these very same exceptions that were widely exaggerated during apartheid to curtail the work of

<sup>139</sup> (1998) 19 ILJ 240 (T).

<sup>140</sup> n 66 above.

<sup>141</sup> For Kenya this is in the Employment Act, 2007, section 5(3) while for Uganda, it is Employment Act, section 6(3).

<sup>142</sup> Act No. 107 of 1978.

<sup>143</sup> Above, Chapter I and III.

<sup>144</sup> E Emdon, W Mgoqi & R Rosenthal 'Report on the establishment, registration and administration of NGOs – The independent study into an enabling environment for NGOs' The Development Resources Centre (1995) 2.

<sup>145</sup> Constitution of the Republic of South Africa, 1996, section 18.

<sup>146</sup> I Currie & J De Waal *The Bill of Rights Handbook* (2005) 425.



organisations working on issues like LGB rights.<sup>147</sup> The Non-profit Organisations Act, 1998<sup>148</sup> was introduced in 1998 and it reformed the law, giving effect to the constitutional protection of the freedom of association. It was aimed at encouraging and supporting non-profit organisations 'in their contribution to meeting the diverse needs of the population.'<sup>149</sup> The approach was thus to consider them as partners in development rather than as enemies. The Act allows organisations to operate even without registration.<sup>150</sup> The Registrar may also refuse to register such an organisation but only if not satisfied that the application meets the requirements of registration which are provided for in section 12, and these do not include desirability of name or objectives.<sup>151</sup> This makes it possible for any organisation, including those working on LGB rights, to register and operate, or choose not to register and still operate. The Act also repeals Chapters I and III of the Fund-raising Act, 1978 which unduly limited the operational space for non-profit organisations.<sup>152</sup> The fact that consensual same-sex relations are not criminalised further serves to make it clear that organisations working on LGB rights are entitled to the right to freedom of association.<sup>153</sup>

Organisations in all the other countries still face a number of challenges, as their constitutions do not expressly protect against discrimination based on sexual orientation. However, in Botswana and Kenya, progress has been made through judicial declarations of equality, while Uganda has instead entrenched discrimination through a court decision.

In Botswana, the Constitution protects freedom of assembly and association, including belonging to different associations for the protection of their interests.<sup>154</sup> This right is however not unlimited, as provision is made for limitations under laws required in the interests of 'defence, public safety, public order, public morality or public health;' those for the protection of the rights and freedoms of others and those imposed upon public officials, provided these laws or actions done under them are reasonably justifiable in a democratic society.<sup>155</sup> The main law governing civic organisations is the Societies Act, 1972,<sup>156</sup> which is a

<sup>147</sup> Above, 420.

<sup>148</sup> Act No. 71 of 1998

<sup>149</sup> Above, section 2.

<sup>150</sup> Above, section 12(1). Also see Inyathelo - The South African Institute for Advancement 'A concise guide to The Nonprofit Organisations Act 71 of 1998' (2009) 4 [http://www.Inyathelo.Org.Za/Images/Publications/Non-Profit\\_Organisations\\_Act\\_71.Pdf](http://www.Inyathelo.Org.Za/Images/Publications/Non-Profit_Organisations_Act_71.Pdf) (accessed 11 April 2018).

<sup>151</sup> Section 13(3).

<sup>152</sup> Section 33.

<sup>153</sup> Currie & De Waal (n 146 above) 443.

<sup>154</sup> Botswana Constitution, section 13(1).

<sup>155</sup> Above, section 13(2).

<sup>156</sup> 18:01 (Botswana).

pre-1998 law, and which has not been amended post 1998. It requires every local organisation to apply for registration within 28 days of its formation.<sup>157</sup> The Registrar is given powers to refuse to register an organisation if, in his/her opinion, its objects are 'likely to be used for any unlawful purpose...'<sup>158</sup> or its constitution or rules 'are in any respect repugnant to or inconsistent with any written law,'<sup>159</sup> or the name is in his/her opinion 'repugnant to or inconsistent with any written law or otherwise undesirable'.<sup>160</sup> Section 7(2)(a) has in the post 1998 period been used by the Registrar to deny registration to the main LGB organisation in Botswana, Lesbians, Gays and Bisexuals of Botswana (LEGABIBO). This was the subject of the *Attorney General v Thuto Ramogge & 19 Others (LEGABIBO Registration case)*,<sup>161</sup> where the Court of Appeal found no justifiable reasons to restrict the right to freedom of association of LGB persons.

In Kenya, the 1963 Constitution provided for the right to freedom of association under article 70(b)<sup>162</sup> in exactly the same terms as the Constitution of Botswana in article 80. The claw-back clause however made it easy for a repressive state to grossly limit these rights, which is what was done by the post-independence governments, although at that time most of the organisations were faith-based organisations which enjoyed legitimacy and public goodwill, and so the governments had to tread more carefully.<sup>163</sup> The 2010 Constitution introduced a more elaborate and less restricted right to freedom of association in its article 33. It accords the right to every person and specifies that the right includes the 'right to form, join or participate in the activities of an association of any kind.'<sup>164</sup> It also requires that legislation requiring registration of organisations should not provide for unlawful denial of registration and should provide for the right to a fair hearing before registration is cancelled.<sup>165</sup> At the statute level, the Non-Governmental Organizations Coordination Act, Cap 134<sup>166</sup> which was enacted in 1990, and recently revised in 2012, was the first law to broadly govern civil society in Kenya, as prior to that multiple forms of registration applied to different organisations, including as companies, trusts and organisations having

<sup>157</sup> Above, section 6(1).

<sup>158</sup> Above, section 7(2)(a).

<sup>159</sup> Above, section 7(2)(e).

<sup>160</sup> Above, section 7(2)(h)(iii).

<sup>161</sup> (2014) CACGB-128-14 (Court of Appeal of Botswana)

<sup>162</sup> Constitution of the Republic of Kenya, 1963, article 80.

<sup>163</sup> For a discussion on the relationship between the civil society organisations and the state in East Africa generally but Kenya in particular see, CP Maina 'Conclusion: Coming of age: NGOs and state accountability in East Africa' in M Mutua (ed) *Human rights NGOs in East Africa: Political and normative tensions* (2009) 305, 208.

<sup>164</sup> Constitution, article 33(1).

<sup>165</sup> Constitution, article 33(3).

<sup>166</sup> Non-Governmental Organizations Coordination Act, Cap 134 (revised 2012).

memoranda of understanding with the government.<sup>167</sup> The Act provides for mandatory registration of organisations.<sup>168</sup> It also gives the registrar powers to reject a proposed organisation's name on the grounds that the name is, in the Director's opinion, 'repugnant to or inconsistent with any law or is otherwise undesirable'.<sup>169</sup> Using the powers under this provision, the Director refused to register the organisation, National Gay and Lesbian Human Rights Commission (NGLHRC). The organisation's promoter, Eric Gitari, went to court, contending that the refusal was contrary to the guarantees of the right to freedom of association under Kenya's Constitution. The High Court agreed and found the refusal by the Registrar to register the organisation unconstitutional. The court made it clear that 'any person' as used in the Constitution referred to all persons, including LGB persons, and therefore all deserved equal protection under the law.<sup>170</sup> The state's appeal against this decision is still pending before the Court of Appeal. The NGO Board may also refuse to register an organisation if it is satisfied that its proposed activities or procedures are 'not in the national interest'.<sup>171</sup> This language is vague and can be used against organisations working on LGB rights.<sup>172</sup> Indeed, the NGO Board has withdrawn the licences of organisations working on human rights issues including LGB issues.<sup>173</sup> The Public Benefit Organisations (PBO) Act, 2013 was enacted but it has never come into force. It is more in line with the Constitution, as it specifies more transparent and less onerous requirements for registration,<sup>174</sup> establishes an independent regulator, the Public Benefit Organizations Regulatory Authority,<sup>175</sup> and gives organisations an opportunity to self-regulate.<sup>176</sup> However, since it requires the Minister to appoint a date for this law to come into force, and

<sup>167</sup> RA Jillo, F Kisinga 'NGO law in Kenya' (2009) 11 *International Journal for Not-for-Profit Law* 39, 42.

<sup>168</sup> Section 10(1).

<sup>169</sup> Section 8(3)(b)(ii).

<sup>170</sup> *Eric Gitari v Attorney General* Petition 440 of 2013 [2015] eKLR (The *Eric Gitari* case).

<sup>171</sup> n 166 above, section 14(a).

<sup>172</sup> Also see Jillo & Kisinga (n 167 above) 48.

<sup>173</sup> One of these is the Kenya Human Rights Commission, which is one of the organisations that supports LGB rights in Kenya. See for example 'NGOs: We were shut over plan to contest poll result in court' <https://www.nation.co.ke/news/NGOs--We-were-shut-over-plan-to-contest-poll-result-in-court-/1056-4059114-jc5pvc/index.html> (accessed 11 April 2018). For more examples of NGO crackdowns, see 'Jobs to go as Uhuru administration revokes registrations of 525 NGOs in Kenya, freezes their accounts' [Standardmedia.co.ke https://www.standardmedia.co.ke/article/2000144966/jobs-to-go-as-uhuru-adminstration-revokes-registrations-of-525-ngos-in-kenya-freezes-their-accounts](https://www.standardmedia.co.ke/article/2000144966/jobs-to-go-as-uhuru-adminstration-revokes-registrations-of-525-ngos-in-kenya-freezes-their-accounts) (accessed 11 April 2018). However, courts have found some of these revocations have been halted, see for example that of KHRC, see *Kenya Human Rights Commission & Another v Non-Governmental Organisations Co-ordination Board & Another* [2018] eKLR.

<sup>174</sup> Public Benefits Organisations Act, section 6-19.

<sup>175</sup> Above, sections 34-49.

<sup>176</sup> Public Benefits Organisations Act, sections 20-33.

such date has not been appointed despite a successful court challenge which gave the Minister 14 days to set the date,<sup>177</sup> this law was still not in force by the end of August 2018.

In Uganda, the right to freedom of association was included in the 1967 Constitution under article 8(2)(b) and under article 18(1) in almost the same terms as the Botswana and Kenyan provisions. The 1995 Constitution however has a wider formulation of the right in article 29(1)(e) which includes the freedom to form and join organisations. The right is subject to the general limitation of rights in article 43 of the Constitution.<sup>178</sup> The first law to deal with NGO operations was the Non-Governmental Organisations (Registration) Act, Cap 113, which commenced in 1989. It required mandatory registration of organisations<sup>179</sup> and gave powers to the then NGO Board to revoke the registration of an organisation in the public interest, among other reasons.<sup>180</sup> This Act was amended in 2006, giving powers to the NGO Board to incorporate organisations and issue permits to regulate them.<sup>181</sup> It also introduced a provision barring registration of organisations whose objectives contravene the law,<sup>182</sup> a provision that directly affects LGB organisations as they are regarded as contravening the law. More restrictive provisions were included in the Regulations made under this amendment, including imposing 'special obligations' on NGOs not to make direct contact with persons in their areas of operation without the permission of the Resident District Commissioners (RDCs), who are political appointees of the President. They also require NGOs not to do anything prejudicial to the security of Ugandans, or dignity and interests of Ugandan persons.<sup>183</sup> The Constitutional Court found these provisions to be constitutional as it emphasised the importance of regulation of civil society.<sup>184</sup> The new NGO Act, 2016 largely built upon the 2006 amendment and made many provisions of the 2006 regulations, including the special obligations imposed on NGOs, a part of the law.<sup>185</sup> This has made the operating environment for LGB organisations more complicated.<sup>186</sup> Under section 30, an organisation shall not be registered 'where the objectives of the organisation as specified in

<sup>177</sup> *Trusted Society of Human Rights Alliance v Cabinet Secretary for Devolution and Planning & 3 Others* [2017] eKLR.

<sup>178</sup> It subjects the enjoyment of rights to the rights of others and public interest (article 43(1). The Public interest is further restricted not to allow political persecution; detention without trial, and limitations beyond what is acceptable and demonstrably justifiable in a free and democratic society (article 43(2)).

<sup>179</sup> Section 2 of the repealed Non-Governmental Organisations Registration Act, Cap 113.

<sup>180</sup> Above, section 10(c).

<sup>181</sup> Non-Governmental Organisations Registration (Amendment) Act 2006.

<sup>182</sup> Above, section 4(d).

<sup>183</sup> Regulation 13 of the Non Governmental Organisations Registrations Regulations, 2009.

<sup>184</sup> *HURINET and Others v Attorney General* Constitutional Petition No. 5 of 2009.

<sup>185</sup> This is now section 44 of the NGO Act, 2016.

<sup>186</sup> See Human Rights Awareness and Promotion Forum 'Position paper on the Non-governmental Organisations Act, 2016' (2016) 3-4 <https://hrapf.org/?mdocs-file=1669&mdocs-url=false> (accessed 20 April 2018).

its constitution are in contravention of the laws of Uganda', among other reasons. This provision is yet to be interpreted by the court, but since the laws of Uganda criminalise same-sex relations, it may easily be interpreted as allowing the refusal to register organisations working on LGB issues.<sup>187</sup> The provision on special obligations specifically threatens LGB organisations, as the obligations are wide and vague and can thus be easily interpreted to restrict the freedom of association with regard to LGB organisations.<sup>188</sup>

The other law that raises concerns for LGB organising is the Companies Act, 2012. When the then Non-Governmental Organisations Registration Act<sup>189</sup> was amended in 2006,<sup>190</sup> organisations were given the option to elect whether to register as non-governmental organisations (NGOs) or as companies limited by guarantee under the Companies Act, 2012 or as trusts under the Trustees Incorporation Act.<sup>191</sup> However, the coming into force of the Non-Governmental Organisations Act, 2016, which repealed and replaced Cap 113, removed the options, and now all NGOs are required to first be incorporated under the Companies Act or the Trustees Incorporation Act before they can register with the NGO Bureau and obtain a permit under the NGO Act.<sup>192</sup> This implies that organisations will have to first get incorporated before they can be registered as NGOs. However, section 32 of the Companies Act, 2012 gives the Registrar powers to refuse to reserve the name of a company if the name is seen as 'undesirable'. The Registrar's use of these powers to deny SMUG registration has been challenged before the High Court of Uganda, but unfortunately the Court upheld the registrar's action on the basis that same-sex relations were criminalised under section 145 of the Penal Code Act.<sup>193</sup>

*g) Status of LGB persons serving in the army*

Service in the army is another area where LGB persons are usually excluded. This exclusion is based largely on patriarchal beliefs which consider LGB persons to be unfit for military service.<sup>194</sup> Among the selected Common Law African countries, only South Africa expressly provides protection for LGB persons in the army, upon entry and during service. According to Belkin & Canaday, during the apartheid period, there was a dual-policy on how to deal

<sup>187</sup> As above.

<sup>188</sup> As above.

<sup>189</sup> Cap 113

<sup>190</sup> The Non Governmental Organisations Registration (amendment) Act, 2006.

<sup>191</sup> Cap 165

<sup>192</sup> Section 29 of the Non-governmental Organizations Act, 2016.

<sup>193</sup> *SMUG Registration case*, n 92 above.

<sup>194</sup> This was the case for example in South Africa, see DJ Conway 'In the name of humanity, can you as a woman, as a mother, tolerate this? Gender and the militarisation of South Africa' (2000) Unpublished master's thesis, University of Bristol, Bristol.

with LGB persons in the army. This policy tolerated LGB persons among those conscripted to join the army, but strictly prohibited homosexuality among members of the permanent force.<sup>195</sup> Even then, among the conscripted force, those who were suspected of being gay were discriminated against and regarded as persons with a disorder. They were subjected to shock therapy, or chemical castration or such other practices, and could not be entrusted with leadership or sensitive information, and were largely restricted to being caterers or medical orderlies.<sup>196</sup> For the permanent force, applicants would be questioned about their sexual orientation, and those found to be gay would not be admitted. Those who committed acts regarded as homosexual acts would be punished up to court martial level, and those who admitted to homosexuality but who had not committed any acts would be sent for rehabilitation.<sup>197</sup> This official attitude towards homosexuality was due to the then prevailing ideals of masculinity, which saw homosexuality as being incompatible with masculinity. Furthermore, homosexuals were seen as enemies of the state, and as such persons to be firmly dealt with.<sup>198</sup> Now, there is protection of LGB persons within the army starting in 1998 when, following the express protections against discrimination based on sexual orientation in the South African Constitution, the South African National Defence Force (SANDF) adopted the Policy on Equal Opportunity and Affirmative Action.<sup>199</sup> The Policy among others formally banned discrimination on the basis of sexual orientation within the army. The Policy was reviewed and readopted in 2002. Therefore, officially, LGB persons can join the armed forces and can serve just like everyone else, a complete departure from the pre-1998 position.

Many countries have no express regulations stopping service in the army by LGB persons, but at the same time have no protections for them, and the environment promotes hiding one's sexual orientation if it is homosexual or bisexual. In Botswana, Kenya and Uganda, there are no express laws or policies to exclude homosexuals from the military. For Uganda in particular, however, the Code of Conduct of the Uganda Peoples' Defence Forces prohibits members of the Uganda Peoples' Defence Forces from developing 'any illegitimate

<sup>195</sup> A Belkin & M Canaday 'Assessing the integration of gays and lesbians into the South African National Defence Force' (2010) 38 *Scientia Militaria: South African Journal of military studies* 1.

<sup>196</sup> See J Cilliers & LHeinecken 'South Africa: Emerging from a time warp' in CC Moskos et al (eds) *The post modern military: Armed forces after the Cold War* (2010) 242-264.

<sup>197</sup> L Heinecken 'Social equality versus combat effectiveness: An institutional challenge for the military' (1998) 7:6 *African Security Review* 3-16.

<sup>198</sup> Conway, n 198 above.

<sup>199</sup> South African Department of Defence 'Department of Defence policy on equal opportunity and affirmative action' (2002).



or irresponsible relationship that is contrary to public morality with any other persons'.<sup>200</sup> Although this provision is yet to be interpreted, the reference to relationships 'contrary to public morality' shows that it may be used target to homosexual relationships.<sup>201</sup>

*h) LGB persons donating blood*

Since the discovery of HIV, the donation of blood by LGB persons, particularly men who have sex with men, has been restricted in various countries. This is justified on the grounds that usually, the HIV prevalence rate is higher for men who have sex with men than men who have sex with women, and therefore their blood is much more likely to be infected with HIV than other groups of persons.<sup>202</sup> Internationally, the World Health Organisation issued guidelines on assessing donor suitability for blood donation in 2002, which classified men who have sex with men and gays as a high-risk group.<sup>203</sup> The Guidelines recommended deferring a person whose former sexual behaviours put them at risk for at least 12 months after the last sexual contact and to permanently defer 'individuals whose sexual behaviours put them at high risk of transfusion-transmissible infections.'<sup>204</sup> Instead of classifying persons by their sexual orientation, the guidelines do so by their behaviour.

In the selected Common Law African countries, the practices differ, and one of the reasons this is so is because each country has its own unique experiences with HIV, but also because the HIV scourge there is largely due to heterosexual sexual behaviour rather than homosexual activity.<sup>205</sup> In Botswana, the National Policy on Blood Transfusion is silent on homosexuality,<sup>206</sup> and even the pre-donation form does not collect information on sexual behaviour.<sup>207</sup> Indeed non-discrimination is one of the principles to be followed.<sup>208</sup> The Ministry of Health asserted that they do not discriminate against gays in blood transfusion but the Director of the National Blood Transfusion Service clarified that they actually do not

<sup>200</sup> Uganda Peoples' Defence Forces Act, Act 7 of 2005, Seventh Schedule, Regulation 2(e).

<sup>201</sup> There is no set standard for 'public morality' in Uganda, though extreme measures policing issues such as women's dress, pornography and homosexuality have been imposed by political leaders over the years. See D Kintu *The Ugandan morality crusade: The brutal campaign against homosexuality and pornography* (2017) 43.

<sup>202</sup> See FA Hochberg 'HIV/AIDS and blood donation policies: a comparative study of public health policies and individual rights norms' (2002) 12 *Duke Journal of Comparative & International Law* 231-280, 233-241.

<sup>203</sup> World Health Organisation 'Guidelines on assessing donor suitability for blood donation' (2002) 220-224.

<sup>204</sup> As above.

<sup>205</sup> C Gerard et al (eds) *Safe blood in developing countries* (1995) 17, 48.

<sup>206</sup> Ministry of Health 'National Policy on Blood Transfusion' 2000.

<sup>207</sup> Above, Appendix 2.

<sup>208</sup> Above, Appendix 3.

take blood from gay donors based on the WHO guidelines.<sup>209</sup> The 2001 Policy Guidelines on Blood Transfusion in Kenya protect against the discrimination of blood donors on any grounds.<sup>210</sup> However, it requires donors to fill a form disclosing their present and past health status, and any person with 'an identified risk factor will be temporarily or permanently excluded from blood donation'.<sup>211</sup> This implies that MSM could be excluded on the basis of being high risk for HIV. In Uganda, the health check questionnaire includes a question as to whether one has had 'sex with a male or female prostitute or more than one partner?' and this is applicable to both men and women. When one answers 'Yes' to this question, they are supposed to contact a pre-donation counsellor.<sup>212</sup> Demographic information is collected before donation, and questions are asked about one's lifestyle and 'disease risk factors',<sup>213</sup> and thus MSM may be left out based on behavioural patterns.

South Africa is the only country to have no restriction on gays donating blood. The South African National Blood Service (SANBS), initially only allowed donation of blood by gay men if they had had no sex for six months or longer. This however ended in 2014,<sup>214</sup> and now anyone who has had a new partner within the last six months is not allowed to donate blood.<sup>215</sup>

#### *i) Non-discrimination in access to health services*

Another area where there is usually discrimination is in access to goods, information and services within the health sector generally. Most goods and services are tailored towards the majority heterosexual communities.<sup>216</sup> As such, states must go out of their way to provide tailored goods and services for LGB persons, including lubricants, condoms, and tailored health services that address the issues of LGB persons. In the selected countries, almost all of them have made progress at the legal and policy level to provide non-discriminatory services, even though gaps still remain.

<sup>209</sup> 'Botswana gay blood donation ban challenged' *Mamba Online* 5 June 2014 <http://www.mambaonline.com/2014/06/05/botswana-gay-blood-donation-ban-challenged/> (accessed 5 March 2018).

<sup>210</sup> Ministry of Health 'Policy Guidelines on blood transfusion in Kenya' (2001) 5.

<sup>211</sup> Above, 13.

<sup>212</sup> Uganda Blood transfusion services 'Who can give blood?' <http://www.ubts.go.ug/giving-blood.html> (accessed 5 March 2018).

<sup>213</sup> Uganda Blood Transfusions Services 'Blood donation process' <http://www.ubts.go.ug/donation%20process.html/> (accessed 5 March 2018).

<sup>214</sup> 'SA finally ends gay blood donation ban' *Mamba Online* 20 May 2014 [www.mambaonline.com/2014/05/20/sas-gay-blood-donation-ban-finally-ends/](http://www.mambaonline.com/2014/05/20/sas-gay-blood-donation-ban-finally-ends/) (accessed 5 March 2018).

<sup>215</sup> Above.

<sup>216</sup> KH Mayer et 'Sexual and gender minority health: what we know and what needs to be done' (2008) 98 *American Journal on Public Health* 989-995.

South Africa leads with the Constitution guaranteeing the right to non-discrimination on the basis of sexual orientation,<sup>217</sup> and also the right to health care, which belongs to ‘everyone’.<sup>218</sup> At the policy level, the National Strategic Plan (NSP) 2017 – 2022 identifies LGBTI persons as one of the most-at-risk-populations. Goal 3 aims at reaching ‘all key and vulnerable populations with customised and targeted interventions.’<sup>219</sup> It grounds the HIV response in a human rights framework and expressly maps out measures to address barriers that affect, among others, LGB access to services.<sup>220</sup> The South African National LGBTI Framework, 2017-2022 recognises the challenges that LGB populations face in accessing health goods and services and provides for tailored goods and services.<sup>221</sup>

Botswana’s Constitution does not expressly protect the right to health. However, the Public Health Act<sup>222</sup> does not prohibit discrimination in access to health care, except for discrimination against health workers by their employers on the basis of their health status.<sup>223</sup> At the policy level, the 2011 National Health Policy’s vision is to create an environment where all people can achieve the highest standard of health and wellbeing.<sup>224</sup> This can be interpreted as accommodating all persons. Its implementation is guided by, among other principles, respect for dignity, and the equitable distribution of resources to ensure that even those who are ‘vulnerable, marginalised and underserved...’ access them.<sup>225</sup> This in principle should accommodate LGB persons, but more express protection is required.

As regards HIV/AIDS, the 2012 Botswana HIV Policy recognises the need to reduce stigma and discrimination against persons living with HIV, and as such makes a bold declaration that ‘every person’ in Botswana shall not be discriminated against in terms of access to health services.’<sup>226</sup> It however does not specifically include LGB persons as one of the groups for whom extra effort will be taken to ensure their access to HIV services.

<sup>217</sup> Section 9 of the South African Constitution.

<sup>218</sup> Section 27(a) of the Constitution.

<sup>219</sup> South Africa National AIDS Council ‘The national strategic plan (NSP) 2017 – 2022’ Goal 3 <http://sanac.org.za/about-sanac/the-national-strategic-plan-nsp-2012-2016-in-a-nutshell/> (accessed 5 March 2018).

<sup>220</sup> Above, Goal 5.

<sup>221</sup> South Africa National AIDS Council ‘South African national LGBTI HIV framework, 2017-2022’ 2017 <http://sanac.org.za/2017/06/26/sa-national-lgbti-hiv-plan/> (accessed 5 March 2018)

<sup>222</sup> Public Health Act, 11 of 2013.

<sup>223</sup> Above, section 148(1).

<sup>224</sup> Republic of Botswana ‘National health policy: Towards a healthier Botswana’ (2011).

<sup>225</sup> Above, para 31.

<sup>226</sup> Republic of Botswana ‘Botswana national policy on HIV and AIDS’ revised edition (2012) paras 2.1.3 and 7.1.5.

The National Strategic Plan for HIV<sup>227</sup> has among its guiding principles non-discrimination including on the basis of sexual orientation.<sup>228</sup> However, it does not make particular mention of key populations or LGB persons despite acknowledging the role of stigma and discrimination in negatively impacting the HIV response.<sup>229</sup> The 2012 Botswana National HIV and AIDS Treatment Guidelines also do not specifically address LGB persons, except for recognising that safe implementation of post exposure prophylaxis for men who have sex with men remains to be established.<sup>230</sup> The Integrated HIV Clinical Care Guidelines 2016 include engaging high-risk groups like men who have sex with men on the use of pre-exposure prophylaxis,<sup>231</sup> and actually prioritising them for PrEP.<sup>232</sup> Therefore, Botswana has also made progress towards including LGB persons in access to health and particularly within the HIV response.

Kenya's 2010 Constitution guarantees the right to health and to healthcare, including reproductive health for 'every person'.<sup>233</sup> This was a big departure from the 1963 Independence Constitution, which did not provide for the right to health. Article 27 provides that 'every person is equal before the law and has the right to equal protection and equal benefit of the law', and this includes enjoyment of all rights.<sup>234</sup> The state is enjoined not to discriminate on 'any ground' but does not specifically mention sexual orientation, although it mentions sex.<sup>235</sup> The High Court has, in respect of LGB persons, held that the word 'every person' in article 27 means exactly that, and as such LGB persons are also among those protected.<sup>236</sup> This implies the same interpretation for the right to health. Although the Health Act 2017 does not specifically address LGB persons, it confirms that the right to the highest attainable standard of health is for 'every person'.<sup>237</sup> It also provides that everyone has the right privacy and to be treated with dignity and respect.<sup>238</sup> It however requires the state to, among other things, put in place a comprehensive programme to

<sup>227</sup> Republic of Botswana 'The second Botswana national strategic framework for HIV and AIDS 2010-2016' (2009).

<sup>228</sup> Above, para 2.3.

<sup>229</sup> Above, para 1.2.4.

<sup>230</sup> Government of Botswana, Ministry of Health '2012 Botswana National HIV & AIDS Treatment Guidelines' (2012) para 1.2.3

<sup>231</sup> Republic of Botswana, Ministry of Health 'Handbook of the Botswana 2016 integrated HIV clinical care guidelines' (2016) 5.

<sup>232</sup> Above, 7.

<sup>233</sup> Article 43(1)(9a) of the Constitution of the Republic of Kenya 2010.

<sup>234</sup> Constitution, article 27 (1) and (2).

<sup>235</sup> Constitution, article 27(4).

<sup>236</sup> *Eric Gitari* case (n 166 above).

<sup>237</sup> The Health Act, No. 21 of 2017, section 5(1).

<sup>238</sup> Above, section 5(2).

implement 'means to reduce unsafe sexual practices'<sup>239</sup> which may be problematic if same-sex relations are seen as such practices, which may thus imply 'changing' or trying to 'cure' homosexuality rather than creating an environment that promotes safe sex. The Kenya AIDS Strategic Framework recognises men who have sex with men among key populations.<sup>240</sup> It also adopts a human rights approach to HIV. The 2015-2019 National AIDS Council's Strategic Plan also includes interventions geared towards Key Populations, among whom men who have sex with men are included. Functional Area 3 seeks a human rights approach to facilitate access by key populations, among others.<sup>241</sup>

Uganda's Constitution does not provide for the right to health, but includes access to medical care and health care among the National Objectives and Directive Principles of State Policy (NODPSP).<sup>242</sup> This would imply that the right is not justiciable, but in light of a recent amendment to the Constitution to recognise the NODPSP,<sup>243</sup> it is now arguable that the rights included therein are justiciable.<sup>244</sup> The Public Health Act has been in place since 1935, and it predictably does not address discrimination on the grounds of sexual orientation.<sup>245</sup>

Uganda has adopted the trend of attempting to address the general HIV/AIDS epidemic while at the same time criminalising same-sex practices and harassing LGB persons. In 1990, at the height of the HIV/AIDS scourge, the Penal Code was amended to increase the punishment for carnal knowledge against the order of nature from 14 years to life imprisonment, ostensibly as a way of curbing HIV/AIDS.<sup>246</sup> The same was done in the now nullified Anti-Homosexuality Act, where one's HIV positive status automatically changed the offence from 'homosexuality' to 'aggravated homosexuality', initially attracting the death penalty,<sup>247</sup> but which was in the end reduced to life imprisonment.<sup>248</sup> The Anti-Homosexuality Bill, 2010 also proposed an obligation on any professionals (including healthcare professionals) to report anyone who they got to know was a homosexual to the authorities within 48 hours.<sup>249</sup> The HIV/AIDS Prevention and Control Act, 2014 prohibits

<sup>239</sup> Above, section 68(1)(e)(ii).FX

<sup>240</sup> Ministry of Health 'Kenya AIDS strategic framework 2014-2015-2018-2019'

<sup>241</sup> The National AIDS Control Council 'Strategic Plan 2015-2019,' July 2015.

<sup>242</sup> Principle XIV(b) and XX.

<sup>243</sup> Article 8A of the Constitution of Uganda (introduced by the Constitutional Amendment Act 2005).

<sup>244</sup> C Mbazira 'Public interest litigation and judicial activism in Uganda: Improving the enforcement of economic, social and cultural rights' (2009) Human Rights and Peace Centre Working Paper No. 24. See also the Supreme Court decision in *CEHURD v. Attorney General*, Constitutional Appeal No.1 of 2016.

<sup>245</sup> The Public Health Act Cap, 281.

<sup>246</sup> Penal Code Amendment Act 1990.

<sup>247</sup> Anti-Homosexuality Bill, 2010.

<sup>248</sup> Anti-Homosexuality Act, 2014 (AHA), now nullified, section 3(1)(b).

<sup>249</sup> n 247 above, clause 14.

discrimination on the basis of HIV status in access to health services.<sup>250</sup> The state has obligations to ensure the right of access to equitable distribution of health goods, information and services in a non-discriminatory manner, provide treatment to all on a non-discriminatory basis, prevent and control HIV transmission, provide care and funding, and give priority to most at risk groups.<sup>251</sup> Most at risk populations are defined to include fishing communities, prisoners, migrant populations, the armed forces and other groups as may be determined by the Minister from time to time.<sup>252</sup> This therefore leaves out gay men, men who have sex with men, lesbians, and women who have sex with women.

The HIV/AIDS Strategic Plan III recognises that there is a higher HIV prevalence among men who have sex with men,<sup>253</sup> and yet little has been done to address this situation.<sup>254</sup> It aims at reducing discrimination by 90%, and specifically considers 'ensuring access to health services to MSM and other groups'.<sup>255</sup> However, instead of promoting the adoption of measures of reaching these groups, it provides that the state will not specify sexual orientation in data collected,<sup>256</sup> which is instead a problem, as the information concerning these groups may not be known. Strategic Objective 1 is 'To scale up efforts to eliminate stigma and discrimination of PLHIV and other vulnerable groups,' and interventions would include instituting and strengthening 'anti-stigma and discrimination programs for key populations.' Uganda also has a ministerial directive on non-discrimination in health service provision that specifically covers services for LGB persons.<sup>257</sup> Uganda has therefore only generally made progress in the health sector, nevertheless marking a big departure from what the position was prior to 1998.

*j) Non-discrimination in access to justice*

Although the justice system is usually available for all, there are accessibility concerns for different groups of people depending on where they are. Prior to 1998, there were no formal laws limiting access to justice by particular groups, although this did not mean equal access for everyone. This was simply formal equality and so many were left behind. LGB persons are among those left behind when access to justice mechanisms do not specifically reach out

<sup>250</sup> HIV/AIDS Prevention and Control Act, 2014, sections 37 and 39.

<sup>251</sup> Above, Section 24.

<sup>252</sup> Above, Section 24(2)

<sup>253</sup> Ministry of Health 'National HIV and AIDS Strategic Plan 2015/2016 - 2019/2020' 5.

<sup>254</sup> Above, 10

<sup>255</sup> Above, 8.

<sup>256</sup> Above, 15.

<sup>257</sup> Republic of Uganda, Ministry of Health 'Ministerial directive on access to health services without discrimination' (2014) <https://www.scribd.com/document/233209149/MoH-Ministerial-Directive-on-Access-to-Health-Services-Without-Discrimination-19-June-14> (accessed 8 September 2017).



to them, as they are already excluded through stigma and discrimination.<sup>258</sup> This implies that in order for change to happen, specific laws or policies encouraging access by LGB persons have to be devised.<sup>259</sup>

Only South Africa has specifically mentioned LGB persons in the context of access to justice, and this is under the equality clause of the Constitution. That provision expressly protects against discrimination on the basis of sexual orientation. The Constitution also establishes courts that are impartial and independent of any persons, and are only subject to the law and the Constitution.<sup>260</sup> The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, which was intended to give effect to section 9 of the Constitution, also clearly shows that sexual orientation is one of the prohibited grounds of discrimination.<sup>261</sup> The Act establishes equality courts, which are all high courts,<sup>262</sup> and gazetted magistrate's courts.<sup>263</sup> These courts are meant to bring justice closer to the people. It imposes a duty on the state and state contractors, and other actors including non-governmental organisations, to promote equality through drawing plans, codes and regulatory mechanisms, enforcing and monitoring them, and reporting non-compliance.<sup>264</sup> The Act also establishes the Equality Review Committee, which advises the minister on the steps taken towards ensuring substantive equality.<sup>265</sup> The Constitution also empowers the South African Human Rights Commission to continue operating.<sup>266</sup> The South African Human Rights Commission Act gives the Commission powers to, among others, promote respect and observance of human rights, and monitoring and assessing the human rights situation in the country.<sup>267</sup> It can advise and make recommendations on any human rights matters in line with the Constitution.<sup>268</sup> This clearly includes sexual orientation among matters it can investigate.

No such revolutionary change has been witnessed in the case of Botswana, which has had the same Constitution in force since 1966. Section 3 provides for rights for 'every person' without any discrimination, although it does not include sexual orientation among the prohibited grounds of discrimination. Section 15 prohibits the making of discriminatory

<sup>258</sup> See Southern African Litigation Centre 'Access to justice for healthcare violations: Background document' (2017) 24.

<sup>259</sup> Above, 27-33.

<sup>260</sup> Constitution, section 165(2).

<sup>261</sup> The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, section 1(1).

<sup>262</sup> Above, section 16(1)(a)

<sup>263</sup> Above, section 16(1)(c).

<sup>264</sup> Section 26.

<sup>265</sup> Section 32.

<sup>266</sup> Section 181(1)(b) and 184 read together with item 20 of schedule 6 of the Constitution.

<sup>267</sup> Section 2, South African Human Rights Commission Act, Act 40 of 2013.

<sup>268</sup> Section 13(1)(a).

laws,<sup>269</sup> as well as discriminatory treatment.<sup>270</sup> The Court of Appeal has extended protection to LGB persons by acknowledging that they are persons who are entitled to the same rights as any other persons under section 3.<sup>271</sup> It also establishes courts and ensures independence of the courts through the provisions on how they are appointed, security of tenure and disciplinary action.<sup>272</sup> Section 10(9) guarantees independence of the courts. Botswana, however does not have a national human rights institution, although efforts are underway to establish one, which presently makes it difficult for people to challenge and report human rights violations.<sup>273</sup>

Before 2010 in Kenya, there was no guarantee for full equality in access to a fair trial. The 2010 Constitution however guarantees the independence of the judiciary and subjects them only to the Constitution and the law.<sup>274</sup> The Constitution requires the courts to do justice to all regardless of status.<sup>275</sup> It also guarantees the right to a fair hearing, which is a right guaranteed to 'every person'.<sup>276</sup> 'Every person', as already discussed, has been interpreted by the courts to include LGB persons.<sup>277</sup> It also provides for the corollary right to a fair trial for anyone accused of committing an offence.<sup>278</sup> It also establishes the Kenya National Human Rights and Equality Commission,<sup>279</sup> which is given the mandate to among others 'monitor, investigate and report on the observance of human rights in all spheres of life in the Republic, including observance by the national security organs'.<sup>280</sup> Under article 59(3) 'every person' has a right to complain to the Commission about human rights violations. It therefore allows all persons, including LGB persons, to report cases of human rights violations. The Kenya National Human Rights and Equality Commission Act also provides that the Commission shall be open to all persons.

For Uganda, the 1967 Constitution, which was in force until 1995, had various claw backs to

<sup>269</sup> Constitution of Botswana, section 15(1).

<sup>270</sup> Above, section 15(2).

<sup>271</sup> *LEGABIBO Registration* case (n 41 above).

<sup>272</sup> Constitution of Botswana, sections 95-104.

<sup>273</sup> The Republic of Botswana 'Office of the President: Human rights commission' <http://www.gov.bw/en/Ministries--Authorities/Ministries/State-President/Office-of-the-President/Divisions/Human-Rights-Commissions1/> (accessed 8 March 2018).

<sup>274</sup> Constitution of Kenya, article 160(1).

<sup>275</sup> Constitution of Kenya, article 159(2)(a).

<sup>276</sup> Above, article 50(1).

<sup>277</sup> *Eric Gitari* case (n 170 above).

<sup>278</sup> Above, article 50(2).

<sup>279</sup> Above, article 59(1).

<sup>280</sup> Above, article 59(2)(d).

the right to a fair trial.<sup>281</sup> The 1995 Constitution did away with these and established courts that are independent and not subject to the control of any person or authority.<sup>282</sup> Article 28(1) entitles every person to the right to a 'fair, speedy and public hearing before an independent and impartial court or tribunal established by law'. This right is non-derogable under article 44(c). The Constitution also establishes the Uganda Human Rights Commission, which investigates abuses of human rights, and the Equal Opportunities Commission, which is responsible for redressing abuses arising out of discrimination and marginalisation. Originally, section 15(6)(d) of the Equal Opportunities Commission Act, 2007 had stopped the Commission from investigating matters regarded as immoral or socially unacceptable by the majority. The provision was inserted specifically to prevent 'homosexuals and the like' from claiming protection under the Act,<sup>283</sup> but was eventually declared unconstitutional by the Constitutional Court in *Adrian Jjuuko v Attorney General*.<sup>284</sup> The main ground for its quashing by the Court was that it discriminated against a class of persons based on their attributes.<sup>285</sup>

*k) Changes in treatment of LGB immigrants*

Recognition and acceptance of LGB immigrants has lately become an important issue. There are two categories of immigrants and different rules apply to each. Short-term immigrants come into the country for brief visits, while the second category is those seeking asylum or permanent residence. For the first category, no country among those selected expressly excludes short-term immigrants on the basis of sexual orientation. South Africa however, formerly recognised only spouses of married persons to be entitled to an easier immigration process under section 25(5) of the Aliens Control Act, and left out partners of persons in permanent same-sex relations. This provision of the Act was declared unconstitutional in the *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* (2 December 1999) - (*Immigration* case) and the court read in the words 'or partner, in a permanent same-sex life partnership' after the word 'spouse' in order to remedy the

<sup>281</sup> Article 15(12) had exceptions to the right to a fair hearing that watered down the rights declared in the preceding sub articles.

<sup>282</sup> Constitution of Uganda, article 128.

<sup>276</sup> See Parliament of Uganda 'Hansard, December 12 2016.' For a more detailed discussion of the process leading to the inclusion of the provision, see S Tamale 'Giving with one hand, Taking away with the other: The Uganda Equal Opportunities Commission Act, 2007' in Human Rights Awareness and Promotion Forum (HRAPF) *Still Nowhere to Run: Exposing the deception of minority rights under the Equal Opportunities Commission of Uganda* (2010) 19-22. <http://hrapf.org/?mdocs-file=1604&mdocs-url=false> (accessed 6 April 2018).

<sup>284</sup> Constitutional Petition No.1 of 2009. (Constitutional Court of Uganda).

<sup>285</sup> Above, line 375.

discrimination.<sup>286</sup> In 2002, the Immigration Act, 2002 replaced the Aliens Control Act, 1991.<sup>287</sup> It defines 'spouse' to include a partner in a permanent homosexual relationship.<sup>288</sup>

For the second category, the 1951 Refugee Convention regards as refugees all persons who are unable or unwilling to return to their home countries due to a well-founded fear of persecution for reasons among others of 'membership of a particular social group.'<sup>289</sup> The Convention imposes obligations upon states not to discriminate against refugees,<sup>290</sup> expel refugees<sup>291</sup> or forcefully return them to their countries of origin.<sup>292</sup> The Refugees Act, 1998 largely adopts the definition of a refugee in the 1951 Convention,<sup>293</sup> and also defines 'social group' to include persons belonging to a particular sexual orientation.<sup>294</sup> This makes LGB persons entitled to protection when fleeing persecution due to their sexual orientation. In Botswana, Kenya and Uganda, the refugee laws also adopt the 1951 Refugee Convention definition and specifically protect persons persecuted on the basis of 'sex' and 'membership of a social group' but do not specifically provide protection on grounds of sexual orientation.<sup>295</sup>

#### 4.2.2 Changes in political positions on homosexuality

This section explores the changes in the political environment that have occurred in the selected Common Law countries, where LGB SL has been taking place in the last 20 years. It proceeds from the standpoint made in Chapter 2.4 above, that strategic court cases on LGB rights influence social change through influencing decisions made by political leaders on LGB rights.

Prior to 1998, the dominant stance of political leaders on LGB rights in the selected countries in Common Law Africa was lack of protection and negative and pejorative statements.

<sup>286</sup> *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*, 2000 1 BCLR 39 (2 December 1999).

<sup>287</sup> Act 96 of 1991.

<sup>288</sup> The Immigration Act, 2002, section 1.

<sup>289</sup> Article 1 of the Refugee Convention, 1951.

<sup>290</sup> Above, Article 3.

<sup>291</sup> Article 32.

<sup>292</sup> Article 33.

<sup>293</sup> Section 3 of the Refugees Act, 1998.

<sup>294</sup> Above, section 1.

<sup>295</sup> In Botswana, the schedule to the Refugees (Recognition and Control) Act, 1968 (Botswana) defines political refugee in almost the same terms as the Refugee Convention. Kenya's Refugees Act, No. 13 of 2006 in section 3 defines refugee in the same terms too; while Uganda's Refugee Act, 2006 in section 4(1) identifies fear of persecution on among others sex and membership of a social group as factors qualifying one as a refugee.

Denials of even the existence of LGB persons by political leaders was common, in line with the mantra that 'homosexuality is not African.'<sup>296</sup> There were some changes however as the years progressed towards the end of August 2018 and these changes were galvanised or influenced by SL on LGB rights. By the end of August 2018, the political language in all countries had become more favourable. The changes are hereby examined in accordance with the following themes: political commitments to the protection of LGB rights, political speeches, pronouncements and policy positions about LGB issues, and the issue of appointments of LGB individuals to positions of political authority.

Prior to 1998, the only political commitments to the protection of LGB rights in the selected countries were the promises by the African National Congress (ANC) in South Africa. For a greater part of its history, the ANC had been largely hostile to LGB rights. Key leaders were quoted during the period of the struggle against apartheid as stating that LGB persons were not normal,<sup>297</sup> and that the struggle was for majority rights and not minority rights like LGB rights.<sup>298</sup> In 1991, Winnie Mandela and three of her 'bodyguards' stood trial on charges of kidnap of four young men from a Methodist Church manse in Orlando West.<sup>299</sup> In her defence, it was argued that the purpose of the abduction of the youths was to rescue them from sexual abuse by the male priest in charge of the church.<sup>300</sup> Disparaging language against homosexuality was widely used during the trial which depicted same-sex relations as a practice alien to Africans and which raised worries among LGB groups of what this meant when the ANC came to power.<sup>301</sup> As the demise of apartheid approached, the ANC started changing its stance with Thabo Mbeki, the then ANC Director of Information, formally writing in a telegram that the ANC indeed stood for equal rights and this included

<sup>296</sup> This is perhaps the most commonly used justification for hostility and persecution directed towards LGB persons in Africa. Many African leaders and authors argue that homosexuality was a western or Arab import, which never existed before colonialism or Arab incursion (see for example Sir Apolo Kagwa *Ekitabo ky'empisa z'abaganda* (The customs of the Baganda) 2005 (First published in 1905) 138. Despite researchers finding evidence to the contrary (see for example OS Murray & W Roscoe *Boy-wives and female husbands: Studies of African homosexualities* (1998). For a recent discussion of these see M Epprecht *Heterosexual Africa? The history of an idea from the age of exploration to the age of AIDS* (2008) 34-64), the idea still holds great sway among many.

<sup>297</sup> ANC executive member Ruth Mompati's response to a question by journalist Peter Tatchell in 1987. See P Tatchell, 'The moment the ANC embraced gay rights' in N Hoard et al (eds.) *Sex and politics in South Africa* (2005) 140, 142.

<sup>298</sup> ANC Chief Representative in London, Solly Smith on being asked for the ANC's official position on LGB rights. See Tatchell, n 297 above 143.

<sup>299</sup> R Holmes 'De-segregating sexualities: Sex, race and the politics of the 1991 Winnie Mandela Trial' (1993) 5 *Program of African Studies Northwestern University* 12. Winnie Mandela's pack of 'body guards' were called the Mandela United Football Club and they were rumoured to deal brutally with suspected apartheid informants.

<sup>300</sup> As above.

<sup>301</sup> See R Holmes, White rapists made coloureds (and homosexuals): The Winnie Mandela trial and the politics of race and sexuality in Gevisser & Cameron (n 49 above) 284.

the rights of LGB persons.<sup>302</sup> Leaders such as Albie Sachs also spoke in favour of LGB rights.<sup>303</sup>

To concretise this changed stance, the ANC included sexual orientation among the protected grounds against discrimination in its Constitutional Principles for a New South Africa.<sup>304</sup> On this basis, protection against discrimination on the grounds of sexual orientation was included in the Interim Constitution of South Africa.<sup>305</sup> The ANC, which was then the ruling party, also made it clear that it supported the inclusion of protection on the grounds of sexual orientation within the Final Constitution,<sup>306</sup> which ended up in section 9(3) of the same.<sup>307</sup> The ANC changed its stance due to the legacy of discrimination and apartheid and the persistent lobbying and engagement by LGB organisations<sup>308</sup> and openly LGB persons within its ranks.<sup>309</sup> Interestingly, the ANC government opposed every case in which the constitutional validity of laws that were discriminatory against LGB persons were challenged in court. According to human rights attorney Crystal Cambanis, the movement expected the ANC government to concede that many of these laws were far out of line with the constitutional principles of human dignity and equality.<sup>310</sup>

Political statements and actions after the Constitution came into force were largely unfriendly to LGB persons. For example, when he was Deputy President, Jacob Zuma in 2006 publicly referred to same-sex marriages as a disgrace.<sup>311</sup> Some traditional leaders also publicly condemned same-sex marriage. Among them were the Zulu king, Goodwill Zwelithini, who commented that homosexuality was a form of moral decay,<sup>312</sup> while Patekila Holomisa, chief of the Amagebe and then president of the Congress of Traditional

<sup>302</sup> See telegram from Thabo Mbeki to Peter Tatchell, dated 24 November 1987 quoted in Tatchell (n 294 above) 145.

<sup>303</sup> Sachs spoke at an Organisation of Lesbian & Gay Activists (OLGA) event as early as 1990, Gevisser & Cameron (n 49 above) 82.

<sup>304</sup> The African National Congress 'Constitutional principles for a democratic South Africa' April 1991 <http://www.anc.org.za/content/constitutional-principles-democratic-south-africa> (accessed 24 March 2018).

<sup>305</sup> Constitution of the Republic of South Africa, Act 200 of 1993, section 8(2).

<sup>306</sup> African National Congress 'ANC policy proposals for the final constitution' <http://www.anc.org.za/content/anc-policy-proposals-final-constitution> (accessed 24 March 2018). Para 2.10 emphasises that 'The right to be protected from unfair discrimination must specifically include those discriminated against on the grounds of ethnicity, language, race, birth, sexual orientation and disability...'

<sup>307</sup> Constitution of the Republic of South Africa, 1996.

<sup>308</sup> These included organisations like the Gay & Lesbian Organisation of the Witwatersrand (GLOW); the Organisation of Lesbian & Gay Activists (OLGA); and later the National Coalition on Gay and Lesbian Equality when it was formed in 1994. See Tatchell (n 297 above) 146-147.

<sup>309</sup> One of the more prominent of these was Simon Nkoli who was involved in the Delmas treason trial of 1984-1988.

<sup>310</sup> Interview with Crystal Cambanis, Johannesburg, 8 February 2018.

<sup>311</sup> 'Candidate of the left or the conservatives?' *Mail and Guardian* 29 September-5 October, 2006.

<sup>312</sup> 'Gays are rotten, says Zulu king' *Timeslive* 23 January 2012, <https://www.timeslive.co.za/news/south-africa/2012-01-23-gays-are-rotten-says-zulu-king/>



Leaders of South Africa and chairperson of the Constitutional Review Committee, also castigated homosexuality as something that the ANC knows cannot be supported by the majority.<sup>313</sup>

At the international level, South Africa's commitment to the protection of LGB persons has at best been unpredictable. In 2011, South Africa led the process that culminated in the passing of the first ever resolution on sexual orientation at the UN Human Rights Council, the resolution on 'Human rights, sexual orientation, and gender identity'.<sup>314</sup> The Resolution expressed concern about violations of the rights of LGB and transgender persons as well as discrimination, and requested a report on violence and discriminatory laws and practices against persons based on sexual orientation as well as a dialogue on the findings of the study. This resolution in fact came out of lobbying efforts of activists as South Africa had initially tabled a resolution that was questioning the position of protection on the grounds of sexual orientation in international human rights laws.<sup>315</sup> Since that time, South Africa has continued to be unpredictable in its support of LGB rights at the UN level, sometimes voting in favour of protections based on sexual orientation and sometimes backtracking, showing that political commitment is lacking at this level.<sup>316</sup> Most controversially, South Africa abstained during the recent voting to appoint an independent expert on SOGI issues.<sup>317</sup> President Zuma also refused to condemn Uganda's Anti-Homosexuality Act,<sup>318</sup> and sent a homophobic ambassador to Uganda during the time the country was debating the repressive Anti-Homosexuality Bill.<sup>319</sup> Therefore, despite the official pro-equality and human rights stance of the ANC prior to ascending to power in South Africa and through the process of the promulgation of South Africa's Constitution, subsequent ANC

<sup>313</sup> 'Traditional leaders and the fuel that fires homophobia' *The Daily Maverick* 25 May 2012 <http://www.dailymaverick.co.za/article/2012-05-25-traditional-leaders-and-the-fuel-that-fires-homophobia> (accessed 25 March 2018).

<sup>314</sup> UN Human Rights Council, Resolution A/HRC/RES/17/19 'Human rights, sexual orientation, and gender identity' June 17, 2011.

<sup>315</sup> This was UN Human Rights Council 'The imperative need to respect the established procedures and practices of the General Assembly in the elaboration of new norms and standards and their subsequent integration into existing international human rights law' A/HRC/16/L.27 [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A%2FHRC%2F16%2FL.27](http://ap.ohchr.org/documents/dpage_e.aspx?si=A%2FHRC%2F16%2FL.27) (accessed 21 Mar. 2011).

<sup>316</sup> For a detailed discussion on South Africa's changing positions at the UN, see E Jordaan 'Foreign policy without the policy? South Africa and activism on sexual orientation at the United Nations' (2017) 24:1 *South African Journal of International Affairs* 79-97.

<sup>317</sup> 'SA abstains on key UN vote to end discrimination against gays' News 24 5 July 2016 <https://www.news24.com/SouthAfrica/News/sa-abstains-on-key-un-vote-to-end-discrimination-against-gays-20160705> (accessed 24 March 2018).

<sup>318</sup> 'Zuma's failure to condemn anti-gay law an insult to the Constitution' Politics web, 9 April 2014 <http://www.politicsweb.co.za/documents/zuma-refuses-to-condemn-ugandas-antigay-law--lindi>

<sup>319</sup> 'SA party protests posting of anti-gay diplomat to Uganda' *The Observer* 28 January 2010 <http://www.observer.ug/component/content/article?id=6997:sa-party-protests-posting-of-anti-gay-diplomat-to-uganda> (accessed 25 March 2018).

governments, particularly that of President Zuma, have not entirely reflected this commitment both within and outside of South Africa.<sup>320</sup>

In the case of Botswana, LGB rights were largely not discussed by politicians before 1998.<sup>321</sup> However, starting in 1998, discussions on LGB rights started as the reform of the Penal Code was underway. Then secretary of the ruling Botswana National Party clearly stated that LGB rights were not to be discussed, as they would 'shock' the people.<sup>322</sup> Among those who spoke out against LGB rights was the then vice president (and later President) Seretse Ian Khama, who emphasised that same-sex acts were criminalised and that human rights does not justify 'unnatural acts'.<sup>323</sup> Kgosi Linchwe III—traditional leader of the Bakgala stated that homosexuals were worse than animals,<sup>324</sup> while Kgosi Seepapitso IV of the Bangwaketse emphasised that gays deserved to be beaten and jailed.<sup>325</sup> The state strongly opposed the decriminalisation of homosexuality during the *Kanane* case. The government is also said to have snubbed US envoy on LGB rights, Randy Berry, when he visited Botswana in 2016.<sup>326</sup> In contrast, former President Festus Mogae has been supportive of LGB rights, calling for the decriminalisation of consensual same-sex relations.<sup>327</sup> Nevertheless, there has so far been no firm official commitment to protect against discrimination on the grounds of sexual orientation except for the City Council of Gaborone's motion calling for an end to the criminalisation of same-sex relations.<sup>328</sup> Furthermore, the government deported an anti-gay American pastor for hate speech during a radio debate after he called a gay activist a liar

<sup>320</sup> In its 1994 National Election Manifesto, the ANC states that the party is committed to creating a democratic society based on equality, human dignity and freedom. See African National Congress '1994 National Election Manifesto' <http://www.anc.org.za/content/1994-national-elections-manifesto> (accessed 4 May 2018). This stance was reiterated by the ruling party over the years (See for example the 2009 National Election Manifesto, African National Congress '1999 National Election Manifesto' <http://www.anc.org.za/docs/manifesto/2009/manifesto.pdf> (accessed 4 May 2018). In 2006, President Jacob Zuma made disparaging remarks against same-sex marriage. 'Zuma's anti-gay comments lead to backlash' *IOL* 27 September 2006 <https://www.iol.co.za/news/politics/zumas-anti-gay-comments-lead-to-backlash-295249> (accessed 4 May 2018).

<sup>321</sup> Tabengwa & Nicol, n 64 above, 339-340.

<sup>322</sup> As above at 341.

<sup>323</sup> 'Vice President Khama harshly denounced homosexuality' *Midweek Sun*, 1998 quoted in Human Rights Watch (n 63 above) 48.

<sup>324</sup> 'Whip them or jail them: Kgosi Seepapitso's view on homosexuals' *Midweek Sun*, 17 June 1998.

<sup>325</sup> Human Rights Watch 'UN: landmark resolution on anti-gay bias' 26 September 2014 <https://www.hrw.org/news/2014/09/26/un-landmark-resolution-anti-gay-bias> (accessed 24 March 2018).

<sup>326</sup> See 'Plot thickens in Botswana-America diplomatic relations over gay rights' *The Sunday Standard* 24 January 2016 <http://www.sundaystandard.info/plot-thickens-botswana-america-diplomatic-relations-over-gay-rights> (24 March 2018).

<sup>327</sup> See for example 'Botswana should decriminalise homosexuality, says former president' *The Telegraph* 20 October 2011, <https://www.telegraph.co.uk/news/worldnews/africaandindianocean/botswana/8839131/Botswana-should-decriminalise-homosexuality-says-former-president.html> (Accessed 24 March 2018).

<sup>328</sup> See 'City of Gaborone calls for an end to gay ban in Botswana' *Mamba Online* 1 April 2016 <http://www.mambaonline.com/2016/04/01/city-gaborone-calls-end-gay-ban-botswana/> (accessed 26 February 2018).

and a paedophile.<sup>329</sup> At the international level, Botswana has maintained consistent opposition to sexual orientation protections at the UN, the latest being its leading the resistance to the appointment of an Independent Expert on the 'protection against violence and discrimination based on sexual orientation and gender identity'.<sup>330</sup> It also voted against the 2014 resolution to combat violence and discrimination based on sexual orientation and gender identity.<sup>331</sup> At best, Botswana has abstained on votes concerning sexual orientation.<sup>332</sup>

In Kenya, before 1998, there was little or no political discussion on LGB rights. However, after 1998 political leaders started making statements on gay rights, which mostly expressed opposition to their protection. Then President Daniel Arap Moi made it clear that he was opposed to same-sex relations in 1999.<sup>333</sup> Sixteen years later, during US President Obama's visit to Kenya in 2015, current President Uhuru Kenyatta stated that homosexuality was a 'non-issue' for Kenya.<sup>334</sup> In 2010, then Prime Minister Raila Odinga stated that gays were unnatural and deserved to be arrested.<sup>335</sup> In 2015, Vice President William Ruto stated that there was no room for gays in Kenya.<sup>336</sup> In November 2010, the commissioner of prisons, Isaiah Obugo, announced that the prisons authorities intended to install closed-circuit television (CCTV) cameras in prisons to curb same-sex relations among male prisoners.<sup>337</sup>

<sup>329</sup> 'American anti-gay pastor deported from Botswana for hate speech' *Africanews.com* 20 September 2016 <http://www.africanews.com/2016/09/20/american-anti-gay-pastor-deported-from-botswana-for-hate-speech/> (accessed 31 March 2018).

<sup>330</sup> See 'Botswana bid to derail gender body fails' *Sunday Standard* 29 November 2016 <http://www.sundaystandard.info/botswana%E2%80%99s-bid-derail-gender-body-fails> (accessed 24 March 2018).

<sup>331</sup> Human Rights Watch 'UN: Landmark Resolution on Anti-Gay Bias' 26 September 2014 <https://www.hrw.org/news/2014/09/26/un-landmark-resolution-anti-gay-bias> (accessed 24 March 2018).

<sup>332</sup> For example it abstained during the vote on the 2016 Resolution on protection against violence and discrimination based on sexual orientation and gender identity, which established the independent expert on SOGI issues. Human Rights Council 'Protection against violence and discrimination based on sexual orientation and gender identity' Resolution A/HRC/32/L.2/Rev.1 (2016). See The Conversation 'LGBTI vote at the UN shows battle for human rights is far from won' <https://theconversation.com/lgbti-vote-at-the-un-shows-battle-for-human-rights-is-far-from-won-62307> (accessed 23 March 2018).

<sup>333</sup> 'Moi condemns gays' *BBC News, World: Africa*, 30 September 1999. <http://news.bbc.co.uk/2/hi/africa/461626.stm> (accessed 15 April 2018).

<sup>334</sup> 'Uhuru Kenyatta dismisses gays rights as a non-issue in Kenya' *Daily Nation* 25 July 2015 <https://www.nation.co.ke/news/Uhuru-Kenyatta-gays-rights-barack-obama-kenya/1056-2808676-751bh/index.html> (accessed 24 March 2018).

<sup>335</sup> 'Kenya: PM orders arrest of gay couples' *Daily Nation* 28 November 2010, <http://allafrica.com/stories/201011290110.html> (accessed 24 March 2018).

<sup>336</sup> 'No room' for gays in Kenya, says deputy president' *Reuters* 4 May 2015. <https://uk.reuters.com/article/uk-kenya-gay/no-room-for-gays-in-kenya-says-deputy-president-idUKKBN0NP10620150504> (accessed 24 March 2018).

<sup>337</sup> 'Surveillance cameras to curb gay sex in prisons' *Daily Nation* 3 November 2010 <https://www.nation.co.ke/News/regional/Surveillance%20cameras%20to%20curb%20gay%20sex%20in%20prisons/-/1070/1046196/-/y0cuvlz/-/index.html> (accessed 24 March 2018).

A few positive voices have spoken out in favour of LGB rights. One was the-then Minister of Special Programmes who, in October 2010, advocated for the rights of men who have sex with men (MSM) to access health services.<sup>338</sup> Despite calls for her resignation, the Minister of Justice, Hon. Mutula Kilonzo supported her and stated that discrimination against LGB persons was against the law.<sup>339</sup> Former Chief Justice Willy Mutunga also spoke out, stating that gay rights are human rights.<sup>340</sup> Explaining his statements during former US President Obama's visit, President Kenyatta stated that he would not tolerate violence against gays.<sup>341</sup> Following the passing of Uganda's Anti-Homosexuality Act in 2014, a minor party in Kenya sought to table a similar law against homosexuality, something that did not succeed.<sup>342</sup> At the international level, Kenya has consistently voted against protection of LGB persons at the UN Human Rights Council.<sup>343</sup> It is therefore clear that the majority of the political players are against protection of LGB rights in Kenya, although there are a few isolated pockets of support.

In Uganda, there was largely not much political discussion before 1998 on LGB rights. Discussions on prohibiting same-sex marriages made it to the Constituent Assembly in 1994, but many delegates laughed at the concerns that gays would use the then unclear language on the right to start a family to claim for marriage equality as the possibility was generally unthinkable at the time.<sup>344</sup> After 1998, a clearly anti-gay stance started emerging among politicians. On his part, President Museveni has sent out mixed signals on the matter. He started with calls to arrest gays.<sup>345</sup> Then, during the discussions of the Anti-Homosexuality Bill, he started by warning ruling party MPs to 'go slow' on the issue of the Anti-

<sup>338</sup> 'Religious outrage over minister's support of gay rights' *IRIN* 6 October 2010 <http://www.irinnews.org/report/90685/kenya-religious-outrage-over-ministers-support-gay-rights> (accessed 5 May 2018).

<sup>339</sup> See UHAI-EASHRI (n 73 above) 21.

<sup>340</sup> 'Kenya: Gay Rights are human rights, says Chief Justice Mutunga' *The Star* 9 September 2011 <http://allafrica.com/stories/201109091335.html> (accessed 24 March 2018).

<sup>341</sup> 'I will not allow violence on gays, Uhuru says, cites protection for all under law' *The Star* 19 October 2015 [https://www.the-star.co.ke/news/2015/10/19/i-will-not-allow-violence-on-gays-uhuru-says-cites-protection-for-all\\_c1226707](https://www.the-star.co.ke/news/2015/10/19/i-will-not-allow-violence-on-gays-uhuru-says-cites-protection-for-all_c1226707)

<sup>342</sup> 'Kenyan Adventist politician proposes extreme anti-gay bill' *The Spectrum Magazine*, 14 August 2014, <https://spectrummagazine.org/article/alita-byrd/2014/08/14/kenyan-adventist-politician-proposes-extreme-anti-gay-bill> (Accessed 24 March 2018).

<sup>343</sup> Kenya voted no to the appointment of at the UN independent expert on sexual orientation. See LGBT Europe 'UN Human Rights Council votes for independent expert on LGBT discrimination' 4 July 2016 <http://www.lgbt-ep.eu/press-releases/un-body-votes-for-independent-expert-on-lgbt-discrimination/> (accessed 24 March 2018). Kenya also voted no during 2014 resolution on LGB rights. 'Human Rights, Sexual Orientation, and Gender Identity' (A/HRC/RES/27/32), was adopted on September 26 2014, See MK Lavers 'UN Human Rights Council adopts LGBT resolution' 26 September 2014. <http://www.washingtonblade.com/2014/09/26/breaking-u-n-human-rights-council-adopts-lgbt-resolution/> (accessed 24 March 2018).

<sup>344</sup> See Mujuzi (n 24 above).

<sup>345</sup> 'Arrest Homos, says Museveni' *The New Vision* 28 September 1999.

Homosexuality Bill.<sup>346</sup> He also wrote to the Speaker of Parliament opposing the passing of the Anti-Homosexuality Bill,<sup>347</sup> but later signed the bill into law.<sup>348</sup>

Some cabinet ministers, particularly the current and former ministers of Ethics and Integrity, have expressly been at the helm of the fight against homosexuality. Current minister Rev. Fr. Simon Lokodo issued the statement confirming that the government would not tolerate the promotion of homosexuality after the stopping of the 2016 Pride celebrations.<sup>349</sup> He has gone ahead to live up to this by stopping LGB events he regards as promoting homosexuality, without anyone in the government stopping or condemning him for doing so.<sup>350</sup> His predecessor, Nsaba Buturo, promised a tough law on gays, a promise that was fulfilled in the form of the Anti-Homosexuality Bill.<sup>351</sup> Then ruling party MP, David Bahati, tabled the Anti-Homosexuality Bill in 2010, and, instead of being castigated, was elected vice chairperson of the ruling party caucus and later State Minister in charge of Planning.<sup>352</sup>

However, there have been pro-LGB moves within various government ministries and institutions. The Uganda Police Force has officially been training police officers on LGB rights in collaboration with HRAPF and the Uganda Human Rights Commission, and the police spokesperson publicly acknowledged the need to train police officers to protect the rights of all persons without discrimination.<sup>353</sup> The Ministry of Health has also issued the ministerial directive on non-discrimination in health services, including on the basis of sexual orientation.<sup>354</sup> Therefore, it can be concluded that at the political level, there are mixed feelings about protection of LGB rights. Although the government is largely hostile to LGB rights, it also plans specifically for LGB persons in policing and health service delivery.

<sup>346</sup> 'Gay Bill: Museveni warns MPs' *New Vision* 12 August 2014. [https://www.newvision.co.ug/new\\_vision/news/1306786/gay-museveni-warns-mps](https://www.newvision.co.ug/new_vision/news/1306786/gay-museveni-warns-mps) (accessed 1 October 2017). Also see 'Museveni warns NRM on Homosexuality Bill' *New Vision*, 12 January 2010. [http://www.newvision.co.ug/new\\_vision/news/1298014/museveni-warns-nrm-homo](http://www.newvision.co.ug/new_vision/news/1298014/museveni-warns-nrm-homo) (accessed 9 September 2017).

<sup>347</sup> 'Museveni blocks Anti-Homosexuality Bill' *Monitor* 17 January 2014. <http://www.monitor.co.ug/News/National/Museveni-blocks-Anti-Homosexuality-Bill/688334-2148760-lq03yn/index.html> (accessed 24 March 2018).

<sup>348</sup> 'Joy, anger as Museveni signs law against gays' *Daily Monitor*, 24 February 2014. <http://www.monitor.co.ug/News/National/Joy--anger-as-Museveni-signs-law-against-gays/688334-2220400-lbtu35/index.html> (accessed 24 March 2018).

<sup>349</sup> See n 101 above.

<sup>350</sup> He stopped the 2016 and 2017 Pride events; the 2017 Queer Kampala International Film Festival; the FARUG skills training workshop in 2014 and the East and Horn of Africa Human Rights Defenders workshop in 2014.

<sup>351</sup> 'Tough anti-gay law due' *Sunday Vision* 26 August 2007. Also see 'Anti-gay Bill to be tabled soon' *New Vision* 1 July 2009

<sup>352</sup> See 'Uganda appoints anti-gay politician to government' eNCA, 2 March 2015. <http://www.enca.com/africa/uganda-appoints-anti-gay-politician> (accessed 14 April 2018).

<sup>353</sup> 'Police organise workshop on how to protect gays' *Daily Monitor* 15 November 2017.

<sup>354</sup> n 257, above.



It however seems to be most particularly against what it regards as ‘exhibitionism’ and ‘promotion’ of homosexuality which, if the definition in the now nullified Anti-Homosexuality Act (AHA) is any guide, would unfortunately include all public activities in support of LGB rights.<sup>355</sup> Indeed, the state has actively opposed every single case on LGB rights. At the international level, Uganda has been unwavering in their opposition to protection on the basis of sexual orientation, voting no during the first ever resolution on LGBT rights at the UN Human Rights Council,<sup>356</sup> and again during the 2016 resolution on the mandate of the UN Independent expert on LGB issues.<sup>357</sup>

In conclusion, political commitments protecting LGB persons have been made only in South Africa, but even there the actions of politicians usually differ from written commitments. For Botswana, Kenya and Uganda, there are very few political commitments made to protect LGB rights. Whereas in Botswana and Kenya the state is largely ambivalent, in Uganda the state actively persecutes LGB persons.

#### 4.2.3 Changes in the social environment

Over the past 20 years, there has been some visible change in how LGB persons are regarded by the general population in the selected Common Law countries in Africa. It is the premise of this study that SL has an important role to play in shaping the public discourse surrounding LGB rights, and that changes can be attributed to the institution of cases as well the pronouncement of courts, both for and against LGB rights. Changes in the social environment will be considered by analysing opinion polls and other studies that have considered changes in: social attitudes; social status; religious stance and attitudes; media coverage; and depiction in popular culture, putting into consideration the potential bias and the inherent limitations of such surveys and studies, including not asking the same questions and failure to repeat the same surveys over a long period of time.<sup>358</sup>

<sup>355</sup> Section 13, AHA, 2010.

<sup>356</sup> Uganda opposed the UN Human Rights SOGI resolution in 2011 (See International Service for Human Rights ‘Historic decision: Council passes first-ever resolution on sexual orientation & gender identity’ 17 June 2011 <http://www.ishr.ch/news/historic-decision-council-passes-first-ever-resolution-sexual-orientation-gender-identity> (accessed 24 March 2018)).

<sup>357</sup> Above.

<sup>358</sup> For a more detailed discussion of the challenges of determining public opinion basing on surveys see Andrew R. Flores & A Park ‘Polarized Progress: Social Acceptance of LGBT People in 141 Countries, 1981 to 2014’ March 2018, 6-7



a) *Societal attitudes towards LGB persons*

There has been more change in public attitudes seen in South Africa than elsewhere among the selected Common Law African countries. Public opinion in South Africa has shifted quite radically from the time before inclusion of sexual orientation protections in the country's final constitution. Du Pisani argues that there were hardly any positive discussions about homosexuality, whether among blacks or whites, prior to the 1960s. Among whites, a subculture of 'moffie-bashing' was rife.<sup>359</sup> Among blacks, discussions in *Drum* – a popular urban publication – showed considerable disdain for homosexuality.<sup>360</sup> This has however changed greatly over time. The taboo against the discussion of homosexuality among Afrikaners for example was broken in 1968 when the Criminal Law Amendment Act of 1968 was being debated in parliament.<sup>361</sup> People expressed differing views and a large number of writers of letters in newspapers wrote in support of the protection of LGB persons.<sup>362</sup> In 1994, public opinion was still very hostile to LGB rights, and in a survey done by the NCGLE, it was found that 48% of the responses were clearly anti-gay.<sup>363</sup> This is why the NCGLE chose not to pursue a public campaign but rather to engage the Constitutional Commission and key supportive individuals like Archbishop Tutu.<sup>364</sup>

The Pew Research Centre found that in 2002, 63% of the population did not accept homosexuality.<sup>365</sup> By 2006, the percentage had risen to 70% of the population.<sup>366</sup> Seven years later, in 2013, they found a 9% drop to 61%.<sup>367</sup> An AfroBarometer survey published in March 2016 found that 67% of South Africans would like or would not mind having homosexual neighbours.<sup>368</sup> The Other Sheep Foundation found in 2017 that 70% of South Africans believed that homosexual sex was 'wrong and disgusting' while at the same time 49%

<sup>359</sup> See K du Pisani 'Shifting sexual morality? Changing views on homosexuality in Afrikaner society during the 1960s' (2012) 57:2 *Historia* 182, 189.

<sup>360</sup> Above.

<sup>361</sup> Above.

<sup>362</sup> Above, 182.

<sup>363</sup> The NCGLE conducted a public survey of which results were never released publicly but which, according to Hoad et al, showed that there was still much hostility against LGB persons in South Africa. N Hoad et al (eds.) *Sex and politics in South Africa* (2005) 194.

<sup>364</sup> GG da Costa Santos 'Decriminalising homosexuality in Africa: lessons from the South African experience' in C Lennox & M Waites (eds.) *Human rights, sexual orientation and gender identity in the commonwealth: Struggles for decriminalisation and change* (2013), 313, 323-324.

<sup>365</sup> See Pew Research Centre (2013) 'The global divide on homosexuality: Greater acceptance in more secular and affluent countries' Washington, 23, <http://www.pewglobal.org/files/2013/06/Pew-Global-Attitudes-Homosexuality-Report-FINAL-JUNE-4-2013.pdf> (accessed 28 March 2018).

<sup>366</sup> Pew Research Centre 'Attitudes Toward Homosexuality in African Countries' 13 November 2006, <http://www.pewresearch.org/fact-tank/2006/11/13/attitudes-toward-homosexuality-in-african-countries/> (accessed 28 March 2018).

<sup>367</sup> See Pew Research Centre (2013) (n 365 above) 23.

<sup>368</sup> See AfroBarometer 'Good neighbours? Africans express high levels of tolerance for many, but not for all' Afrobarometer Dispatch No. 74 (2016) 12.

believed that gay people should not have the same rights as others.<sup>369</sup> These surveys all indicate a greater positive change in the acceptance of homosexuality in South Africa, although this change is not as much as would be expected, considering the expansive constitutional and legal protections. The latest study by the Williams Institute of the University of California, Berkeley show consistently rising acceptance levels, with the peak happening around the year 2008.<sup>370</sup>

In Botswana, no opinion poll was conducted about the public's perceptions on LGB rights before 1998. However, the Court of Appeal in the *Kanane* case<sup>371</sup> relied on recent amendments to the criminal law expanding the criminalisation of same-sex conduct<sup>372</sup> to conclude that public opinion was against homosexuality. According to Quansah, same-sex conduct was not largely discussed in public before the *Kanane* case, which started in March 1995, and it was that case that brought the issue out into the public domain.<sup>373</sup> By 1998, public discussions about the need for law reform had started, and the human rights organisation DITSHWANELO organised a conference at which human rights lawyer Duma Boko (later the advocate in the *Kanane* case), spoke out against the laws criminalising consensual same-sex conduct as vague and ought to be declared null and void.<sup>374</sup> 1998 is the year that LGB persons in Botswana formed LEGABIBO, the first LGB organisation in the country. Nevertheless, discrimination against LGB persons remains with the continued criminalisation.<sup>375</sup> However, some positive changes have been observed with regard to how the public in Botswana perceives LGB rights, with public discussions on homosexuality taking place and many voices coming out in support of decriminalisation. The March 2016 AfroBarometer survey found that 43% of the people in Botswana would like or would not mind having homosexual neighbours.<sup>376</sup> This is twice the African average of 21%,<sup>377</sup> making Botswana one of the more tolerant countries for homosexuals in Africa. The Other Sheep Foundation interviewed parents of LGB persons who were supportive of their children,

<sup>369</sup> See generally, The Other Foundation 'Progressive prudes: A survey of attitudes towards homosexuality and gender non-conformity in South Africa' (2016).

<sup>370</sup> Flores & Park, n 358, 355.

<sup>371</sup> n 40 above.

<sup>372</sup> This was the 1998 amendment to the Penal Code which extended criminalisation of 'carnal knowledge against the order of nature' to women and the debate the preceded the amendment as already discussed above.

<sup>373</sup> EK Quansah 'Same-sex relationships in Botswana: Current perspectives and future prospects' (2004) 4 *African Human Rights Law Journal* 201, 202, 217.

<sup>374</sup> Tabengwa & Nicol (n 85 above) 340.

<sup>375</sup> M Selemogwe & D White 'An overview of gay, lesbian and bisexual issues in Botswana' (2013) 17:4 *Journal of Gay & Lesbian Mental Health* 406-414.

<sup>376</sup> See AfroBarometer (n 344 above) 12.

<sup>377</sup> Above.

even when they still found it hard to believe that they were ‘born that way’.<sup>378</sup> The study by the Williams Institute found that over 33 years (1981-2014), there had been a consistent positive change in societal attitudes towards LGB persons in Botswana, albeit without any major changes.<sup>379</sup>

Kenyan’s attitudes towards homosexuality before 1998 were also generally not measured, and homosexuality was largely not discussed at the time. However, discussions preceding the 2010 Constitution in Kenya ignited the debate on same-sex relations with many voices for and against their prohibition in the Constitution coming up. Eventually, the Constitution did not prohibit same-sex relations, but also did not specifically legalise them. In 2002, the Pew Research Centre found that 99% of Kenyans believed that homosexuality should not be accepted. This number was at 96% in 2007; remained at 96% in 2011; and was at 90% in 2013.<sup>380</sup> This shows a considerable positive change in a period of less than ten years, although the rates of homophobia remain very high. The percentage has continued to increase, with 14% of Kenyans indicating that they would tolerate or not mind having homosexual neighbours in 2016.<sup>381</sup> The International LGBTI Association conducted the 2016 Global Attitudes Survey on LGBTI people and noted that 53% of people in Kenya did not agree that being LGB should be a crime, and that 46% of the people had no concerns about their neighbour being gay or lesbian.<sup>382</sup> In 2017, a survey among 77 university students in Nairobi found acceptance of homosexuality among 27.1% with another 25.7% stating that there should be acceptance, but with reservations.<sup>383</sup> This rhymes with the assertion by the AfroBarometer study that the young and more educated are more accepting of homosexuality than the older generation.<sup>384</sup> Among this group, 88% were also in favour of employment of homosexuals.<sup>385</sup> UHAI-EASHRI observed in 2011 that ‘viral homophobia and transphobia is still the order of the day for the majority of LGBTI Kenyan citizens.’<sup>386</sup> Generally, a greater number of Kenyans do not accept homosexuality or homosexuals, but this number has been steadily reducing since 2002. This is more or less in line with the

<sup>378</sup> The Other Sheep Foundation ‘Canaries in the coal mines: An analysis of spaces for LGBTI activism in Botswana’ (2017) 15.

<sup>379</sup> Flores & Park, n 358 above, 31.

<sup>380</sup> See Pew Research Centre (2013) n 361 above, 23.

<sup>381</sup> See AfroBarometer (n 368 above) 12.

<sup>382</sup> The ILGA-RIWI 2016 Global attitudes survey on LGBTI people in partnership with LOGO [http://ilga.org/downloads/07\\_THE\\_ILGA\\_RIWI\\_2016\\_GLOBAL\\_ATTITUDES\\_SURVEY\\_ON\\_LGBTI\\_PEOPLE.pdf](http://ilga.org/downloads/07_THE_ILGA_RIWI_2016_GLOBAL_ATTITUDES_SURVEY_ON_LGBTI_PEOPLE.pdf) (accessed 31 March 2018)

<sup>383</sup> MB Massawe ‘An assessment of the human rights attitudes toward sexual diversity in Kenya: A case study of universities in Nairobi’ LLM Thesis, United States International University, Africa (2017) 57.

<sup>384</sup> Above, 14-15.

<sup>385</sup> Above, 55.

<sup>386</sup> UHAI-EASHRI (n 73 above) 20.

Williams Institute's finding that over the past 33 years, attitudes have become more positive, although the period between 2010 and 2012 saw a sudden decline in the levels of acceptance, which then rose again, and have been rising since.<sup>387</sup>

In Uganda, before 1998 homosexuality was not much of a public topic, which is why when a member of the Constituent Assembly mooted the possibility of agitations for same-sex marriages in 1994, the matter was simply ridiculed.<sup>388</sup> Occasionally, a few religious leaders and journalists would bring up the matter in public.<sup>389</sup> Although no public opinion polls were published on the matter at the time, public sentiments about the issue were exposed when Makerere University law lecturer, Prof. Sylvia Tamale, started speaking out in favour of the protection of LGB persons. She was voted worst woman of the year in 2003 because of this.<sup>390</sup> At around the same time, the Pew Research Centre found that 95% of Ugandans did not accept homosexuality. This increased to 96% in 2007 and continued to hover around the same margin in 2013.<sup>391</sup> The AfroBarometer study in 2016 found that 95% of Ugandans would not tolerate having a homosexual neighbour.<sup>392</sup> This shows almost no change in the levels of homophobia between the years 2002 and 2017. However, these poll responses were probably more reflective of the anti-gay campaigns and debates that were going on at the time, including the political debates surrounding the Anti-Homosexuality Bill that was introduced in 2009. That context meant that being against homosexuality was the most acceptable position to adopt, and misconceptions of what exactly homosexuality is may have contributed to these trends. A 2008 study involving 164 participants at Makerere University found that 69.5% of the respondents objected to homosexuality on moral grounds.<sup>393</sup> However, of all the respondents, only 43% understood homosexuality to be about sexual orientation rather than sexual conduct, and 50% thought that homosexuality was all about anal sex.<sup>394</sup> Again, just as in Kenya, there were more positive answers to questions around homosexuals being normal, with 42.6% of the respondents regarding

<sup>387</sup> Flores & Park, n 358 above, 355.

<sup>388</sup> Mujuzi (n 24 above) 281.

<sup>389</sup> For a selection of such articles in the press for the period 1998-2007, see S Tamale (ed) 'Homosexuality: Perspectives from Uganda' *Sexual Minorities Uganda* (2007) 1, 86.

<sup>390</sup> See 'End of year list of cheers, jeers' *New Vision* 31 December 2003. Tamale describes the state of public opinion at the time as a shock. See S Tamale 'Out of the closet: Unveiling sexuality discourses in Uganda' (2003) 2 *Feminist Africa* 42. <https://www.akinamamawaafrika.org/index.php/publications/oral-herstory/48-tamale-out-of-the-closet-femafrika/file> (accessed 5 May 2018).

<sup>391</sup> Pew Research Centre (2013) (n 365 above) 23.

<sup>392</sup> Afrobarometer (n 365 above) 12.

<sup>393</sup> A Jjuuko 'Aren't these emperors naked?' Revealing the nexus between culture and human rights over the issue of homosexuality in Uganda (2008) LLB Dissertation, Makerere University, 92.

<sup>394</sup> Above, 88-89.

homosexuals as normal<sup>395</sup> and 49.3% opposing criminalisation of homosexuality.<sup>396</sup> Uganda is generally a tolerant society,<sup>397</sup> and the fact that levels of homophobia seem to be very high is not commensurate with this view, as the relatively low levels of violence against LGB persons show. The results of the opinion polls may therefore be a result of a highly politically charged atmosphere rather than a reflection of the real views of the masses.<sup>398</sup> The Williams Institute study shows a steep decline in the levels of society acceptance from 2005 to 2006, and then again from 2008 to 2014. Acceptance has been increasing back to pre-2005 levels since then.<sup>399</sup>

Taken together, the levels of acceptance of homosexuality are still low in all the different sample countries. Nevertheless, it can be concluded that South Africans are more accepting of homosexuals than any of the other countries, indicating that decriminalisation and positive legal protection does a lot to change people's attitudes. Botswana also shows a marked positive change demonstrating that perhaps the recent positive court decisions have made an impact in changing people's attitudes. Kenya also shows gradual positive change over the years, although the levels of homophobia remain high, and this also collates with the recent positive legal judgments. Uganda seems to have maintained high levels of homophobia since 1998, and again it is the country with the least legal changes, despite a number of court victories. Therefore, there is a positive relationship between legal change and change in public perceptions on homosexuality. However, the nuanced nature of public opinion must be taken into consideration, and factors such as the need to fit in with prevailing trends, misconceptions and myths, the prevailing political and legal positions as well as local perceptions concerning an issue all need to be considered when measuring public opinion. Finally, there is a need to further interrogate what respondents actually mean when they provide answers to the surveys so as to fully appreciate the responses within the relevant contexts and nuances.

<sup>395</sup> Above, 89-90.

<sup>396</sup> Above, 91.

<sup>397</sup> K Ward 'Religious institutions and actors and religious attitudes to homosexual rights: South Africa and Uganda' in Lennox & Waites (n 318 above) 409, 410. Also AfroBarometer, see n 368 above.

<sup>398</sup> See T Shah, 'The Uganda conspiracy theory' (2011) 15 *Christianity Today* [www.christianitytoday.com/ct/2011/marchweb-only/ugandaconspiracytheory.html](http://www.christianitytoday.com/ct/2011/marchweb-only/ugandaconspiracytheory.html) (accessed 31 March 2018).

<sup>399</sup> Flores & Park, n 358 above, 355.

b) *Violence against LGB persons*

LGB persons face violence in all communities, as they are usually regarded as second-class citizens, who thus deserve or bring upon themselves the violence.<sup>400</sup> In all four countries, LGB persons face violence, albeit at different levels. Violence manifests in the form of murders, physical attacks, insults and abuses. In all the Common Law African countries considered in this study, there are reports of violence against LGB persons.

In the case of Botswana, reports of violence against LGB persons are rare but they exist, more especially against young LGB persons who are sometimes bullied or beaten, and so people still have to be careful.<sup>401</sup> LEGABIBO is now a fully registered organisation that rents an office in a well to do suburb of Gaborone. It has never been attacked, despite the community knowing the work done by the organisation.<sup>402</sup> Even well-known LGB activists live relatively violence free lives, as intimated by Caine Youngman who has been at the frontline for LGB equality in Botswana.<sup>403</sup> Youngman attests that he can walk around freely even when people do identify him as an LGB activist.<sup>404</sup> The low levels of violence are attributable to the peaceful nature of the Batswana, who are more or less a peaceful society that resolve their issues amicably rather than through violence. According to Bradley Fortuin and Botho Maruatone:

We are people who are hospitable, and less confrontational. People would rather sit back and judge in their own spaces, rather than indulge in violence... we believe in botho.<sup>405</sup>

Therefore, there has not been much change as regards the incidence of violence towards LGB persons from the period before 1998.

For Kenya, there was less violence in the period before 1998, with violence against LGB persons being a more recent development. Of late however, as LGB court-based victories

<sup>400</sup> Human Rights Council, United Nations General Assembly, Report of the Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity, 2017, A/HRC/35/36, Geneva, CH: Office of the High Commissioner for Human Rights, Para 17 <https://daccess-ods.un.org/TMP/4976555.7050705.html> (accessed 15 May 2018).

<sup>401</sup> Interview with Caine Youngman.

<sup>402</sup> Interview with Bradley Fortuin and Botho Maruatone, of Lesbians, Gays and Bisexuals of Botswana (LEGABIBO), Gaborone, 10 October 2017.

<sup>403</sup> Interview with Caine Youngman, Lesbians, Gays and Bisexuals of Botswana (LEGABIBO), Gaborone, 12 October 2017.

<sup>404</sup> Above.

<sup>405</sup> Interview with Advocate Tshiamo Rantao. Rantao Kewagamang Attorneys, Gaborone, 12 October 2017. Interview with Botho Maruatone (n 402 above) and Caine Youngman (n 375 above).



increase, violence against LGB persons has also risen.<sup>406</sup> In 2008, the Kenya Chapter of the International Center for Reproductive Health (ICRH-Kenya) had its health unit in Kilifi forcefully shut down by religious groups who threatened to burn it down for providing health services to LGB persons.<sup>407</sup> One of the most horrific tales of violence was recorded in February 2010, when a mob emerged from Friday prayers and dragged several men out of a government research facility, and doused them with petrol. They were only saved from being set alight by the police.<sup>408</sup> This followed calls by a US-based right wing religious entity, Project See, to have LGB persons attacked.<sup>409</sup> In February 2010 in Mtwapa, in the coastal city of Mombasa, two men were beaten by a mob referring to themselves as 'Operation Gays Out,' for allegedly preparing to have a gay wedding. It is only the police that saved them from death.<sup>410</sup> Human Rights Watch reported at least three murders in the three years preceding 2015.<sup>411</sup> Despite this violence, LGB activists in Kenya believe that the Kenyan community poses less of a threat to them.<sup>412</sup> On a more positive note, the police has been protective of LGB persons who are attacked, although it takes no action against the perpetrators, and they also sometimes engage in violence against LGB persons themselves.<sup>413</sup> One outstanding example of police protection from violence is when they monitored the Project See website to keep track of and investigate cases of hate speech directed against LGB persons.<sup>414</sup>

In Uganda, there are few reported cases of violence before 1998, and again few cases from then up to 2009.<sup>415</sup> According to HRAPF and the Consortium on Documentation of Violations based on Sexual Orientation and Gender Identity, only one case of violence was documented for each of 1995, 1999, and 2001.<sup>416</sup> However, with the President speaking out strongly against homosexuality in the early 2000s, and the amendment of the constitution to prohibit same-sex marriages in 2005, the levels of violence started increasing. The Consortium recorded 10 cases of violations, many of which involved violence, in 2010; 9 in

<sup>406</sup> For a discussion of violence against LGB persons, see generally, Human Rights Watch 'The issue is violence: Attacks on LGBTI people on Kenya's coast' (2015).

<sup>407</sup> Above, 29-30.

<sup>408</sup> UHAI-EASHRI (n 73 above) 21.

<sup>409</sup> Above.

<sup>410</sup> 'Mob attacks gay 'wedding' party' *Daily Nation* 12 February 2010.

<sup>411</sup> Human Rights Watch (n 389 above) 30.

<sup>412</sup> Joint interview with Lorna Dias, Jackson Otieno, Kelvin N. Washiko, Yvonne Oduor, and Brian Macharia, all of Gay and Lesbian Coalition of Kenya (GALCK staff), Nairobi, 26 July 2017.

<sup>413</sup> Human Rights Watch (n 389 above) 30-38.

<sup>414</sup> UHAI-EASHRI (n 73 above) 31.

<sup>415</sup> Consortium on documenting Violations Based on Sex determination, Sexual Orientation and Gender Identity 'Uganda report of violations based on sex determination, gender identity, and sexual orientation 2014' (2015) 13.

<sup>416</sup> Interview with Ms. Patricia Kimera, Head, Access to Justice Division, HRAPF, Kampala, 24 April 2018.

2011; 21 in 2012; and 30 in 2013.<sup>417</sup> The *Victor Mukasa & Yvonne Oyoo v Attorney General* (*Victor Mukasa case*)<sup>418</sup> case in 2006 shows the nature of the violence as Victor Mukasa's house was forcefully entered, and a visitor in the house arrested and denied access to toilet facilities, amidst insults. Violence continued to increase with 89 cases of violations recorded by the Consortium in 2014,<sup>419</sup> and 91 in 2015,<sup>420</sup> and then there was a drop to 57 cases in 2016.<sup>421</sup> Sexual Minorities Uganda reported 162 violations against LGB and transgender persons for the period 20 December 2013 to 1 May 2014, following the passing of the Anti-Homosexuality Bill.<sup>422</sup> 30% of these cases involved a component of violence, and 30% a component of intimidation.<sup>423</sup> Another outstanding example of violence in recent times is the 2016 stopping of the Pride celebrations by the Uganda Police.<sup>424</sup> Sixteen activists were arrested, bundled onto police trucks, dumped in dirty Police cells, and subjected to beatings and mockery by inmates.<sup>425</sup> The more than 200 persons at the venue were kept in the room for over an hour, and some were groped and had wigs forced off their heads.<sup>426</sup> However, Uganda has few recorded murders based on one's sexual orientation,<sup>427</sup> despite the high profile murder of prominent LGB activist David Kato in 2010 who was hit on the head with a hammer by a person he had harboured at his home.<sup>428</sup> Training of police officers on LGB rights has however been going on since 2015 and this may also partly explain the reduction in violations for the year 2016. Uganda has thus witnessed increasing violence against LGB

<sup>417</sup> Consortium (n 412 above) 13.

<sup>418</sup> (2008) AHRLR 248 (High Court of Uganda).

<sup>419</sup> HRAPF and The Consortium on Monitoring Violations Based on Sex Determination, Gender Identity and Sexual Orientation 'The Uganda report of violations based on gender identity and sexual orientation' (2015) 21.

<sup>420</sup> HRAPF and The Consortium on Monitoring Violations Based on Sex Determination, Gender Identity and Sexual Orientation 'The Uganda report of violations based on gender identity and sexual orientation' (2016) 25.

<sup>421</sup> HRAPF and The Consortium on Monitoring Violations Based on Sex Determination, Gender Identity and Sexual Orientation 'The Uganda Report of Violations based on Gender Identity and Sexual Orientation' (2017) 26.

<sup>422</sup> Sexual Minorities Uganda 'From torment to tyranny: Enhanced persecution in Uganda following the passage of the Anti-Homosexuality Act 2014 20 December 2013 – 1 May 2014' (2014) 2.

<sup>423</sup> Above, 3-7.

<sup>424</sup> HRAPF 2016 (n 87 above) 22.

<sup>425</sup> Above.

<sup>426</sup> Details of the violence and violations are documented in the LGBTI Violations Report 2017 (n 420 above) 22-25.

<sup>427</sup> A number of allegations of murders of LGB persons have been made but according to Ms. Kimera, HRAPF has not been able to verify any of them despite conducting verification on the ground. Interview with Patricia Kimera, n 412 above. For one allegation that stood out, see 'Probe into disputed report of 7 slain LGBT Ugandans' 76 Crimes, 7 August 2014 <https://76crimes.wordpress.com/2014/08/17/report-7-lgbt-ugandans-slain-65-flee-abroad/> (accessed 31 August 2018); and JL Feder 'American organizations sought thousands off unsubstantiated story of stoning of LGBT Ugandans' Sexuality Policy Watch, 22 Aug 2014 <http://sxpolitics.org/around-the-web-136/9655> (accessed 31 August 2018).

<sup>428</sup> The official version from the prosecution was that the accused murdered Kato after he had demanded for sex from him. The accused person confessed to this. Nevertheless, this was not considered as a defence and the judge convicted him and sentenced him to 30 years in prison. 'Gay activist murderer sentenced to 30 years' *Daily Monitor* 10 November 2011 <http://www.monitor.co.ug/News/National/688334-1270664-a30st8z/index.html> (accessed 15 April 2018).

persons over the past ten years, with a reduction in the year 2016 when the police, who usually perpetuate the violence, agreed to be trained on LGB rights.

South Africa, which has the most progressive laws on LGB rights the world over, unfortunately also continues to suffer from high levels of violence against LGB persons. There is rampant hate crime including murders, and ‘corrective’ rape against LGB persons.<sup>429</sup> According to a study by Out LGBT Well-being, 4 out of 10 South Africans know of someone who has been murdered because of their sexual orientation.<sup>430</sup> Black South Africans in rural areas are at higher risk of violence.<sup>431</sup> Lesbians who have a low income and are not able to access secure housing and transport are also particularly vulnerable.<sup>432</sup> Violence based on sexual orientation, including murder and corrective rape, is common in South Africa, which is also generally known for its high crime rates.<sup>433</sup> A recent survey shows that 14% of the population in the Gauteng province of South Africa approved of violence against LGB persons.<sup>434</sup> There is a noted disconnect between the rights and procedures on paper and those in reality.<sup>435</sup> Part of the reason for this disconnect between the progressive legal changes and the lived realities of LGB persons is because the victims do not know how to use the progressive laws and the institutions that have been put in place to ensure that the protection extends to them.<sup>436</sup> A further issue is the failure or refusal of the police to protect LGB persons from violence; a refusal to take seriously the cases of hate crimes reported to them and even complicity with the perpetrators of violence based on sexual orientation.<sup>437</sup> Additionally, the National Task Team on LGBTI and Gender-based Violence (NTT) which was established in 2011 to coordinate redress for attacks against LGB and transgender and intersex persons, although hailed as an example of important mechanisms put in place by the state to address violence against LGB persons,<sup>438</sup> remains

<sup>429</sup> K Thomas ‘Homophobia, injustice and “corrective rape” in post-Apartheid South Africa’ *Violence and Transition Project, Centre for the Study of Violence and Reconciliation* (2013) 4.

<sup>430</sup> Above, 12.

<sup>431</sup> Out LGBT Well-being, Access Chapter 2 et al ‘Hate crimes against Lesbian, Gay, Bisexual and Transgender (LGBT) People in South Africa’ (2016) 12.

<sup>432</sup> Human Rights Watch ‘“We’ll show you you’re a woman” Violence and discrimination against black lesbians and transgender men in South Africa’ (2011) 2.

<sup>433</sup> Above, 14-15.

<sup>434</sup> R Ballard & C Hamann ‘Quality of life survey IV 2015/2016: Social cohesion’ GCRO Data Brief No. 8, 2018, 26.

<sup>435</sup> Lawyers for Human Rights, et al ‘A Submission to the UN Human Rights Committee in response to the Initial Report by South Africa under the International Covenant on Civil and Political Rights at the 116th session of the Human Rights Committee’ Geneva, March 2016, 5.

<sup>436</sup> S Bornman et al *Protecting survivors of sexual offences - The legal obligations of the state with regard to sexual offences in South Africa* (2013).

<sup>437</sup> n 431 above, 46-49.

<sup>438</sup> United Nations ‘Living free and equal: What states are doing to tackle violence and discrimination against lesbian, gay, bisexual, transgender and intersex people’ , 2016, 36-37.

largely ineffective as its mechanisms are not easily accessible by LGB persons, and it also remains rather incapacitated in carrying out its coordination role.<sup>439</sup>

Overall, violence against LGB persons in Africa was rather uncommon before 1998. This may have been due to the fact that very few persons had come out as LGB at the time, and this made homosexuality less of a threat to the established heterosexual ways of life. It may also have been due to the absence of proper documentation about the issue. The levels of violence increased with the increased visibility of the LGB movement, particularly after the turn of the century, which is also the same time there were increased court victories in favour of LGB persons. Therefore, violence seems to be a reaction by the majority to a minority seen as threatening the established heterosexual and patriarchal ways of life. The absence of effective mechanisms to offer redress to victims, and a lack of awareness of these mechanisms where they exist and lack of access to them, exacerbate the effects of violence. Persons who mainly face violence are those living in slum or low-income areas, who therefore lack access to security services, and stand out in their own communities due to their sexual orientation. Generally as regards violence, the change in the selected countries has been negative as there is more violence against LGB persons.

*c) Societal attitudes towards LGB persons in public settings*

How other persons in the public treat LGB persons is an important indicator of acceptance in a particular country. The particular public settings that are going to be examined here are: the streets (which includes being allowed to hold meetings, and other public activities like pride parades and workshops), schools, and hospitals. The attitudes differ from one country to the next but in all the study countries, out LGB persons are treated with some degree of resentment.

In South Africa, where same-sex marriages are legal since the recognition of sexual orientation as a protected ground against discrimination in the Constitution in 1994, there have been notable changes in the treatment of LGB persons in the public setting. Where LGB organisations were largely operating more or less clandestinely,<sup>440</sup> they are now freely allowed to register and to operate.<sup>441</sup> Gay pride parades have been held in South Africa since

<sup>439</sup> Lawyers for Human Rights et al (n 435 above) 14.

<sup>440</sup> For a history of gay organising see M Gevisser 'A History of South African Lesbian and Gay Organisation: The 1950s to the 1990s,' in Gevisser & Cameron (n 49 above) 14.

<sup>441</sup> The first organisation to be established to advocate for gay rights in South Africa was the Gay Association of South Africa (GASA).

1990,<sup>442</sup> The first South African Gay pride parade was held in 1990 as a march against apartheid and discrimination of LGB persons.<sup>443</sup> In 1994, a decision was made to change the activity from a march to a celebration,<sup>444</sup> and this is the type of pride that has dominated.<sup>445</sup> Another change as regards pride is that it has of recent extended to other cities besides Johannesburg, with Cape Town holding its own pride parade since 1993, and it has also been holding a queer costume party since 1994. Pride parades are now also held in Knysna since 2001, Klerksdorp since 2010, Port Elizabeth and Durban since 2011, Bloemfontein and Polokwane since 2012, and Pretoria since 2013. The pride parades have faced protests and in a particular incident in 2007, protesters removed over 700 pride posters.<sup>446</sup> The pride parades and activities have suffered more from internal conflicts and controversies than from external attacks. They have become more commercialised and racialised than before.<sup>447</sup> Many believe that they should not be celebrations but rather protests, as there is still a lot to be achieved.<sup>448</sup> As regards business, service is usually available to all now without discrimination. However, there have been numerous cases where businesses have refused to provide venues or other services to same-sex couples.<sup>449</sup> One of these, a refusal by a wedding venue to host a same-sex wedding, resulted into an investigation by the South African Human Rights Commission, although the complaint was later withdrawn.<sup>450</sup>

As regards schools, formally all students of all sexual orientations are admitted to schools, and are supposed to be protected from discrimination. However, in the Out LGBT Wellbeing study, 55% of all LGB persons below 24 years indicated that they have faced discrimination while in school.<sup>451</sup> Indeed, there are reports of LGB students being kicked out of school for their sexual orientation.<sup>452</sup> Concerning hospitals, cases of LGB persons being

<sup>442</sup> For a detailed discussion of the Pride Parade, see generally A Manion & S de Waal *Pride: Protest and Celebration* (2006).

<sup>443</sup> Above, 6-49.

<sup>444</sup> Above.

<sup>445</sup> Above.

<sup>446</sup> See A Stielau 'Double agents: Queer citizenship(s) in contemporary South African visual culture' dissertation presented for the degree of Master of Arts in Fine Art, University of Cape Town, January 2016, 47.

<sup>447</sup> See for example S Moore 'Asserting difference, asserting sameness: heteronormativity, homonormativity, and subversion in South African pride events' [https://www.ru.ac.za/media/rhodesuniversity/content/criticalstudiesinsexualitiesandproduction/documents/CSSR%20Blog%20Post%20-%20S.%20Moore\\_March17.pdf](https://www.ru.ac.za/media/rhodesuniversity/content/criticalstudiesinsexualitiesandproduction/documents/CSSR%20Blog%20Post%20-%20S.%20Moore_March17.pdf). (accessed 2 April 2018).

<sup>448</sup> Above.

<sup>449</sup> See for example 'Made to feel inhuman: Gay couple dumped by Springs wedding venue' <http://www.mambaonline.com/2018/01/16/feel-inhuman-springs-wedding-venue-dumps-sex-couple/> (accessed 02 April 2018).

<sup>450</sup> *L Brown-Waterson v Kilcairn, Riebeek Valley* (SAHCR) 2014.

<sup>451</sup> Out LGBT Well-being (n 431 above) 6.

<sup>452</sup> See for example 'Gay student kicked out of Durban college' *GroundUp*, 8 February 2017 <https://www.groundup.org.za/article/gay-student-kicked-out-durban-college/> (accessed 28 March 2018).

abused have also surfaced.<sup>453</sup> What is strange about South Africa is that, despite the presence of equality courts and other enforcement mechanisms, LGB persons rarely use them when they are being discriminated against in public, pointing to the assertion that the mechanisms need to be taken down to the people and made more relevant to them.<sup>454</sup> Thus, whereas a lot has changed from 20 years ago as regards the public visibility of LGB persons, a lot still has to be done. Indeed more than half of LGB persons in South Africa prefer not to come out, and live in fear of discrimination.<sup>455</sup>

For Botswana, there has been a slow positive change in the way LGB persons are treated in public spaces since 1998. No major development besides the court victories have happened which can be compared to South Africa's constitutional changes or Uganda's Anti-Homosexuality Act, and therefore the change is more evolutionary. LGB organisations can now register after the *LEGABIBO Registration* case, and many organisations have come up.<sup>456</sup> However, there is still need to be careful, and many organisations, including LEGABIBO, do not label their offices.<sup>457</sup> On the streets, LGB organisations are able to demonstrate and make demands, as well as get involved in political processes. Although gay pride parades have not been held, LEGABIBO holds a party to coincide with the Johannesburg Pride (Jo'burg Mardi Gras) in South Africa, and usually supports individuals to attend pride parades in South Africa.<sup>458</sup> It has also been holding public demonstrations to demand for LGB rights, particularly on the International Day Against Homophobia and Transphobia (IDAHOT).<sup>459</sup> Furthermore, an annual LGB film festival has been held since 2013 and is supported by other organisations.<sup>460</sup> In 2013, LEGABIBO also held a meeting with chiefs (dikgosi) from across Botswana on LGB rights.<sup>461</sup> As regards businesses, no business specifically caters for LGB persons, and no cases have been reported of businesses refusing to serve LGB persons. Cases of the eviction of LGB persons from rented premises have also been recorded.<sup>462</sup> In

<sup>453</sup> See for example A Muller 'Scrambling for access: Availability, accessibility, acceptability and quality of healthcare for lesbian, gay, bisexual and transgender people in South Africa' (2017) 17 *BMC International Health Human Rights* 16.

<sup>454</sup> Bornman et al, n 436, above.

<sup>455</sup> Out LGBT Well-being (n 431 above) 5.

<sup>456</sup> Interview with Bradley Fortuin and Botho Maruatone (n 398 above).

<sup>457</sup> As above.

<sup>458</sup> Lesbians, Gays and Bisexuals of Botswana 'Events' <https://legabibo.wordpress.com/events/> (accessed 15 May 2018).

<sup>459</sup> Above.

<sup>460</sup> The Other Sheep Foundation (n 374 above) 15-16.

<sup>461</sup> See generally, J McAllister, J 'LGBT activism and 'Traditional values': promoting dialogue through indigenous cultural values in Botswana' Hivos 2014

[https://hivos.org/sites/default/files/7\\_lgbt\\_activism\\_and\\_traditional\\_values\\_by\\_john\\_mcallister.pdf](https://hivos.org/sites/default/files/7_lgbt_activism_and_traditional_values_by_john_mcallister.pdf) (accessed 26 June 2018).

<sup>462</sup> Interview with Bradley and Botho, n 398 above.



schools, there is also discrimination and bullying against LGB students.<sup>463</sup> Discrimination and stigma in public health continues to be high despite MSM being recognised in government policies.<sup>464</sup>

In Kenya, LGB organisations have increased from the time when they were six and came together to form GALCK in 2006 to over 18 in 2011 working on different issues and ranging in size.<sup>465</sup> The oldest organisation, ISHTAR MSM, was established in 1998 and registered in 2002.<sup>466</sup> There are a number of mainstream organisations and even state entities working with LGB groups, and with which GALCK and other organisations have established strategic partnerships including the Kenya National Human Rights Commission (the KNHRC), the Kenya Human Rights Commission (KHRC) and the International Commission of Jurists (ICJ-Kenya).<sup>467</sup> GALCK and other organisations have been involved in campaigns for LGB equality.<sup>468</sup> These include World AIDS Day celebrations since 2006 and IDAHOT celebrations since 2007.<sup>469</sup> Kenyan organisations have however not yet held pride celebrations. In schools, LGB students still face discrimination, and are usually dismissed when their sexual orientation is discovered, and their parents usually stop paying school fees for them.<sup>470</sup> Access to health services for openly LGB persons is also still a major challenge, despite the progressive policy regime.<sup>471</sup> In terms of businesses openly providing services to LGB persons, this is not very common. Indeed one of the challenges LGB Kenyans still face is being evicted from their rented premises when their sexual orientation is discovered.<sup>472</sup> Therefore, the increased visibility of LGB organising in Kenya has come with the downside of LGB persons being largely excluded, although the levels of acceptance seem to be increasing generally.

In Uganda, the change has largely been negative. In 1998, there was no visible LGB organisation or LGB organising in public spaces. The tabling of the Anti-Homosexuality Bill in 2009, with its restrictive provisions, made LGB issues emerge to the fore in Uganda, which simultaneously increased LGB organising and also galvanised opposition to LGB

463 Above.

464 The Other Sheep Foundation, n 378 above, 18.

465 UHAI-EASHRI (n 73 above) 9-10.

466 Above.

467 Above, 13-16.

468 Joint interview with Lorna Dias and GALCK staff (n 408 above).

469 UHAI-EASHRI (n 73 above) 16-17.

470 Above, 28.

471 Above, 32.

472 Above, 27-28.

issues.<sup>473</sup> There has been a huge rise in the number of LGB organisations, and this has increased visibility for LGB groups.<sup>474</sup> This visibility has led to resistance, with organisations being unable to register with their names or objectives undisguised.<sup>475</sup> A court case on the refusal to register Sexual Minorities Uganda (SMUG) was still pending at the end of 2017.<sup>476</sup> LGB activists have held pride celebrations for the past five years, albeit in private confined spaces, but the police, on the orders of Minister Lokodo, have disrupted the last two.<sup>477</sup> The police also continue to raid and stop LGB public events as already discussed.<sup>478</sup> This is an addition to targeting allies of the LGB community, and this has been manifested through the suspension and investigations of the activities of the Refugee Law Project, which used to host the Civil Society Coalition on Human Rights and Constitutional Law (CSCHRCL) in 2014,<sup>479</sup> and the raid on the Makerere University Walter Reed Project, which used to conduct HIV research including LGB persons.<sup>480</sup> Human Rights Awareness and Promotion Forum (HRAPF), an organisation that provides legal aid services to LGB persons, was warned by the Permanent Secretary of the Minister of Gender, Labour and Social Development to desist from ‘provoking’ government through the distribution of materials supporting decriminalisation of consensual same-sex relations.<sup>481</sup> In May 2016, HRAPF’s offices were broken into, and a guard on duty murdered, but the police did not carry out conclusive investigations.<sup>482</sup> They were broken into again in February 2018, and two guards were left with grave injuries, but once again with nothing taken, and the police has still failed to fully investigate the break-in.<sup>483</sup>

<sup>473</sup> For a detailed discussion of the Bill and the various efforts to fight it, see A Jjuuko & F Mutesi ‘The multifaceted struggle against the Anti-Homosexuality Act in Uganda, in Nicol et al (n 51 above).

<sup>474</sup> There are over 50 LGBTI organisations in Uganda. HRAPF alone has facilitated the registration of over 40 of these (Interview with Ms. Patricia Kimera, n 412 above).

<sup>475</sup> Interview with Patricia Kimera, n 412 above.

<sup>476</sup> *SMUG Registration* case, n 92 above.

<sup>477</sup> See n 101 and n 102 above.

<sup>478</sup> See n 93 to n 102 above.

<sup>479</sup> ‘Ugandan government launches investigation of leading NGO for “promoting homosexuality’ *BuzzFeed News* 5 June 2014 <http://www.buzzfeed.com/lesterfeder/ugandan-government-launches-investigation-of-leading-ngo-for#.fjLpvP3Dd> (accessed 14 April 2018).

<sup>480</sup> ‘Makerere project recruited gays – police’ *Daily Monitor* 9 April 2014. <http://www.monitor.co.ug/News/National/Makerere-project--recruited-gays---police/688334-2272794-tol72cz/index.html> (accessed 14 April 2018).

<sup>481</sup> Letter to HRAPF from the Permanent Secretary Ministry of Education & Sports, Pius Bigirimana, dated 6 October 2016 (on file with HRAPF).

<sup>482</sup> See Human Rights Awareness and Promotion Forum ‘Press release: Violent break-in at HRAPF offices’ Kampala, Monday 23 May 2016, <https://hrapf.org/press-release-violent-break-in-at-hrapf-offices/> (accessed 14 April 2018).

<sup>483</sup> See for example Civicus ‘Authorities fail to investigate break-ins targeting human rights organisations’ 3 August 2018 <https://monitor.civicus.org/newsfeed/2018/03/08/authorities-fail-investigate-break-ins-targeting-human-rights-organisations/> (accessed 31 August 2018).

A positive change has been noted in the health sector as Uganda has specialised clinics serving LGB persons in a form of collaboration between the Ministry of Health and the Most at Risk Populations Initiative (MARPI).<sup>484</sup> The Uganda Human Rights Commission (UHRC) has been conducting workshops on LGB rights, which have involved the training of magistrates, prosecutors, and members of civil society.<sup>485</sup> As already seen, the Uganda Police Force has allowed its police officers to be trained on LGB rights.<sup>486</sup> No cases of businesses refusing to serve LGB persons have been reported, although a number of bars and other services exist that are known as 'gay bars' as they cater almost exclusively to LGB clients.<sup>487</sup> Eviction of LGB persons from housing on the basis of their sexual orientation is one of the most common violations registered.<sup>488</sup> In terms of schools, students discovered to be engaged in same-sex conduct are routinely dismissed, and in some cases beaten up by their fellow students.<sup>489</sup> CSE has now been banned in schools for fear of promoting homosexuality, as a result of the moral panic that came from the discovery of a book on sexual expression at one of Uganda's leading primary schools, Greenhill Academy.<sup>490</sup>

In conclusion, while there is visible positive change in the treatment of LGB persons in the public sphere in South Africa, there are still challenges that have to be overcome in order to achieve real acceptance. For Botswana and Kenya, the space is increasingly opening up, while for Uganda, the change is much slower, and in many cases it is negative rather than positive, as the more visible LGB persons become, the more they are shut down by the state.

<sup>484</sup> See Most at Risk Populations Initiative 'Who we are' <http://www.marpi.org/marpsite/aboutus> (accessed 14 April 2018).

<sup>485</sup> The author has been one of the facilitators at some of these workshops.

<sup>486</sup> n 350 above.

<sup>487</sup> Interview with Frank Mugisha, Kampala, Executive Director, Sexual Minorities Uganda, Kampala, 20 July 2017.

<sup>488</sup> In 2014, there were 20 such cases (Consortium on documenting violations due to sexual orientation and gender identity HRAPF n 416 above) 32-34. These reduced to one case of evictions from rented premises and two cases of banishments from the village in 2015, HRAPF and Consortium on documenting violations due to sexual orientation and gender identity, n 419 above, 47. In 2016, HRAPF reported 3 such evictions in 2016, HRAPF and the Consortium on documenting violations due to sexual orientation and gender identity, n 420 above, 43.

<sup>489</sup> An incident arising from the beating of two students by fellow students led to a riot at one of Uganda's leading schools as rioting students accused the school of shielding students practicing homosexuality. See 'Ntare closed as students accuse school of 'homosexuality cover-up' <http://observer.ug/news-headlines/39116-ntare-closed-students-accuse-school-of-homosexuality-cover-up> (accessed 14 April 2018).

<sup>490</sup> For details on the process leading to this ban as well as the moral panic that preceded it see, L Beljaars 'Moral panic in Uganda: How American influence led to the ban on all forms of sexual education in the East African nation' (2017) [https://www.researchgate.net/publication/319324931\\_Moral\\_panic\\_in\\_Uganda\\_How\\_American\\_influence\\_led\\_to\\_the\\_ban\\_on\\_all\\_forms\\_of\\_sexual\\_education\\_in\\_the\\_East\\_African\\_nation](https://www.researchgate.net/publication/319324931_Moral_panic_in_Uganda_How_American_influence_led_to_the_ban_on_all_forms_of_sexual_education_in_the_East_African_nation) (accessed 22 April 2018).

d) *Changes in religious attitudes*

Religious opposition is usually the most organised opposition against LGB rights anywhere and this has been no exception in Common Law Africa. There have been changes over the years in how LGB persons are treated by the church and other religions in the selected countries. In South Africa, before 1998, the Dutch Reformed Church was the major opponent against homosexuality among Afrikaners,<sup>491</sup> but other churches were equally opposing among the communities where they operated.<sup>492</sup> Following the end of apartheid and the new constitution, many churches/leaders in the churches have emerged to stand up for equality, even when this is not the position of the majority of the church members. Archbishop Desmond Tutu of the Anglican Church particularly started out early and identified homosexuality as the new frontier for the struggle for equality.<sup>493</sup> The Dutch Reformed Church itself has apologised for its role in perpetuating apartheid and made amends towards ensuring equality, even for LGB persons, and as a result of this, divisions of opinion have appeared in the church, just as it has for the Anglican Church. The South African Council of Churches in 2006 sent an open letter to the chairpersons of the Parliamentary Portfolio Committees on Home Affairs and Justice & Constitutional Development, urging them to abide by the Constitutional Court decision in the *Fourie* case<sup>494</sup> and to pass a law on marriage equality.<sup>495</sup> Among Muslims, an openly gay Imam, Muhsin Hendricks has been ministering for over 20 years at what has been referred to as Africa's first gay mosque, the People's Mosque in Cape Town.<sup>496</sup> There has been a notable emergence of conservative Pentecostal churches in opposition to mainstream churches' shifting stance of supporting equality, but despite this, there is more support for equality in all sectors, even if this means also having gay equality.<sup>497</sup> On the whole, there is more positive change as regards church views on homosexuality in South Africa.

In Botswana, there have been both negative and positive changes since 1998. With the growing LGB movements in these countries, there has been a change in how the churches

<sup>491</sup> See generally K du Pisani 'Puritanism transformed: Afrikaner masculinities in apartheid and post-apartheid period' in R Morrell (ed.) *Changing Men in Southern Africa* (2001) 157.

<sup>492</sup> Ward (n 393 above) 409, 414.

<sup>493</sup> See for example D Tutu Foreword to P Germond & S de Gruchy *Aliens in the household of God: Homosexuality and christian faith in South Africa* (1998).

<sup>494</sup> n 10 above.

<sup>495</sup> Global Ministries 'Same sex marriages position of South African Council of Churches' 1 November 2006 [https://www.globalministries.org/same\\_sex\\_marriages\\_position\\_of\\_s\\_10\\_10\\_2014\\_1111](https://www.globalministries.org/same_sex_marriages_position_of_s_10_10_2014_1111) (accessed 14 April 2018).

<sup>496</sup> A Bruce-Lockhart 'Meet the imam of Africa's first gay-friendly mosque' World Economic Forum 4 May 2017, <https://www.weforum.org/agenda/2017/05/gay-lgbt-mosque-imam-muhsin-hendricks/> (accessed 14 April 2018).

<sup>497</sup> Ward (n 397 above) 415.

approach LGB issues. The debate started as early as 1998 when the Penal Code reform process<sup>498</sup> was underway. The Evangelical Fellowship of Botswana, the coalition that brings together evangelical churches, began crusades against homosexuality.<sup>499</sup> These have been sustained as they opposed LEGABIBO's registration and also usually carry out public campaigns against LGB persons.<sup>500</sup> However, the other churches, including the Roman Catholic Church and the Anglican Church, have largely remained silent on the matter, and have been taking in openly LGB persons.<sup>501</sup> Indeed the Botswana Council of Churches, which is part of the World Council of Churches which brings together different denominations, particularly protestant ones, has openly supported LGB rights, with its Reverend Thabo Otukile Mampane stating that if the churches do not stand with LGB persons, then they would be '[judging] them against the wishes of God too'.<sup>502</sup>

In Kenya, the change has also been largely negative, with more pronounced religious opposition to LGB rights. Just like it is in all the four countries, the opposition is led by Pentecostal churches that speak out most against LGB rights in Kenya, and this means a lot in a country where there are more evangelicals than any other Christian group.<sup>503</sup> Kaoma identified Kenya as one of the countries where the US religious right is using its influence to oppose LGB rights and is largely succeeding.<sup>504</sup> The East African Center for Law and Justice (EACLJ), a Christian NGO, has led the fight against LGB rights.<sup>505</sup> They supported prohibition of same-sex marriages within the 2010 Constitution.<sup>506</sup> The Kenya Christian Professionals Forum (KCPF) was an interested party in the *Eric Gitari* case,<sup>507</sup> and is actively opposing the decriminalisation case currently before the High Court.<sup>508</sup> The National

<sup>498</sup> Which led to the Penal Code (Amendment Act) 1998, n 59 above.

<sup>499</sup> See Tabengwa & Nicol (n 85 above) 341.

<sup>500</sup> The Other Sheep Foundation (n 378 above) 16.

<sup>501</sup> 'Botswana accepts gays but rejects their marriages' *cainews Africa* 22 April 2016 <http://allafrica.com/stories/201604220322.html> (accessed 5 May 2018).

<sup>502</sup> Above, 17.

<sup>503</sup> The Pew Forum on Religion & Public Life found that 56% of all Christians in Kenya were either Pentecostal or charismatics. The Pew Forum on Religion & Public Life 'Spirit and power - A 10-country survey of Pentecostals' Pew Research Centre, 5 October 2006, 4.

<sup>504</sup> See generally, K Kaoma 'Globalising the culture wars: US conservatives, African churches and homophobia' (2009).

<sup>505</sup> See for example N Baptiste 'It's Not : Behind the Christian right's onslaught in Africa' *Foreign Policy in Focus* 2 April 2014, <http://fpif.org/just-uganda-behind-christian-rights-onslaught-africa/> (accessed 14 April 2018).

<sup>506</sup> Above.

<sup>507</sup> n 170 above.

<sup>508</sup> See PO Ogamba 'Christians, Muslims oppose petition seeking gay rights' 2 March 2018, <https://www.standardmedia.co.ke/article/2001271697/christians-muslims-oppose-petition-seeking-gay-rights> (accessed 14 April 2018).

Council of Churches also actively opposes LGB rights.<sup>509</sup> Some groups of Muslims such as the Registered Trustees of Jamia Masjid Ahle Sunneit Wal Jamaat and those of Umma Foundation,<sup>510</sup> and the Kenya Muslim National Advisory Council (KEMNAC) also join the Christian groups.<sup>511</sup> On a more positive note, there are a handful of active LGB supportive churches, for example the Riruta Hope Community Church in Nairobi led by Pastor John Makhoka,<sup>512</sup> The Other Sheep Kenya as well as St. Sebastian, which is hosted at Kisumu Initiative for Positive Empowerment (KIPE).<sup>513</sup>

Uganda is one of the countries where the religious right from the US has exercised much influence over the approach of religious bodies to the issue of LGB rights.<sup>514</sup> Here, the Pentecostal churches take the lead, with the Family Life Network, affiliated to the Watoto Ministries, being one of the foremost organised entities.<sup>515</sup> It was the Network that pushed for the Anti-Homosexuality Act, 2014, invited US Preacher Scott Lively to Uganda, and organised the Anti-LGBTI conference of 2009. Pastor Martin Sempa of the Makerere Community Church was for a long time on the frontline against LGB rights, as was Pastor Solomon Male of Arising For Christ Ministries, who spearheaded the establishment of the National Coalition Against Homosexuality and Sexual Abuses in Uganda (NCAHSAU), which he chairs. Male and Sempa go to the extent of libelling other pastors as being homosexuals.<sup>516</sup> US evangelicals, including The Family, a powerful conservative group, support them.<sup>517</sup> Some of the pastors come from the US to Uganda and preach against homosexuality.<sup>518</sup> The Inter Religious Council of Uganda (IRCU), which brings together

<sup>509</sup> See for example National Council of Churches of Kenya 'Embrace value-based leadership - Central Region' April 30 2015, <http://www.ncck.org/newsite2/index.php/information/news/391-embrace-value-based-leadership-central-region> (accessed 14 April 2018).

<sup>510</sup> These have appeared in court to formally oppose the decriminalisation of same-sex relationships and appeared in court in the on-going decriminalisation case.

<sup>511</sup> This in 2011 asked leaders to apologise for pro-gay sentiments. See 'Muslims Want CJ's Apology on Gays Talk' *The Star* 12 September 2011.

<sup>512</sup> For more information about this church, see 'Pastor John Makokha Welcomes Persecuted LGBT Community to his church in Kenya' *Huffington Post* 30 April 2014 [https://www.huffingtonpost.com/2014/04/30/john-makokha-lgbt-church-kenya\\_n\\_5241105.html](https://www.huffingtonpost.com/2014/04/30/john-makokha-lgbt-church-kenya_n_5241105.html) (accessed 14 April 2018).

<sup>513</sup> See UHAI-EASHRI (n 73 above) 21.

<sup>514</sup> Kaoma, n 504 above.

<sup>515</sup> The Watoto Ministries are led by Pastor Gary Skinner, and it is one of the biggest elite Pentecostal churches in the country.

<sup>516</sup> Pastor Male and Sempa were both convicted of defaming fellow pastor, Robert Kayanja after they accused him of engaging in homosexual acts. *Uganda V Pr Moses Solomon Male, Pr Dr Martin Sempa, Pr Michael David Kyazze, Pr Robert Kaira, Deborah Kyomuhendo and David Mukalazi*, Buganda Road Magistrates Court criminal case 1063 of 2010, which conviction was upheld on appeal by the High Court.

<sup>517</sup> See for example 'Museveni, Bahati named in US 'cult' *The Observer* 25 November 2009, <http://www.observer.ug/component/content/article?id=6187> (accessed 11 March 2016).

<sup>518</sup> Apart from Scott Lively, Lou Engle is another big name pastor from the US who publicly preached against homosexuality in Uganda. See 'In Uganda, push to curb gays draws US guest' *The New York Times*, 2 May 2010 <https://www.nytimes.com/2010/05/03/world/africa/03uganda.html> (accessed 14 April 2018).



different religions and faiths, also actively opposes LGB rights and even applied to join the Anti-Homosexuality Act case in support of its constitutionality.<sup>519</sup> Indeed, the pastors also proactively lobby the state to further criminalise same-sex activity in the same way they actively planned the Anti-Homosexuality Bill,<sup>520</sup> and also organised a fete to thank President Museveni for signing the Bill into law.<sup>521</sup> It is not just the evangelicals that oppose homosexuality, although they are the most vocal group. The Anglican Church has also been very vocal, starting in 1998 when, with the support of the Episcopal Church of the USA, the Church organised conferences to prepare bishops who were to attend the decennial Lambeth conference in 1998 to resist attempts to recognise gay priests.<sup>522</sup> Archbishop Luke Orombi took the anti-homosexuality campaign much further during his reign, as he led a boycott of the 2008 decennial Lambeth conference of Anglican bishops over the consecration of Bishop Gene Robinson in the USA.<sup>523</sup>

The Catholic Church has also largely maintained a position hostile to homosexuality. However, after initially supporting the Anti-Homosexuality Bill, the church eventually stated that criminalisation was not the way to go but rather the approach should be to bring LGB persons closer so that they could reform.<sup>524</sup> Muslims in Uganda have also largely been opposed to LGB rights, with the Supreme Mufti of Uganda calling upon gays to be marooned on an island as early as 1998.<sup>525</sup> This position has not changed as the Supreme Mufti supported the AHB and commended parliament for passing the Bill into law.<sup>526</sup> However, there are also religious groups supportive of LGB rights, although they are in a clear minority. These include Bishop Christopher Ssenyonjo, who was defrocked for this

<sup>519</sup> It did this together with The Family Life Network, and the Uganda Centre for Law and Transformation. They applied to join the AHA case, n 42 above, as respondents, but the application was never heard as the case was decided before it could be heard (*Inter Religious Council of Uganda (IRCU), the Family Life Network and the Uganda Centre for law and Transformation v The Attorney General of Uganda & 10 Others*, Miscellaneous Constitutional Application No. 23 of 2014).

<sup>520</sup> They admitted to this in their application to oppose the Anti-Homosexuality Act, n 464 above.

<sup>521</sup> 'Uganda: Hundreds attend rally to celebrate anti-gay law' *Daily Xtra* 31 March 2014.

<sup>522</sup> <https://www.dailyxtra.com/uganda-hundreds-attend-rally-to-celebrate-anti-gay-law-59430> (accessed 14 April 2018). For a detailed discussion of this event and what it implies, see B Bompani 'For God and For My Country: Pentecostal-charismatic Churches and the Framing of a New Political Discourse in Uganda' in E Chitanda & A van Klinken (eds) *Public religion and the politics of homosexuality in Africa* (2016) 1.

<sup>523</sup> K Ward 'The role of the Anglican and Catholic Churches in Uganda in public discourse on homosexuality and ethics' (2015) 9:1 *Journal of Eastern African Studies* 127, 136.

<sup>524</sup> 'Orombi skips talks over gays' *The New Vision* 31 May 2007.

<sup>525</sup> 'Exclusive Video: Uganda's Catholic Archbishop opposes Anti-Homosexuality Bill' *Box Turtle Bulletin* 24 December 2009 <http://www.boxturtlebulletin.com/2009/12/24/18804> (accessed 14 April 2018).

<sup>526</sup> 'Mufti wants gays abandoned on islands' *Daily Monitor* 15 October 2007

<sup>526</sup> Uganda Muslim Supreme Council 'The Mufti of Uganda speaks out against homosexuality' 22 March 2013, [http://umscommunications.blogspot ug/2013/03/normal-0-false-false-false-en-us-x-none\\_22.html](http://umscommunications.blogspot ug/2013/03/normal-0-false-false-false-en-us-x-none_22.html) (accessed 14 April 2018). Also see 'Mufti commends Parliament for passing the Anti-Homosexuality Bill' Uganda Muslim Supreme Council News, 13 January 2014 (accessed 14 April 2018).

reason, and who has nevertheless continued to speak out.<sup>527</sup> The churches that are supportive are generally small and standalone or part of a global network. These include the Unitarian Universalist Church of Kampala. LGB people also meet and pray in small isolated communities since they are generally not accepted in the larger communities.<sup>528</sup>

Generally, the position of most churches in the selected countries has in the past 20 years galvanised against LGB rights. Only South Africa saw a change from official opposition among mainstream churches to a commitment to equality. For the other countries, the situation is largely one that continues to get hostile against LGB persons.

*e) Changes in media coverage of LGB persons- representation in the media*

The media usually publishes what appeals to the majority, as one of their main aims is to make profit. Unpopular issues may therefore not appeal to the public and are usually left out of their coverage. However, media also plays an important role in shaping public opinion, and therefore it can play an important role in turning public opinion for the better in respect of LGB persons.<sup>529</sup> LGB rights received limited coverage as the majority of the public are largely homophobic in the selected countries. However, the media has the potential, through good and fair reporting, to change public opinion in favour of LGB persons. For all the countries surveyed, content is restricted and the presentation of issues is not very friendly to LGB persons. Different countries are however at different levels.

For South Africa, before 1994, gay issues were largely matters not to be discussed in mainstream media. Discussions on LGB rights were limited to major events like pride parades, the rare occurrence of an arrest of a huge group of people, state efforts to reform the law and, in some instances, negative things/ crimes committed by LGB people. Only LGB-specific media used to report on LGB issues, one of the better-known of which was the magazine 'Exit'.<sup>530</sup> After 1998, LGB issues started gaining prominence and could be covered by the different media houses in more or less positive terms, reflecting the on-going debate in the country.<sup>531</sup> However, despite this, many still feel that LGB issues are sidelined in the

<sup>527</sup> See Ward 2013 (n 397 above) 136.

<sup>528</sup> See for example 'Inside the tiny church where members of Uganda's beleaguered gay community have found sanctuary' *The Guardian* 9 February 2014. <https://www.theguardian.com/world/2014/feb/09/uganda-gays-church-sanctuary-kampala> (accessed 14 April 2018)

<sup>529</sup> Gay and Lesbian Archives (GALA) of South Africa 'Out in the media? Knowledge, attitudes and practices of the media towards lesbian, gay, bisexual, transgender and intersex issues and stories' Community Media for Development/ CMFD Productions, November 2006, 5.

<sup>530</sup> Above, 13.

<sup>531</sup> Above.

media. A 2006 study found that over 55% of respondents thought that LGB issues are not given adequate coverage by the media.<sup>532</sup> More so, the coverage is usually overwhelmingly on negative stories,<sup>533</sup> and where stories are positive, they largely cover the white gay men and not the blacks.<sup>534</sup>

For the rest of the countries, the trends are moving from no coverage at all prior to 1998, to more coverage, but still limited to the more sensational issues and more biased reporting.<sup>535</sup> The coverage is usually about official sources, government, courts or the legislature and not the day-to-day lives of LGB persons.

For Botswana, most of the stories (81%) published in the media about LGB persons are what was described as 'incomplete,' meaning that they did not give full facts or give LGB persons an opportunity to present their side of the story.<sup>536</sup> They therefore end up reflecting the majority views, which are largely homophobic and dismissive of LGB voices.<sup>537</sup> However, despite the negative coverage, many of the activists believed that the media gives them positive coverage and time, with more balanced views.<sup>538</sup> Social media is also alive, and activists use it to share positive stories.<sup>539</sup> There is therefore a more positive change in media coverage on LGB issues.

For Kenya, in 2011 UHAI-EASHRI found a change in the print media's coverage of LGB issues over a period of 10 years, from 2001-2011, pointing out that there were more positive stories coming through as well as more balanced reporting.<sup>540</sup> However, they also noted that there were few stories coming from LGB persons themselves being covered in the print media. LGB persons also appear on TV and speak about their lives, although no TV shows by openly LGB persons air on TV. In the 1990s, the 'Ellen Show' was dropped from the national broadcaster when Ellen Degeneres came out as lesbian.<sup>541</sup> There is also a change in FM radio stations and how they report on these issues. Even though most of them remain

<sup>532</sup> Above, 8.

<sup>533</sup> Above, 10.

<sup>534</sup> Above, 13.

<sup>535</sup> For a general discussion of reporting on LGB issues in Africa see Genderlinks for equality and Justice 'A snapshot of LGBT media coverage in East, West and Southern Africa' December 18, 2015, <http://genderlinks.org.za/programme-web-menu/a-snapshot-of-lgbt-media-coverage-in-east-west-and-southern-africa-2015-12-18/> (accessed 31 March 2018).

<sup>536</sup> The Other Sheep Foundation quoting a Genderlinks study on LGB media coverage in Botswana (n 378 above) 16.

<sup>537</sup> Above.

<sup>538</sup> Above, 16.

<sup>539</sup> Above. Also interview with Caine Youngman (n 403 above).

<sup>540</sup> UHAI-EASHRI (n 73 above) 20.

<sup>541</sup> Above.

sensationalist, at least they can now report the stories, unlike before when they would not.<sup>542</sup> An analysis of the reporting on LGB issues in the media between 2005 and 2009 found that coverage largely focused on sensational stories, such as the marriage between two Kenyans in London, and the fight between the Anglican Church in Kenya and the Church of England over the ordination of gay bishops.<sup>543</sup> The study found that the majority of newspaper articles had only 5% positive content on homosexuality.<sup>544</sup> Prominent Kenyans have been able to speak out in favour of LGB rights, and the media usually publishes their articles. The most prominent of them is Prof Makau Mutua, a professor of law at the State University of New York in the USA.<sup>545</sup> Social media is also alive with positive stories.<sup>546</sup>

In Uganda, LGB issues were largely not presented in the media before 1998. The first time that LGB issues became household matters in the media was in 1998 as the Church of Uganda begun speaking out against the ordination of gay bishops in the Anglican Church.<sup>547</sup> Sylvia Tamale produced a compilation of articles on LGB issues analysed in themes between the period 1998 and 2008, and there were both positive and negative stories, although the latter were in the majority. Reporting peaked at the height of the tabling of the AHB, and during the time when it was being debated. During this debate, both positive and negative articles were reported, and these were compiled by the Coalition.<sup>548</sup> The largest media house in Uganda, the Vision group, which has both print and electronic media, has an editorial policy that prohibits publication of content on homosexuality unless it is from the executive, courts or the legislature.<sup>549</sup> Other media houses do occasionally carry such content, but the one thing that emerges is the almost absent reporting on state actions against LGB persons and events in the mainstream print media - the New Vision newspaper and the Daily Monitor. For example, no reports have been published about the stopping of LGB events, and about the annual violations reports produced by HRAPF and the Consortium on Monitoring Violations based on Sex Development, Gender Identity and Sexual Orientation.<sup>550</sup> The only newspaper that publishes positive content is the Observer.<sup>551</sup> The

<sup>542</sup> Above.

<sup>543</sup> NS Mbugua 'Mass media framing of homosexuality: A content analysis of the national daily newspapers in Kenya' Master of Laws Dissertation submitted to the University of Nairobi, 2010, 45

<sup>544</sup> Above, 47.

<sup>545</sup> See for example 'It is nonsense to assert that being gay is un-African' *Daily Nation* 31 October 2009. Also see 'Makau Mutua: Gay marriage will be legal in 10 years' *Nairobi Wire* 18 July 2013.

<sup>546</sup> Joint interview with GALCK staff, n 408 above.

<sup>547</sup> Ward (2013) (n 396 above) 128.

<sup>548</sup> See Civil Society Coalition on Human Rights and Constitutional Law (CSCHRCL) 'Uganda's Anti-Homosexuality Bill: The Great Divide' 2009

<sup>549</sup> Vision Group (2014) 'Editorial Policy' <https://issuu.com/newvisionpolicy/docs/243661083-editorial-policy-complete> (accessed 24 July 2017).

<sup>550</sup> Interview with Patricia Kimera, n 416 above.

tabloid Red Pepper usually produces sensational articles on gays, referring to them as ‘bum shafters’; something that shows the reduction of LGB persons to anal sex. It has on many occasions revealed the names and photos of LGB persons. In 2010, a newspaper run by students published the names and residences of LGB persons and called upon the public to hang them, something that the High Court held to be a violation of the rights to privacy and dignity.<sup>552</sup> In the case of electronic media, most TV stations do not cover LGB issues or host LGB activists, but when they do it is usually about putting them on the spot and embarrassing them.<sup>553</sup> FM radio stations also largely report in a sensational way about LGB issues, but nevertheless they do present the issues even more than the print media and TV stations,<sup>554</sup> despite the prior suspension of presenters’ licences and the fines levied against one of the media houses by the Broadcasting Council.<sup>555</sup> Nevertheless, progressive articles also make it to the media reflecting the diversity of opinion on LGB issues, as have articles by Ugandan Professor Sylvia Tamale and journalist Patience Akumu.<sup>556</sup> Uganda also has vibrant social media activists who openly discuss LGB issues, and there is observable change on how people respond to this, with more positive responses being registered in recent times.<sup>557</sup>

Generally, the media representation of LGB issues in the selected countries is still limited, and more sensational than progressive.

*f) Representation in popular culture*

Popular culture usually denotes what cultural products the majority of the people consume or identify with.<sup>558</sup> It includes music, art, literature, fashion, dance, film, cyber culture, television and radio.<sup>559</sup> It is one of the determinants of who the public look up to as role models. Openly LGB persons are more often depicted in novels and popular TV shows in

<sup>551</sup> For example, the Observer has published opinion pieces questioning the sensibility of an anti-homosexuality bill: ‘What will an anti-gay bill achieve?’ *The Observer* 23 January 2014 <http://www.observer.ug/component/content/article?id=29787:what-will-anti-gay-bill-achieve> (accessed 5 May 2018).

<sup>552</sup> n 73 above.

<sup>553</sup> See for example ‘Morning Breeze homosexuality debate 18<sup>th</sup> Dec NBS TV’ <https://www.youtube.com/watch?v=LKP-PUA196U> (accessed 15 April 2018).

<sup>554</sup> Interview with Patricia Kimera, n 416 above.

<sup>555</sup> See notes 86-89 above.

<sup>556</sup> Patience Akumu writes stories that cover the lives of LGB persons. She won the David Astor Journalism Award 2013 partly for these stories, as they stand out in a country where the media is largely hostile to LGB rights.

<sup>557</sup> Interview with Patricia Kimera, n 412 above.

<sup>558</sup> For the difficulties and different ways of defining popular culture, see J Storey *Cultural Theory and Popular Culture* (2001).

<sup>559</sup> A Crossman ‘Sociological definition of popular culture’ *Thoughtco* <https://www.thoughtco.com/popular-culture-definition-3026453> (accessed 31 March 2018).

South Africa, but less so in other places. Some of the more famous LGB names in South Africa are: Justices Edwin Cameron of the Constitutional Court of South Africa and Anna-Marié de Vos formerly of the High Court; politicians Lynne Brown, former minister of Public Enterprises and former Prime Minister of the Western Cape, and Simon Nkoli, the deceased ANC activist who was one of the Delmas trialists;<sup>560</sup> writers Mark Gevisser who authored Thabo Mbeki's biography,<sup>561</sup> Marlene van Niekerk mostly known for her novel 'Triomf'; and Tatamkhulu Africa (Ismail Joubert) who is best known for his novel 'Broken Earth'; sportsperson Karen Hultzer, an Olympic archer; activists Zackie Achmat of the Treatment Action Campaign and Cecil Williams, deceased anti-apartheid activist; lawyer and scholar, Pierre de Vos; and photographer Zanele Muholi.<sup>562</sup> They are largely accepted, respected, honoured and usually depicted in articles and TV shows.

For the other three countries, there are largely no openly LGB persons who have captured public imagination and are featured as role models in their own right. Perhaps only Kenyan writer Binyavanga Wainaina comes close to this, although he came out as gay after he had achieved celebrity status.<sup>563</sup> There are activists who are better known by persons working in civil society organisations and government and the international LGB activist community, but who are not necessarily revered within their countries. These include: Caine Youngman in Botswana;<sup>564</sup> David Nzioka<sup>565</sup> and David Kuria<sup>566</sup> in Kenya; David Kato,<sup>567</sup> Kasha Jacqueline Nabagesera,<sup>568</sup> Frank Mugisha<sup>569</sup> and Pepe Julian Onziema in Uganda.<sup>570</sup> There are barely any outspoken openly gay politicians, lawyers, doctors or other leaders, and this continues to contribute to homosexuality being something that has to be hidden. There are

<sup>560</sup> Gay and Lesbian Memory in Action (GALA) 'Till the time of trial: The prison letters of Simon Nkoli' (2007)<sup>4</sup>.

<sup>561</sup> M Gevisser *Thabo Mbeki: The dream deferred* (2007).

<sup>562</sup> For these and other celebrity activists, see 'Top 10 local celebrity LGBT activists' Youth Village <http://www.youthvillage.co.za/2014/08/top-10-local-celebrity-lgbt-activists/> (accessed 15 April 2018).

<sup>563</sup> He is the winner of the Caine Prize for African Writing 2012, and he was named as one of the 100 most influential persons in the world by Time Magazine in 2014. He came out as gay in 2014. See 'Kenyan writer Binyavanga Wainaina declares: 'I am homosexual' *The Guardian* 21 January 2014 <https://www.theguardian.com/world/2014/jan/21/kenyan-writer-binyavanga-wainaina-declares-homosexuality> (accessed 15 April 2018).

<sup>564</sup> He was one of the petitioners in the *LEGABIBO Registration* case. He features on TV in Botswana and was one of the debaters with US pastor Anderson who insulted him and was later deported.

<sup>565</sup> He was the first openly gay person to appear on TV to speak about LGB rights.

<sup>566</sup> David Kuria ran for Senator in Kenya but later withdrew from the race, citing the lack of funds and threats to his life.

<sup>567</sup> He was a leading LGB activist in Uganda who was murdered in 2011, but was more celebrated by foreigners than local Ugandans.

<sup>568</sup> Former Executive Director, of Freedom & Roam Uganda (FARUG), founder of Kuchu Times Media House and the recipient of the 2011 Martin Ennals Award for Human Rights Defenders.

<sup>569</sup> Executive Director of Sexual Minorities Uganda (SMUG) and recipient of the 2011 Robert F Kennedy Human Rights Award and the 2011 Thorolf Rafto Prize.

<sup>570</sup> Programs Director & Advocacy Officer of Sexual Minorities Uganda (SMUG) and recipient of the 2012 Clinton Global Citizen Award.



no popular local TV shows, or films featuring gay persons, except for the now popular novel, *Kintu*, featuring a story about a general in 18<sup>th</sup> century Buganda who had sex with both men and women.<sup>571</sup>

To conclude, LGB persons scarcely feature in popular culture in the selected African countries. The exception is South Africa, where a number of notable LGB persons are well known and respected, and as such there has not been much change in any of the other three countries from how the situation was before 1998.

#### 4.2.4 Changes in the economic aspects

Many economic changes have taken place in the selected African countries since 1998, the period of LGB SL that is covered by this study. All the countries have continued to develop and prosper economically. This change has however not been reflected for all persons in all countries, as huge inequalities continue to exist. Among those who are still left behind are LGB persons, although the different countries are at different levels. In 1998, few people could come out as openly gay in all the different countries and opportunities were clearly blocked if one identified as such since there was no protection in all the countries on the grounds of sexual orientation. Only Botswana and South Africa were later able to obtain this protection, but Kenya and Uganda have not. Economic changes for LGB persons will be considered looking at the general economic conditions of LGB persons, and considering the trends of employment of LGB persons.

No data exists on the percentage of out LGB persons formally employed in the different countries, but it is quite clear that they are few. In South Africa, unemployment is among the highest in the world,<sup>572</sup> and this becomes worse for LGB persons. The International Labour Organisation (ILO) found that, despite measures being taken to promote equality, in situations of a contracting economy with increased unemployment, and high level of inequality, there is the double challenge of being gay and being of a lower class, which

<sup>571</sup> JN Makumbi *Kintu* (2014). The novel won the Kwani? Manuscript Project in 2013 and the Windham-Campbell Prize in 2018.

<sup>572</sup> It stood at 26.7% in the first quarter of 2018, and has been averaging at 25.54% from 2000 until 2018. See Trading Economics 'South Africa unemployment rate 2000- 2018' <https://tradingeconomics.com/south-africa/unemployment-rate> (accessed 25 May 2018).

makes it difficult to gain access to employment.<sup>573</sup> For those who are found to be gay, they are usually worked 'out of the job' due to harassment, stigma and discrimination.<sup>574</sup> Those already employed fear coming out as gay in apprehension of losing their jobs.<sup>575</sup> For Botswana, besides the change in law, there is nothing much that has been done to ensure substantive equality for LGB persons in employment, and so similar challenges to those in South Africa persist.

For Kenya and Uganda, there is no protection for LGB persons as regards employment within the law. This creates a situation where people can be dismissed for being gay, and this has indeed been happening. As regards Kenya, in 2015, the Equal Rights Trust's submission to the UPR indicated that LGB people had fewer opportunities in employment and faced discrimination.<sup>576</sup> Indeed, this is one of the challenges that LGB persons in Kenya point out.<sup>577</sup> Dismissals on the basis of sexual orientation have been documented in Uganda. In 2015, four such cases were documented,<sup>578</sup> and it would be safe to assume that many more went undocumented, as the report itself highlights the lack of wider coverage as a challenge.<sup>579</sup>

#### **4.2.4 Summary of the extent of social change in the selected Common Law African countries**

Overall, although there has been much change in the laws and the manner in which LGB persons are perceived in the selected Common Law countries in Africa, complete social change, which denotes a change in attitudes, is yet to happen. Since LGB persons are regarded as second-class citizens, they also have limited access to opportunities, including education and employment, and are thus more likely to remain poor compared to the majority of the population. This is true even for South Africa. The progress can be summarised as in the table below:

<sup>573</sup> International Labour Organisation 'PRIDE at work: A study on discrimination at work on the basis of sexual orientation and gender identity in South Africa' Working Paper No. 4 / 2016, 13.

<sup>574</sup> Above, 17.

<sup>575</sup> Above, 19-20.

<sup>576</sup> Equal Rights Trust 'Submission to the United Nations Human Rights Council for a Universal Periodic Review' (21<sup>st</sup> session) of Kenya, 2015, <http://www.refworld.org/country,,,KEN,,54c0f1444,0.html> (accessed, 31 March 2018).

<sup>577</sup> See UHAI-EASHRI (n 73 above) 4-5, 25-26.

<sup>578</sup> HRAPF & Consortium (n 419 above) 46.

<sup>579</sup> Above, 15.

**Table 1: Extent of social change among the selected African Common Law countries**

Country	Level of legal change	Extent of social acceptance	Code
Botswana	Medium – Progressing	Medium - Progressing	3.0
Kenya	Low – Progressing	Low – Progressing	2.5
South Africa	Very High - Stagnating	Medium - Progressing	4.0
Uganda	Very Low - worsening	Low – Progressing	1.5

\*\* The level of social change is determined by combining the extent of legal change and the extent of societal acceptance. ‘1’ denotes limited social change, ‘3’ denotes moderate social change and ‘5’ denotes significant social change.

South Africa is rapidly progressing but its huge inequalities still stand in the way of achieving significant social change. It has achieved almost all there is to achieve in terms of legal change, but in terms of social acceptance, much more needs to be done, although progress is largely being seen. In this respect, South Africa is like two countries in one, with starkly different experiences marked by the racial divide. Whereas some sections of the populace have certainly achieved social change, particularly the more affluent and usually white communities, the poor and usually black communities still face violence against LGB persons. Although Kretz in 2011 regarded South Africa as being at Stage 5, ‘Establishment of positive rights,’ this study would instead put it at stage 6 ‘Full legal equality’ as indeed full legal equality has been achieved for LGB persons, with only the language of marriage missing for those who choose to enter into civil unions. It is for this reason that South Africa is denoted with ‘2.5’ in Table 1 above, rather than with ‘3’, which signifies ‘significant social change’.<sup>580</sup>

Of the other countries, Botswana is making considerably fast headway with major legal changes, particularly the express inclusion of sexual orientation as a protected ground

<sup>580</sup> This is the level of social change that affects the whole nation, and which Rosenberg refers to as ‘significant social reform’. GN Rosenberg *Hollow hope: Can courts bring about social change?* (2008) 4. Giddens on the other hand regarded significant social change to be in terms of ‘modification of basic institutions during a specific period.’ see A Giddens ‘A reply to my critics,’ in D Held & JB Thompson *Social theory of modern societies: Anthony Giddens and his critics* (1989) 45.

against discrimination in the employment law, as well as the enforcement of the decision in the *LEGABIBO Registration* case. In terms of social acceptance, there is little violence and hate speech against LGB persons. On Kretz's spectrum, Botswana would be at Stage 2 because it is yet to decriminalise. However, the protection against discrimination in the Employment Act, the registration of LGB organisations and non-enforcement of the criminal laws would put it at Stage 4. This gives Botswana a number '2' ranking on the table above.

Kenya follows next, as the country is making considerably fast progress towards achieving equality with a more inclusive constitution, and progressive court decisions. However, there is quite a high level of violence mainly concentrated on the coast of Kenya as well as low political will to protect LGB persons and ensure their full equality, despite the fact that there is increasing acceptance. On Kretz's spectrum, Kenya would also be ranked at stage 2 because it is yet to decriminalise. However the above progress would put it at stage 3 'Decriminalisation,' and thus Kenya is ranked at '1.5' on Table 1 above.

Finally Uganda faces a state-led hate campaign against LGB persons, which plays into the homophobia/ignorance of the majority. In Uganda, homophobia is the norm and the 'right thing to do'. This makes it difficult to achieve meaningful social change, despite major inroads being made with court victories affirming the rights of LGB persons. Social acceptance is still very low. On Kretz's spectrum Uganda would be at Stage '2' and indeed this is where it fits. For this reason, Uganda is coded with a '1', showing limited social change. It therefore still remains that for all the countries, the journey to social change in favour of LGB persons is still long, and much more needs to be done to achieve this.

#### **4.3 The extent to which SL contributed to these changes**

The above changes in the selected countries are attributable to a number of factors, among them SL. Determining the extent to which these changes can be attributed to SL however, requires a deeper examination of the changes, the time at which they occurred and whether they would not have happened even if the cases were not brought before the courts and decided the way they were.

There are two aspects to consider when considering the impact of a case: enforcement and implementation of the decision, and the broader impact of the decision.<sup>581</sup> Enforcement is about whether the governments take deliberate measures to comply with the court's orders, while impact is about whether the rights that were intended to be realised through the decision are in fact realised. Whereas enforcement is critical to creating impact, sometimes impact can occur even without enforcement or compliance with the court decision. This is why it is advisable not only to consider the direct impact of a law but also the indirect changes that it creates.<sup>582</sup> Whereas enforcement is an active and deliberate process, impact is largely undirected. Impact can be direct or indirect. Direct impact is created when a court judgment is implemented as ordered by the court and what was intended by the judicial intervention is achieved.<sup>583</sup> Indirect impact on the other hand arises from other aspects not ordered for by the court, but which nevertheless arise, leading to the realisation of the right.<sup>584</sup>

However, the desired change may also occur regardless of the judgment, and this is the organic change model, which relies on the fact that change is always happening and different components are interdependent in such a way that they influence each other differently.<sup>585</sup> Therefore, a particular change can be directly attributed to a judgment, or a judgment may only make a contribution to that change, or the change could happen anyway regardless of the judgment. Therefore, in Common Law Africa, among the above changes, only those that were ordered by the court can be directly attributed to the court cases. All the others, negative or positive, are indirect effects, or organic changes that could have happened regardless of the court cases.

There are two main types of judgments that have characterised the SL scene in the countries under examination, namely, those that apply to only the parties to the case, and those that apply beyond the two parties to it. Cases that challenge violations against a particular

<sup>581</sup> See C Rodriguez-Garavito 'Beyond enforcement: assessing and enhancing judicial impact' in M Langford, C Rodriguez-Garavito & J Rossi *Social Rights Judgments and the politics of Compliance: Making it stick* (2017) 75, 78-80.

<sup>582</sup> See for example BE Harcourt 'After the "social meaning turn." Implications for research design and methods of proof in contemporary criminal law policy analysis' (2000) 34:1 *Law and Society Review* 179, 204-5.

<sup>583</sup> Above, 85.

<sup>584</sup> Above, 86.

<sup>585</sup> This theory is closer to the organic social change theory which Ong puts forward, which is to the effect that social change happens when the marginalised themselves take the reins in their hands and work towards changing the society in which they live. JA Ong 'Organic social change, Distinktion' (2017) 18:1 *Journal of Social Theory* 59, 62. It is however different in the sense that, in my own framing, organic change is inevitable and does not just depend on the oppressed themselves taking the reins, but on all the different actions being taken by everyone, including actions taken to oppose change. It is like a sweeping river, which nevertheless will move forward regardless of the obstacles.

individual and are brought in a strategic way as test cases fall in the first category, and these judgments affect only the parties. Consequently, the court's orders are exclusively directed to the parties. On the other hand, cases challenging laws or conduct that affects the public generally fall in the second category. In such cases, the court's decision will directly impact on all those affected by such a law.

To measure impact of the judgments in the first category, one has to simply know whether the other party has done what it was ordered to do. For the second category, the decision binds all other persons beyond the parties and as such, they are expected to behave according to what was decided/ordered by the court. In this respect, measuring impact requires a consideration of how the judgment has changed the general situation for everyone similarly situated.

For LGB judgments in the selected Common Law countries, those that only affected the parties directly were the *Victor Mukasa* case,<sup>586</sup> the *Rolling Stone* case<sup>587</sup> and the *Lokodo* case<sup>588</sup> in Uganda, where compensation was ordered for the violation of rights in the first two and the status quo maintained in the third case; the *Eric Gitari* case<sup>589</sup> in Kenya where the order to register NGLHRC was issued and *COL & GMN v Resident Magistrate Kwale Court & 4 Others*, (The *COL* case)<sup>590</sup> where anal examinations against the two accused persons were upheld; the *LEGABIBO Registration* case<sup>591</sup> in Botswana where LEGABIBO was ordered to be registered; and the *De Lange* case in South Africa which was referred to mediation. In all these cases, what was ordered by the courts directly affected the two parties. All of them were enforced except for the *Rollingstone* case,<sup>592</sup> where the damages have never been recovered, and the *Eric Gitari* case, where an appeal was lodged and the NGO Board refused to register NGLHRC in the meantime.<sup>593</sup> Nevertheless, an indirect impact of these cases that can be traced is the fact that similar cases have not been brought to court yet. The fact that a court that binds other courts has made a decision makes it fairly foreseeable that the outcome would be the same if another case with similar facts was brought. Where the court has not yet made a decision for all the cases that have been brought before it, it makes sense to wait for the outcome of these cases before filing other cases dealing with the same points

<sup>586</sup> n 418 above.

<sup>587</sup> n 77 above.

<sup>588</sup> n 78 above.

<sup>589</sup> n 170 above.

<sup>590</sup> Petition No. 51 of 2015.

<sup>591</sup> n 86 above.

<sup>592</sup> n 77 above.

<sup>593</sup> Interview with Advocate Ladislaus Rwakafuuzi, Kampala, 20 July 2017.



of law. However, even in cases where the final decision of the court has been rendered, similar cases have not been brought before the courts again, mostly because the conduct/acts complained of have not been repeated in the jurisdiction. For instance, the *Rollingstone* case saw an end to such sensational reporting in Uganda.<sup>594</sup>

For those where laws were targeted, the change is measured by considering whether the laws changed, and whether people changed their conduct in accordance with the change in the laws. This is easier when the court itself changed the law through reading in, or through a declaration of nullity. An example is the *AHA* case where the Constitutional Court declared the *AHA* unconstitutional,<sup>595</sup> the *Adrian Jjuuko* case,<sup>596</sup> where the Court declared section 15(6)(d) of the Equal Opportunities Commission Act (EOC Act) unconstitutional; the South African Constitutional Court's declaration of the sodomy laws null and void in the *Sodomy* case;<sup>597</sup> and the declaration of nullity of the impugned Regulations in the *Langemaat* case.<sup>598</sup> Those where the court read-in legislation were: *Gory v Kolver NO & Others*;<sup>599</sup> the *Satchwell* case;<sup>600</sup> the *Du Toit* case;<sup>601</sup> *J v Director-General, Department of Home Affairs, Minister of Home Affairs, and President of the Republic of South Africa*,<sup>602</sup> *Du Plessis v Road Accident Fund*;<sup>603</sup> *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* (the *Immigration* case);<sup>604</sup> and *Geldenhuys v National Director of Public Prosecutions & Others*.<sup>605</sup> In all these cases, the impact was direct and immediate, and applied to all persons affected by the laws in question, and due to the detailed nature of the judgments and the orders, there was no space left for persons to act otherwise than what the court ordered.

For those where the court required the state to take action, they only had direct impact when the action was taken. These include the *Fourie* case in South Africa,<sup>606</sup> in which the Court gave time to Parliament to enact an appropriate law, and the *Attorney General v Thuto*

<sup>594</sup> Interview with Patricia Kimera, n 412 above.

<sup>595</sup> n 42 above.

<sup>596</sup> n 284 above.

<sup>597</sup> n 54 above.

<sup>598</sup> n 139 above.

<sup>599</sup> 2007 3 BCLR 249 (CC).

<sup>600</sup> 2004 1 BCLR 1 (CC) (17 March 2003).

<sup>601</sup> n 111 above.

<sup>602</sup> (2003) AHRLR 263 (SACC) 28 March 2003.

<sup>603</sup> 2004 1 SA 359 (SCA)

<sup>604</sup> 2000 1 BCLR 39.

<sup>605</sup> 2009 5 BCLR 435 (CC).

<sup>606</sup> n 10 above.

*Ramogge & 19 Others (LEGABIBO Registration)* case,<sup>607</sup> which required the state to register LEGABIBO.

All the six unsuccessful cases<sup>608</sup> did not require any action to be taken, and none of them made any legal changes, so there was no direct impact arising out of their implementation. However, they had the indirect effect of influencing how people perceived LGB rights, as well as sending a message to the executive and the legislature that law reform was not necessary. In a more positive way, in what is regarded as winning by losing, the cases further galvanised the LGB movements in their respective countries, and also sent a message that achieving LGB rights was a necessary struggle.

There is also the concept of backlash, or losing by winning. This is where, due to the court victory, the community or the legislature and the executive take it upon themselves to pass laws or take other actions that effectively nullify what the courts would have ordered. An example is the victory in the *Victor Mukasa* case<sup>609</sup> in Uganda, which is believed by Advocate Ladislaus Rwakafuzi to have contributed to the tabling of the AHB, as the then Minister of Ethics and Integrity promised a tougher law soon after the victory.<sup>610</sup> Makerere University professor Christopher Mbazira shares this view, and argues that the agitation around the initial LGB SL cases was one of the reasons why the authorities decided to take a strong stance against LGB rights and to introduce the brutal AHB.<sup>611</sup>

From the above analysis, some of the changes can be directly attributed to SL. For others, the cases simply contributed to the positive outcome, and in the case of the remainder, change was set to happen even if the cases had never been brought.

There are also other factors that clearly contributed to the legal, political, social and economic changes that took place in Common Law Africa besides litigation. These include: the struggle against apartheid in South Africa, which included a fight against all forms of discrimination; the growth of the LGB movement outside of Common Law Africa which lent

<sup>607</sup> n 41 above, which was an appeal against the High Court's decision to register LEGABIBO.

<sup>608</sup> These are: *Lokodo* case (n 78 above); *Human Rights Awareness and Promotion Forum (HRAPF) v Attorney General of Uganda and the Secretariat of the Joint United Nations Programme on HIV/AIDS (UNAIDS)* (HRAPF case), Reference 6 of 2014 (East African Court of Justice); *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being and Another* (the *De Lange* case), 2016 1 BCLR 1 (CC); *COL* case; *Sexual Minorities Uganda v Scott Lively*, C.A. No. 12-cv-30051-MAP; and the *Kanane* case (n 40 above).

<sup>609</sup> n 381 above.

<sup>610</sup> Interview with Advocate Ladislaus Rwakafuzi. See also 'Tough anti-gay law due' *Sunday Vision* 26 August 2007.

<sup>611</sup> Interview with Prof Christopher Mbazira, Dean of Law, Makerere University, Kampala, 26 March 2018.

support to LGB groups in the different countries and helped to lobby governments to make changes; and the struggle against HIV/AIDS, which showed that leaving LGB persons behind would be detrimental to the struggle against HIV/AIDS. Also, due to the ongoing developments in countries like South Africa, it was simply inevitable that change would occur as equality was the overriding principle.

It is theorised that the change would still have come even if the cases had not been brought. In Botswana, Kenya and Uganda, the developments concerning HIV/AIDS inevitably had to address LGB rights. This explains why the health sector in all countries seems to recognise the need to protect LGB persons in order to stop the spread of HIV. Another factor that would have inevitably led to change is the growth of both the LGB and the anti-gay movements. Hence, whereas SL was an important factor, even without it, the social change seen in all the different countries, with the exception of South Africa, would still have taken place, even if at different rates.

Despite the contribution of other factors, SL is the main deliberate step that LGB groups took to create change. Even in South Africa where the struggle against apartheid had led to an agreement that all discrimination was to be condemned, all the legal changes had to come through hard-won litigation. Indeed, although De Vos does not regard the achievement of same-sex marriage in South Africa as a complete revolution, he acknowledges the role of the court in taking lead of the process, as there was no way the legislature was going to act without such a judgment.<sup>612</sup> In Uganda, only SL could have stopped the AHA, as the measures it encompassed were very popular. Again in Botswana, only litigation could have led to the registration of LEGABIBO as the state had refused to register them and even had to first lose an appeal before agreeing to do so. In Kenya, even after successful litigation, NGHLRC was not registered, but nevertheless the message was clear that what was done was unconstitutional. In all four countries, the state is largely opposed to LGB equality, albeit at different levels, and this implies that the LGB groups themselves have to take action if at all change is to be achieved. Since the state is largely opposed, lobbying or dialogue does little to make change, and it is only SL that is coercive enough to ensure that the changes do happen. Therefore, to a large extent, the legal changes as well as the changes in the political, social and economic status of LGB persons in all the countries are as a direct and indirect result of LGB SL.

<sup>612</sup> See generally, P de Vos 'A judicial revolution? The court-led achievement of same-sex marriage in South Africa' (2008) 4:2 *Utrecht Law Review* 162.

#### **4.4 The contribution of SL to social change in the selected Common Law countries outside Africa**

Of the four selected Common Law countries outside Africa that have undergone successful SL, two of them, Canada and the USA, have been able to have a majority of the population supporting LGB rights up to the level of marriage equality within the last 20 years. The other two countries, Belize and Nepal, are yet to get to the level of marriage equality, although some positive changes are discernible. This is despite the fact that all these countries have had successful SL cases. Based on the tremendous legal change in these countries and the increased visible acceptance of LGB persons by the majority, these two countries can be said to have achieved social change although to differing degrees. Using these two measures, Canada is way ahead of the USA, having registered its legal and public opinion changes earlier. The USA still has on-going vigorous struggles over these matters, but nevertheless the laws have been able to change at the highest level. A majority of public views have also changed in the last 20 years. Belize and Nepal are still struggling with both legal change and social change. Below is a discussion of the extent to which all four countries have achieved social change, and how they compare to the selected countries in Common Law Africa.

##### **4.4.1 Changes in the legal environment**

The changes will be discussed under the same sub-headings as those used in reference to Common Law Africa:

###### *a) Changes in the status of same-sex marriages*

Canada and the US have both achieved marriage equality within the past 20 years, while Belize and Nepal are yet to, although steps have been taken towards LGB recognition generally. In Canada, marriage equality was achieved through statute, but only after being pushed by successful SL in almost all its provinces.<sup>613</sup> By 1998, no single province recognised same-sex marriages. However, by 2005, all of them did. The initial victories were achieved through litigation at the provincial stage, as already discussed in Chapter 3.<sup>614</sup> No case came before the Supreme Court itself as the federal government then drafted a Civil Marriages Act. It then brought a reference seeking the Court's opinion on the draft Civil Marriages Act.

<sup>613</sup> J Fisher 'Outlaws or In-laws?: Successes and challenges in the struggle for LGBT equality' (2004) 49 *McGill Law Journal* 1188.

<sup>614</sup> See section 3.2.1.

The court found the Act to be in line with the Constitution, and it legalised same-sex marriages across Canada in 2005.<sup>615</sup>

In the USA, the change came strictly through litigation, and after a protracted struggle against anti-gay forces that had put legislation in place opposing same-sex marriage or their recognition at state level and even at the federal level, such as the Defence of Marriage Act (DOMA).<sup>616</sup> After several wins at the state level,<sup>617</sup> same-sex marriages were legalised across the US by the US Supreme Court's decision in *Obergefell et al. v Hodges, Director, Ohio Department of Health, et al.*<sup>618</sup>

Of the last two countries, Belize and Nepal, the latter seems to be closer to the recognition of same-sex marriages as the matter has been a subject of huge debate in the country and has been considered on different occasions.<sup>619</sup> The Supreme Court ordered the state to remove all barriers to LGB equality in the *Sunil Babu Pant and Others v Government of Nepal and Others* case (the *Sunil Babu Pant* case) in 2008.<sup>620</sup> The court also stated that the right to marry belonged to every adult. It directed the government to put in place a committee to study the issue of same-sex marriages and make recommendations. Interestingly, the court ventured into the same-sex marriage issue on its own volition and without the petitioners making a prayer to that effect. During Nepal's political transition from monarchy to republic, the draft constitution was reported to include protections for same-sex marriages.<sup>621</sup> However, this draft never came into force as the constituent assembly failed to agree on the framing of the new instrument.<sup>622</sup> The Committee that was ordered by the court was formed to consider international laws on same-sex marriage and prepare a report for the government. It recommended legalising same-sex marriage, but they still remain illegal to date,<sup>623</sup> as the new constitution that was eventually promulgated in 2015 does not recognise them. In

<sup>615</sup> *Reference Re Same-Sex Marriage* [2004] 3 SCR 698, 2004 SCC 79.

<sup>616</sup> See *United States v Windsor* 133 S.Ct. 2675 (2013).

<sup>617</sup> See section 3.4.1, chapter 3 above.

<sup>618</sup> 576 US (2015).

<sup>619</sup> Interview with Sunil Babu Pant, former leader of the Blue Diamond Society, 16 July 2018, London.

<sup>620</sup> 1 Writ No 917; 2064 BS (2007 AD) 2NJALJ (2008) 261(21 December 2007) ..

<sup>621</sup> See for example 'Nepal to stage gay weddings on Everest' *The Telegraph* 19 January 2010 <https://www.telegraph.co.uk/news/worldnews/asia/nepal/7027736/Nepal-to-stage-gay-weddings-on-Everest.html> (accessed 17 April 2018). Also see K Knight 'How Nepal's constitution got queered' Los Angeles Review of Books, 14 October 2015 <https://lareviewofbooks.org/article/how-nepals-constitution-got-queered/#> (Accessed 17 April 2018).

<sup>622</sup> 'Nepal enters crisis mode as constitution talks fail' BBC Nepali, Kathmandu 28 May 2012 <http://www.bbc.com/news/world-asia-18234114> (accessed 17 April 2018).

<sup>623</sup> 'Same-sex marriage still illegal in Nepal, despite 2007 supreme court ruling' *Global Press Journal*, 18 December, 2016 <https://globalpressjournal.com/asia/nepal/sex-marriage-still-illegal-nepal-despite-2007-supreme-court-ruling/> (accessed 17 April 2018).

Belize, the struggle for same-sex marriage is yet to commence in earnest, as the first step was decriminalisation, which was achieved in the *Caleb Orozco v The Attorney General of Belize* (*Caleb Orozco* case).<sup>624</sup> However, this victory is still contested in court, at least on the crucial point that the Constitution provides protection on the grounds of sexual orientation.<sup>625</sup> There is however hope that same-sex marriages may be legalised in Belize in the near future as the Inter American Court issued an advisory opinion in January 2018 to the effect that states must extend all legal protections, including same-sex marriages to LGBT persons.<sup>626</sup> Although the advisory opinion is not outrightly legally binding, countries like Costa Rica and to some extent Chile regard the opinion as binding and have relied on it.<sup>627</sup> It would be interesting to see how Belize reacts.

**b) Status on criminalisation of consensual same-sex relations**

Before 1998, all the countries under review, with the exception of Canada, criminalised same-sex relations. In the past 20 years, all of them have decriminalised these relations. In Canada, decriminalisation was achieved through legislative action in 1969.<sup>628</sup> In the US, it came in 2003 through the case of *Lawrence v Texas* (the *Lawrence* case),<sup>629</sup> which was decided after 36 of the 50 states had decriminalised, and was thus intended more or less to confirm decriminalisation at the national level.<sup>630</sup> In Belize, it came in 2016 through the *Caleb Orozco* case,<sup>631</sup> while in Nepal; this came in 2007 in the case of *Sunil Babu Pant*.<sup>632</sup> In all these countries, before 1998, the laws were largely enforced against LGB persons, although not very commonly. In Canada, the criminal laws were enforced before decriminalisation, although rarely, and persons would be sent to prison and regarded as 'criminal sexual

<sup>624</sup> Supreme Court Claim No. 668 of 2010

<sup>625</sup> See 'Government to continue its partial appeal of section 53 ruling' *Lovefm.com* 7 April 2018, <http://lovefm.com/government-continue-partial-appeal-section-53-ruling/> (accessed 7 April 2018).

<sup>626</sup> State obligations concerning change of name, gender identity, and rights derived from a relationship between same-sex couples (interpretation and scope of articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to article 1, of the American Convention on Human Rights), Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24 (Nov. 24, 2017) [http://www.corteidh.or.cr/docs/opiniones/seriea\\_24\\_eng.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_24_eng.pdf), 218 (accessed 10 November 2018).

<sup>627</sup> J Contesse 'The Inter-American Court of Human Rights' Advisory opinion on gender identity and same-sex marriage' *American Society of International Law Insights*, Issue 9 Vol 22, 26 July 2018. [https://www.asil.org/insights/volume/22/issue/9/inter-american-court-human-rights-advisory-opinion-gender-identity-and#\\_edn29](https://www.asil.org/insights/volume/22/issue/9/inter-american-court-human-rights-advisory-opinion-gender-identity-and#_edn29) (accessed 10 November 2018).

<sup>628</sup> This was under the Criminal Law Amendment Act, 1968-69 which maintained the offences of 'buggery' and 'gross indecency' but provided exceptions for married persons, and anyone above the age of 21.

<sup>629</sup> 539 US 558.

<sup>630</sup> Interview with Prof. Paul Smith, 2<sup>nd</sup> August 2018, Washington DC

<sup>631</sup> *Caleb Orozco v The Attorney General of Belize*, Supreme Court Claim No. 668 of 2010. (10 August 2016).

<sup>632</sup> *Sunil Babu Pant and Others v Government of Nepal and Others* (2008) 1 Writ No 917. 2064 BS (2007 AD) 2NJALJ (2008) 261(21 December 2007).



psychopaths’ and ‘dangerous sexual offenders,’<sup>633</sup> with the case of *Klippert v The Queen* (the *Klippert* case)<sup>634</sup> standing out for the way the courts treated the appellant,<sup>635</sup> and because it was the last conviction before the laws were repealed. In the USA, even though LGB persons would rarely be arrested for consensual same-sex conduct, the courts were also complicit in the phenomenon of the legal process treating LGB persons as unapprehended felons.<sup>636</sup> In Belize, gay persons continued to be arrested under the criminal laws,<sup>637</sup> and to face insults from the police and the public without any action being taken.<sup>638</sup> In Nepal, the absence of protection and legal recognition of LGB persons played a big role in the suffering of severe violations by these groups in the period of political transition from a monarchy to a republic.<sup>639</sup>

*c) Status regarding ages of consent to same-sex relations*

Among the four surveyed countries, it is only in Canada where there are different ages of consent for same-sex relations and for heterosexual relations. This is because when Canada decriminalised consensual same-sex relations in 1969, it maintained the criminalisation of anal sex except between married couples and persons above the age of 18.<sup>640</sup> The age of consent for vaginal intercourse is 16 years. This provision was declared unconstitutional by the courts in the provinces of Ontario in 1995;<sup>641</sup> Quebec in 1998;<sup>642</sup> Alberta in 2002;<sup>643</sup> British Columbia in 2003;<sup>644</sup> and Nova Scotia in 2006.<sup>645</sup> It was also held to be unconstitutional by the Federal Court of Canada’s Trial Division in 1995,<sup>646</sup> but not by the Supreme Court of Canada. This however implies that the different standards are still legal in other provinces

<sup>633</sup> See D Cochrane ‘Policy issues concerning sexual orientation in China, Canada, and the United States’ University of Saskatchewan <https://www.usask.ca/education/documents/profiles/cochrane/policy-panel-remarks.pdf> (accessed 17 April 2018).

<sup>634</sup> [1967] SCR 82

<sup>635</sup> The appellant had admitted to being homosexual and having had consensual sex with men in private in the last one year, and was likely not to stop. He was sent to prison indefinitely as a ‘dangerous sexual offender,’ a sentence that the Supreme Court of Canada upheld.

<sup>636</sup> For a full discussion of the treatment of gays within the legal system in the US before decriminalisation, see RD Mohr *Gays/justice: A study of ethics, society, and law* (1988).

<sup>637</sup> See for example ‘Preachers protest gay cruise, two locals arrested for Sodomy’ 26 January 1998, <http://edition.channel5belize.com/archives/25439> (accessed 17 April 2018).

<sup>638</sup> See UN Human Rights Council ‘Interim report of the special rapporteur of the commission on human rights on extrajudicial, summary or arbitrary executions’ 37, U.N. Doc. A/57/138 (July 2, 2002). Also see generally, CM Evans ‘Challenging “Unnatural Crimes”: The Connection between LGBTI Rights and Gender Specific Sexual Violence Laws in Belize’ (2013) 11:2 *Northwestern Journal of International Human Rights* 189.

<sup>639</sup> See generally Astraea Lesbian Foundation for Justice ‘Bridges to Justice: Case study of LGBTI Rights in Nepal’ 2015, 7-16; interview with Sunil Babu Pant, n 619 above

<sup>640</sup> Section 159 of the Canadian Criminal Code.

<sup>641</sup> *R v Carmen M* (1992), 75 CCC (3d) 556; 15 CR (4th) 368 (Ont Ct Gen Div), Ont Ct App (25 May 1995) (unreported).

<sup>642</sup> *R v Roy* 125 CCC (3d) 442 (Que. C.A.) (1998).

<sup>643</sup> *R v Roth* 2002 ABQB.

<sup>644</sup> *R v Blake* 2003 BCCA 525.

<sup>645</sup> *R v TCF* 2006 NSCA 42.

<sup>646</sup> *Halm v Canada (Minister of Employment and Immigration)* [1995] FCJ no 303 (24 February 1995)

and territories of Canada.<sup>647</sup> A bill to repeal this provision at federal level is still pending.<sup>648</sup> For all the other countries, the ages of consent are the same.

*d) Status regarding recognition of gay persons as suitable to adopt children*

In all four countries, LGB persons were not allowed to adopt children before 1998. However, this has changed within the past 20 years. In Canada, although there has never been a specific legal bar to adoption by LGB persons,<sup>649</sup> the fact that same-sex relations were criminalised before 1969 and that same-sex marriages were not recognised before 2005 acted as *de facto* barriers to same-sex adoption of children.<sup>650</sup> With both bars now effectively removed, same-sex couples can now adopt, and all Canadian provinces have adopted legislation allowing LGB persons and couples to adopt.<sup>651</sup> In the US, the Supreme Court recognised adoptions of children by persons in same-sex marriages in the 2016 case of *V.L. v E.L. et al.*<sup>652</sup> Before that, different states had different laws, and many did not allow same-sex couples to adopt.<sup>653</sup> In Belize, the law recognises ‘spouses’ as capable of adopting,<sup>654</sup> but, since same-sex marriages are not allowed, this does not include same-sex couples or partners. It also allows adoptions by unmarried persons, but places an emphasis on potential child sexual abuse as it only allows persons who are at least 12 years older than the child,<sup>655</sup> and also restricts adoptions of female children by male persons unless there are special circumstances.<sup>656</sup> In Nepal, same-sex couple adoptions are still not possible as same-sex marriages are not recognised.<sup>657</sup>

*e) Status of LGB persons in employment*

Before 1998, only Canada had protections for LGB persons in employment, but by the end of 2017 all the selected countries had such protections, although at differing levels. In Canada, the protection was due to the inclusion of sexual orientation as a protected ground against

<sup>647</sup> See EGALE Canada ‘Overview of LGBT Human Rights in Canada’ 4. <https://egale.ca/wp-content/uploads/2012/10/UPR-Submission.pdf> (accessed 2 April 2018).

<sup>648</sup> Bill C-32.

<sup>649</sup> As observed in *Re v K* [1995] OJ No 1425, 16.

<sup>650</sup> Also see M Butler & C Kirkby ‘Same-sex marriage, divorce and families: selected recent developments’ Library of Parliament, Background Paper 28 August 2013, Library of Parliament, Ottawa <https://lop.parl.ca/Content/LOP/ResearchPublications/2013-74-e.htm> (accessed 1 April 2018).

<sup>651</sup> For details on these laws, see L Taylor ‘We are family (I got all my children with me): The regulation of gay families in North America’ Master of Laws, Faculty of Law, University of Toronto, 2014, 308-309.

<sup>652</sup> 577 US \_ (2016).

<sup>653</sup> For example Alabama from where the *EL* case arose; Arkansas; Florida; Idaho; Indiana; Kansas; Michigan; Mississippi; and Nebraska.

<sup>654</sup> Section 134(2) of the Families and Children Act, Chapter 173.

<sup>655</sup> Above, section 135(1).

<sup>656</sup> Above, section 135(2).

<sup>657</sup> Above, n 622.

discrimination in the Canadian Human Rights Act<sup>658</sup> in 1996.<sup>659</sup> For the US, to date there is no federal protection against discrimination based on sexual orientation. However, some courts have interpreted Title VII of the Civil Rights Act, 1964 as covering sexual orientation, since it protects against discrimination on the basis of sex.<sup>660</sup> In 1998, President Clinton issued an Executive Order stopping discrimination in federal civilian employment.<sup>661</sup> The Supreme Court in *Oncale v Sundowner Offshore Services, Inc* (4 March 1998)<sup>662</sup> held that the protections against workplace discrimination based on sex applied to LGB employees too. In Belize, LGB persons are now protected from discrimination based on sexual orientation since 2016.<sup>663</sup> In Nepal, the 2005 Constitution also lists sexual minorities among disadvantaged groups,<sup>664</sup> and ensures their inclusive participation in state structures.<sup>665</sup> Nepal's new Labour law, the Labour Act, 2017 (2074) came into force on 4 September 2017 and it provides broad protections against discrimination, and this is likely to improve a situation where there has been no protection at all against discrimination within employment.<sup>666</sup>

*f) Protections against discrimination in civil society activities*

There have been no specific restrictions on LGB organising in any of the four countries. However, there have been practical challenges for the operation of such organisations particularly before decriminalisation. All four countries now allow for civil society organising for LGB rights. In Canada, LGB organisations were allowed to operate before 1998, with EGALÉ Canada founded in 1986.<sup>667</sup> However, the Canadian Income Tax Act restricts charities from engaging in political activity, which can include lobbying for change

<sup>658</sup> RSC 1985, c H-6

<sup>659</sup> Through Bill C14 (1996). This arose from a history of cases starting with the *Mossop* case in 1993, where the Supreme Court denied same rights to LGB persons in employment as there was no such protection. In 1995, the same court had held that sexual orientation was a protected ground against discrimination under the Charter, even though it was not expressly included (*Egan v Canada* [1995] 2 S.C.R 513.).

<sup>660</sup> For example the US District Court in the case of *TerVeer v Billington*, No. 1:2012cv01290 - Document 35 (D.D.C. 2014) case opinion from the District of Columbia US Federal District Court and the Equal Employment Opportunity Commission in *David Baldwin v Anthony Foxx, Secretary, Department of Transportation (Federal Aviation Administration Agency*, Appeal No. 0120133080, Agency No. 2012-24738-FAA-03 (US Equal Employment Opportunity Commission), 15.

<sup>661</sup> Executive Order 13087, 28 May 2008.

<sup>662</sup> *Oncale v Sundowner Offshore Services, Inc* 523 U.S. 75.

<sup>663</sup> Equaldex 'LGBT rights in Belize' <https://www.equaldex.com/region/belize> (accessed 2 April 2018).

<sup>664</sup> Article 18 of the 2015 Constitution.

<sup>665</sup> Above, article 42.

<sup>666</sup> UNDP & USAID 'Being LGBT in Asia: Nepal Country Report' (2014) 10.

<sup>667</sup> Egale Canada Human Rights Trust 'Egale Canada calls for inquiry into crown handling of Webster case' 10 February 2005 <https://egale.ca/egale-canada-calls-for-inquiry-into-crown-handling-of-webster-case/> (accessed 5 May 2018)

in laws, and thus affects groups working on issues including LGB issues.<sup>668</sup> In the US, organisations are also regulated by the Internal Revenue Code, which provides that donations to organisations can only be tax deductible if their activities are among those included in section 501(c)(3), covering a limitation on lobbying and other political activities. In Belize, the Non-Governmental Organizations Act<sup>669</sup> recognises Non-Governmental Organisations and these can only be tax-exempt if they are registered under the Act.<sup>670</sup> Under section 8(2), the Registrar can refuse to register an organisation if its name is 'offensive to good morals'. Thus, organisations with names that are explicitly LGB may fail to be registered if this law is strictly interpreted. In Nepal, the Association Registration Act, 1977 requires mandatory registration for an organisation to operate.<sup>671</sup> However, all organisations wishing to receive foreign funding must get the approval of the Social Welfare Council.<sup>672</sup> There is no particular limitation to the operation of LGB organisations and no new laws have been enacted since 1998, and indeed LGB organisations have been able to get some limited funding from the state.<sup>673</sup>

*g) Status of LGB persons serving openly in the army*

The different countries have different histories as regards LGB service in the army. In Canada, discrimination against LGB persons was ended more than 20 years ago after the repeal of the administrative order requiring LGB persons serving in the armed forces to be investigated and then discharged.<sup>674</sup> Therefore by 1998, LGB persons in Canada were free to serve in the army without discrimination. In the US, LGB persons were traditionally discharged from the army when their sexual orientation was discovered. This was first put into policy under the Articles of War of the United States of America of 1916, where article 93 subjected to court martial anyone who committed 'assault with intent to commit sodomy.'<sup>675</sup> Sodomy was made a crime in 1920.<sup>676</sup> This ban was theoretically ended by the 1993 'Do not Ask Do not Tell' (DADT) policy signed into law by President Bill Clinton, which allowed LGB persons to serve in the army without revealing their sexual

<sup>668</sup> NJ Mule 'Advocacy limitations on gender and sexually diverse activist organizations in Canada's voluntary sector' (2011) 2:1 *Canadian Journal of Nonprofit and Social Economy Research* 5.

<sup>669</sup> Chapter 315 of the Laws of Belize.

<sup>670</sup> Above, section 4(1).

<sup>671</sup> The Association Registration Act, 1977, article 3.

<sup>672</sup> Social Welfare Act, Article 16(1).

<sup>673</sup> UNDP & USAID (n 666 above) 36.

<sup>674</sup> Canadian Forces Administrative Order (CFAO) 19-20, Sexual Deviation - Investigation, Medical Investigation and Disposal, made under the May 1967, CF Reorganization Act (C-90).

<sup>675</sup> 39 Stat. 619-Bul. No. 32, W.D., 1916), referred to as the Code of 1916.

<sup>676</sup> War Department 'The articles of war, approved June 4, 1920' September 1920.

<http://ibiblio.org/hyperwar/USA/ref/AW/index.html> (accessed 2 April 2018), article 93.

orientation.<sup>677</sup> However, this policy did not afford any protection for LGB persons, and instead forced them to hide their identity, as those who did not do so could be discharged. This was repealed during the administration of President Obama in the Don't Ask, Don't Tell Repeal Act of 2010.<sup>678</sup> This repeal made it possible for openly LGB persons to serve in the army, but there is no explicit protection against discrimination based on sexual orientation in the US army.

For Belize, there is no express provision recognising LGB service in the army, and as such there is no protection.<sup>679</sup> In Nepal, the 2015 Constitution protects sexual minorities from discrimination, and this means that they cannot be excluded from serving in the army. However, no specific protections against discrimination in the military service exist.

#### *h) LGB persons donating blood*

All countries still have a ban on gay men donating blood. In Canada, this ban came into effect in 1992 through the Health Canada Regulations. However, this was amended in 2013, and men who had not had sex with a man in the last five years were allowed to donate blood following litigation, which questioned the indefinite deferral period.<sup>680</sup> This was reduced to one year in 2016.<sup>681</sup> In the USA, a ban on gay men donating blood was instituted in 1983 after gay men were found to be particularly vulnerable to HIV/AIDS.<sup>682</sup> The ban was relaxed in 2015, by the US Department of Health and Human Services (HHS) Advisory Committee on Blood Safety and Availability to restrict the ban to only those who had had gay sex within the past one year.<sup>683</sup> For Belize, the Caribbean Regional Standards for Blood Banks and Transfusion Services, which also applies to Belize, does not explicitly stop gay men from donating blood but imposes a one year deferral period for anyone who has had 'sexual contact with an individual with HIV infection or at high risk of HIV infection', which generally includes gay men.<sup>684</sup> For Nepal, gay men still cannot donate blood.<sup>685</sup>

<sup>677</sup> (10 USC § 654).

<sup>678</sup> H.R 2965, S.4023.

<sup>679</sup> P Marten & J Galdiga, *J LGBT Military personnel: A strategic vision for inclusion* (2014) The Hague Centre for Strategic Studies 'LGBT military personnel: A strategic vision for inclusion' (2014) 59.

<sup>680</sup> M Goldman et al 'Donor criteria for men who have sex with men: A Canadian perspective' (2014) 54 *Transfusion* 1887, 1889.

<sup>681</sup> See 'Gay men abstinent for a year cleared by Health Canada to donate blood' CBC, 21 June 2018 <http://www.cbc.ca/news/politics/gay-men-blood-donations-1.3643761> (accessed 2 April 2018).

<sup>682</sup> For the history of the ban see R Bayer 'Science, politics, and the end of the lifelong gay blood donor ban' (2015) 93:2 *The Milbank Quarterly* 230.

<sup>683</sup> Above.

<sup>684</sup> Pan American Health Organization (PAHO) 'Caribbean regional standards for blood banks and transfusion services, 2<sup>nd</sup> Edition (2012) 39. [http://www.paho.org/hq/index.php?option=com\\_docman&task=doc\\_view&gid=19529&Itemid=270&lang=en](http://www.paho.org/hq/index.php?option=com_docman&task=doc_view&gid=19529&Itemid=270&lang=en) (accessed 17 April 2018).

*i) Non-discrimination in access to health*

Since 1998, there is a marked positive change in LGB persons' access to health services in all four countries. In Canada, the protection against discrimination based on sexual orientation in the Human Rights Act implies that one cannot be discriminated against in health service provision. There is currently no legal limitation to accessing health services.<sup>686</sup> For the US, the legal changes enabling increased LGB access to health services are more recent, particularly the legalisation of same-sex marriage in 2016, the repeal of the DOMA and the enactment of The Patient Protection and Affordable Care Act, 2010 (ACA).<sup>687</sup> These widened access to health for LGB persons by removing legal barriers in seeking health services particularly for same-sex couples in relation to the repeal of DOMA and the legalisation of same-sex marriages, as well making health insurance more affordable to all for the ACA.<sup>688</sup> The US Department of Health and Human Services issued a policy requiring health services without discrimination based on, among other grounds, sexual orientation.<sup>689</sup>

In Belize, access to health is included as part of the preamble to the Constitution and not part of the main text of the Constitution.<sup>690</sup> The decriminalisation of consensual same-sex relations in the *Caleb Orozco* case<sup>691</sup> is a positive step, as the court itself observed that the continued criminalisation has a detrimental effect on healthcare access.<sup>692</sup> Despite this, no statutory provisions exist to provide for equal health access for LGB persons.<sup>693</sup> However, as regards HIV/AIDS, the third HIV National Strategic Plan (NSP), 2016-2020 includes MSM as one of the groups that are targeted for specific interventions, as they are regarded as victims

<sup>685</sup> Para 7.2(b) of the National Blood Policy 2050 (1993) provides that the National Red Cross in cooperation with other entities 'shall identify the population at low risk for transfusion-transmissible infections who can be selected as blood donors.'

<sup>686</sup> Studies on LGBT health cite other challenges and not the law. See for example C Charles et al 'Improving healthcare for LGBTQ populations' CFMS Position Paper 2015 <https://www.cfms.org/files/position-papers/2015%20Improving%20Healthcare%20for%20LGBTQ%20Populations.pdf> (accessed 17 April 2018), and A Stinchcombe, J Smallbone,, K Wilson, and K Kortess-Miller 'Healthcare and end-of-life needs of lesbian, gay, bisexual, and transgender (LGBT) older adults: A scoping review' 2007 *Geriatrics* 2017.

<sup>687</sup> 42 U.S.C. § 18001 et seq. (2010).

<sup>688</sup> For a detailed discussion of the changes see U Ranji et al 'Health and access to care and coverage for lesbian, gay, bisexual, and transgender individuals in the U.S' Kaiser Family Foundation, Issue Brief, April 2015, 12-13.

<sup>689</sup> See Department of Health and Human Services 'Access to healthcare: Non-discrimination' 15 August 2017 <https://www.hhs.gov/programs/topic-sites/lgbt/accesstohealthcare/nondiscrimination/index.html> (accessed 2 April 2018).

<sup>690</sup> See Constitution of Belize, 1981, Preamble, Para (a).

<sup>691</sup> n 623, above.

<sup>692</sup> Above, para 73.

<sup>693</sup> See United Belize Advocacy Movement (UNIBAM) and the Sexual Rights Initiative (SRI) 'Stakeholder submission on lesbian, gay, bisexual and transgender (LGBT) rights in Belize for the 17th session of the Universal Periodic Review' October 2013 <https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=180&file=EnglishTranslation> (accessed 17 April 2017)



of unfair discrimination.<sup>694</sup> In Nepal, the court ordered all barriers against LGB equality to be removed in the *Sunil Pant Babu* case,<sup>695</sup> and consequently the 2015 Constitution provides for the right to health for everyone.<sup>696</sup> It also emphasises that everyone shall have 'equal access to health services'.<sup>697</sup> However, there is no specific law yet in place to actualise the constitutional provisions. Nevertheless, Nepal's HIV Strategic Plan 2016-2020 includes MSM among key populations<sup>698</sup> and emphasises addressing discrimination in access to HIV services.<sup>699</sup>

*j) Status of non-discrimination in access to justice*

None of the selected countries outside Common Law Africa has a provision excluding LGB persons from accessing the courts of law or other tribunals. In this aspect, they differ from the Common Law African countries, one of which, that is Uganda, had such a provision in its Equal Opportunities Commission Act (this provision was nullified in the *Adrian Jjuuko* case).<sup>700</sup>

*k) Status of discrimination in immigration*

Belize, Canada, and the USA have had explicit laws restricting LGB immigration while Nepal has not. Belize prohibits homosexuals from entering the country under Section 5(1)(e) of the Immigration Act, which makes it plain that LGB persons are not considered to form part of a protected social group as envisioned by the Refugee Convention's definition of a refugee.<sup>701</sup> Belize, like the other Common Law African countries besides South Africa, makes no specific mention of sexual orientation as forming part of a 'particular social group'. In Canada, there was never any specific restriction to LGB persons being allowed into Canada or claiming asylum on the basis of their sexual orientation. However, the Immigration Act, 1985 did not provide any protection and partners of LGB persons could only be allowed asylum on humanitarian and compassionate grounds under subsection 114(2).<sup>702</sup> In 1993, the Supreme Court of Canada identified belonging to a particular sexual orientation as one of the aspects that were covered under 'particular social group'.<sup>703</sup> The Immigration and

<sup>694</sup> See generally, National AIDS Commission 'National HIV/TB strategic plan 2016-2020' October 2015, Goal 5, 40.

<sup>695</sup> n 619 above.

<sup>696</sup> Nepal Constitution, 2015, article 35(1).

<sup>697</sup> Above, article 35(3).

<sup>698</sup> Government of Nepal 'National HIV Strategic Plan 2016-2021', 2nd Edition, June 2017, iii.

<sup>699</sup> Above, 3.

<sup>700</sup> n 284 above.

<sup>701</sup> Article 1 of the Refugee Convention, 1951.

<sup>702</sup> RSC 1985, c. I-2 [1985 Act].

<sup>703</sup> *Canada (Attorney General) v Ward* [1993] 2 SCR 689.

Refugee Protection Act, 2001<sup>704</sup> now recognises same-sex partners, who are entitled to an easier procedure.<sup>705</sup> In the US, before 1998, they did not admit homosexuals into the country under section 212(a)(4) of the Immigration and Nationality Act of 1952.<sup>706</sup> The Supreme Court upheld this policy in the case of the *Boutilier v INS* (May 22, 1967).<sup>707</sup> It was later amended in 1990 to remove the grounds under which homosexuality was interpreted.<sup>708</sup> However, the grounds of ‘crimes involving moral turpitude’ remained in place, and these potentially continued to affect homosexuals.<sup>709</sup> Currently, the Immigration and Nationality Act (‘INA’)<sup>710</sup> has adopted the Refugee Convention’s definition of a refugee. The Foreign Affairs Reform and Restructuring Act of 1998<sup>711</sup> protects refugees from forced return to their countries of origin.<sup>712</sup> Since 1990, the courts have recognised sexual orientation as included among ‘a particular social group’ for asylum purposes.<sup>713</sup> In Nepal, the Immigration Act 2049 (1992) does not specifically mention LGB persons or sexual orientation, and no courts have decided on inclusion of LGB persons.

#### 4.4.2 Changes in the political environment

The political environment in all the four selected countries has changed from ambivalent to protective at differing levels. These changes are as follows:

##### *a) Political positions on homosexuality*

Unlike in the selected Common Law African countries before 1998, the political positions on same-sex relations were more positive in Canada, but rather hostile in Belize, Nepal and the USA, where it was more or less similar to the other African Common Law countries besides South Africa. The reason why Canada was different is because homosexuality had been decriminalised in 1969 through legislation, which was partly inspired by public

<sup>704</sup> SC 2001, c. 27,

<sup>705</sup> The Immigration and Refugee Protection Regulations have allowed the expansion of the family class to include Common Law and conjugal partners, in addition to married spouses.

<sup>706</sup> Pub.L. 82-414, 66 Stat. 163, enacted June 27, 1952.

<sup>707</sup> *Boutilier v INS*, 387 U.S. 118 (1967).

<sup>708</sup> Pub. L. No. 101-649, 104 Stat. 4978 (1990) (codified at 8 U.S.C. §§ 1101- 1524 (1988 & Supp. 11 1990)).

<sup>709</sup> See S Minter ‘Sodomy and public morality offenses under U.S immigration law: Penalizing lesbian and gay identity’ (1993) 26:3 *Cornell International Law Journal* 771, 773.

<sup>710</sup> INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (1994 & 1998 Supp.).

<sup>711</sup> Div. G., § 2242, Pub. L. No. 105-277, 112 Stat. 2681-822 (1998).

<sup>712</sup> Above, section 1241.

<sup>713</sup> *In re Toboso-Alfonso* 20 I. & N. Dec. 819 (B.I.A. 1990). This case was designated as a precedential case by the Attorney General in 1994, making sexual orientation an established ‘particular social group’ for asylum purposes, which thus had to be accepted by all federal courts. See P O’Dwyer ‘A well-founded fear of having my sexual orientation asylum claim heard in the wrong court’ (2007) 52, 185, 196.

condemnation of how the state and the courts dealt with the *Klippert* case.<sup>714</sup> The legislation was introduced by the then Justice Minister (and later Prime Minister) Pierre Trudeau, who justified it with the statement that ‘There's no place for the state in the bedrooms of the nation... what's done in private between adults doesn't concern the Criminal Code’.<sup>715</sup> Since then, more positive statements have been made by politicians in Canada, with the latest coming from current Prime Minister, and Pierre Trudeau’s son Justin Trudeau, who issued an apology for historical state-sponsored persecution of LGB persons in Canada,<sup>716</sup> including an expression of intent to pardon Klippert.<sup>717</sup> All the different decisions of the Supreme Court of Canada have been implemented through legislation being enacted and passed by politicians. This includes the amendment to the Human Rights Act to include sexual orientation, arising out of the *Egan v Canada* case.<sup>718</sup> Canada has also consistently stood for the protection of LGB rights at the UN, voting ‘Yes’ for the General Assembly resolution maintaining the Independent expert on SOGI.<sup>719</sup>

In the USA, different political leaders have taken different positions on LGB rights over the past 20 years. This study will limit itself to the Presidents. At the time of *Bowers v Hardwick* in 1979,<sup>720</sup> republican Ronald Reagan was president and had earlier spoken out against same-sex marriage.<sup>721</sup> The next President, another republican, George HW Bush, however supported LGB rights more than Reagan by signing the Hate Crime Statistics Act, 1990,<sup>722</sup> which was the first federal law to name sexual orientation as a basis for hate crime and to collect data on crimes based on it.<sup>723</sup> The next President—in office by 1998—was the democrat Bill Clinton. He was more publicly supportive of LGB rights, and was the first

<sup>714</sup> Man imprisoned for being gay to get posthumous pardon from Trudeau’ *CBC News* 28 February 2016 <http://www.cbc.ca/news/canada/man-imprisoned-for-being-gay-to-get-posthumous-pardon-from-trudeau-1.3468287> (accessed 17 April 2018).

<sup>715</sup> ‘Trudeau: There’s no place for the state in the bedrooms of the nation’ *CBC* <http://www.cbc.ca/archives/entry/omnibus-bill-theres-no-place-for-the-state-in-the-bedrooms-of-the-nation> (accessed 4 April 2018).

<sup>716</sup> ‘Our collective shame’: Trudeau delivers historic apology to LGBT Canadians’ *CBC*, 28 November 2017 <http://www.cbc.ca/news/politics/homosexual-offences-exunge-records-1.4422546> (accessed 2 April 2018).

<sup>717</sup> n 714 above.

<sup>718</sup> *Egan v Canada* [1995] 2 S.C.R 513.

<sup>719</sup> Arc International ‘SOGI mandate safeguarded in face of hostility’ 21 November 2016 <http://arc-international.net/press-release/sogi-mandate-safeguarded-in-face-of-hostility/> (accessed 2 April 2018).

<sup>720</sup> 478 US 186.

<sup>721</sup> See ‘Reagan would not ease stand on homosexuals’ *New York Times* 18 August 1984, <https://www.nytimes.com/1984/08/18/us/campaign-notes-reagan-would-not-ease-stand-on-homosexuals.html> (accessed 2 April 2018).

<sup>722</sup> 28 U.S.C. § 534 (HCSA).

<sup>723</sup> See Federal Bureau of Investigations ‘Hate crime statistics’ <https://ucr.fbi.gov/hate-crime/2010/resources/hate-crime-2010-about-hate-crime> (accessed 22 April 2018).

president to appoint openly LGB persons to key positions in the federal government.<sup>724</sup> He however put in place the 'Do not Ask Do Not tell' (DADT) Policy after facing opposition when he sought to completely remove barriers to LGB service in the army.<sup>725</sup> Clinton also signed the Defence of Marriage Act (DOMA) in 1996,<sup>726</sup> but also issued an Executive Order banning discrimination on the basis of sexual orientation in employment in the federal civilian government.<sup>727</sup> The next President was George W Bush, a republican, who was either neutral or opposed to same-sex relations.<sup>728</sup> He maintained most of Clinton's pro-gay measures and also appointed openly gay persons into his administration.<sup>729</sup> Bush however proposed a constitutional amendment to protect heterosexual marriage after continued same-sex marriage state victories.<sup>730</sup> It was during his term that the case of *Lawrence v Texas*<sup>731</sup> was decided. At the international level, President Bush's administration did not support the 2008 UN General Assembly's Declaration on Sexual Orientation and Gender identity at the UN, which condemned discrimination and violence based on sexual orientation and gender identity.<sup>732</sup>

President Barack Obama, the democrat who followed Bush, was the most supportive of LGB rights, and created the position of Special Envoy on Sexual Orientation and Gender Identity.<sup>733</sup> He also declared the month of June to be LGBT pride month<sup>734</sup> and supported

<sup>724</sup> 'Why Bill Clinton signed the Defense of Marriage Act' *The New Yorker* 8 March 2013 <https://www.newyorker.com/news/news-desk/why-bill-clinton-signed-the-defense-of-marriage-act> (accessed 5 May 2018).

<sup>725</sup> 'Bill Clinton agrees to "Don't ask don't tell" policy concerning gays in military' *NBC* 19 July 1993 <https://archives.nbclearn.com/portal/site/k-12/flatview?cuecard=618> (accessed 5 May 2018).

<sup>726</sup> W Scott Lamb '20 years ago, Bill Clinton signed the Defense of Marriage Act' *The Washington Times* 21 September 2016.

<sup>727</sup> Executive Order 13087 'Further amendment to Executive Order 11487, Equal Employment Opportunity in the Federal Government' was signed on 28 May 1998. US Merit System Protection Board 'Sexual orientation and the federal workplace: Policy and perception' (2014) 22.

<sup>728</sup> 'Bush on gay rights issues' *ABC News* <https://abcnews.go.com/Politics/story?id=122102&page=1> (accessed 5 May 2018).

<sup>729</sup> 'Roy Moore opposed to the appointment of an "admitted homosexual" to an ambassadorship in 2006' *CNN* 29 September 2017 <https://edition.cnn.com/2017/09/28/politics/kfile-roy-moore-openly-gay-appointments/index.html> (accessed 5 May 2018).

<sup>730</sup> The White House 'President calls for constitutional amendment protecting marriage' 24 February 2004, <https://georgewbush-whitehouse.archives.gov/news/releases/2004/02/20040224-2.html> (accessed 17 April 2018).

<sup>731</sup> 'Lesbian and gay rights during president Clinton's second term: A working paper published by the Citizens' Commission on Civil Rights' (1999) <https://www.aclu.org/other/lesbian-and-gay-rights-during-president-clintons-second-term-working-paper-published-citizens> (accessed 22 April 2018).

<sup>732</sup> 'U.N. divided over gay rights declaration' *Reuters* 19 December 2008, <https://www.reuters.com/article/us-un-homosexuality/u-n-divided-over-gay-rights-declaration-idUSTRE4BH7EW20081218> (accessed 17 April 2018).

<sup>733</sup> 'U.S. appoints first-ever special envoy for LGBT rights' National Public Radio February 23, 2015, <https://www.npr.org/sections/thetwo-way/2015/02/23/388482554/u-s-appoints-first-ever-special-envoy-for-lgbt-rights> (accessed 17 April 2018).

LGB rights internationally. In 2009, he signed into law the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009,<sup>735</sup> which extended hate crime law to cover sexual orientation. He also stopped the Justice Department from defending the Defence of Marriage Act in court, which eventually led to the repeal of the DOMA.<sup>736</sup> He also repealed the DADT policy,<sup>737</sup> and openly supported same-sex marriage, the first sitting President to do so.<sup>738</sup> Obama supported LGB rights internationally, including opposing Uganda's Anti-Homosexuality Bill, speaking out against LGB discrimination on his first African trip.<sup>739</sup> Under him, the USA supported and led efforts to protect LGB rights at the UN Human Rights Council.<sup>740</sup> Since assuming office, President Donald Trump adopted a more anti-LGB rights stance, including addressing the conservative anti-LGB Family Research Council in 2017.<sup>741</sup> Internationally, the US is no longer taking the lead on LGB issues. Indeed in September 2017 it voted against a UN Human Rights Council Resolution condemning the death penalty for same-sex conduct.<sup>742</sup>

For Belize, before 1998, there were no specific political discussions on LGB rights. However, current Prime Minister Dean Barrow and his wife have supported gay rights and spoken out in favour of protection after the *Caleb Orozco* case.<sup>743</sup> The Prime Minister was against the appeal of the decision in the *Orozco* case.<sup>744</sup> The Prime Minister has also called upon LGB rights activist Caleb Orozco to support the country to go to the International Court of Justice to resolve the border dispute with Guatemala.<sup>745</sup> This move indicates recognition of the

<sup>734</sup> White House 'Presidential Proclamation -- LGBT Pride Month, 2016' May 31, 2016 <https://obamawhitehouse.archives.gov/the-press-office/2016/05/31/presidential-proclamation-lgbt-pride-month-2016> (accessed 17 April 2018).

<sup>735</sup> 18 USC § 249.

<sup>736</sup> 'Obama administration will no longer defend DOMA' *CBS News* 24 February 2011, <https://www.cbsnews.com/news/obama-administration-will-no-longer-defend-doma/> (accessed 17 April 2018).

<sup>737</sup> (10 USC § 654).

<sup>738</sup> 'Obama supports same-sex marriage' *Abc.net* <http://www.abc.net.au/radionational/programs/breakfast/obama-supports-same-sex-marriage/4002152> (accessed 17 April 2018).

<sup>739</sup> 'Obama defends gay rights on Kenya trip' *TIME* 26 July 2015 <http://time.com/3972445/obama-kenyatta-gay-rights/> (accessed 5 May 2018).

<sup>740</sup> 'A win for LGBT rights at the last big UN showdown of the Obama era' *UN Dispatch* 22 November 2016 <https://www.undispatch.com/lgbt-vote/> (accessed 5 May 2018).

<sup>741</sup> 'Trump at anti-LGBT summit: "The times are changing back again"' 13 October 2017 <http://www.washingtonblade.com/2017/10/13/trump-at-anti-lgbt-summit-the-times-are-changing-back-again/> (accessed 17 April 2018).

<sup>742</sup> 'U.S. opposes UN resolution against death penalty for same-sex relations' *Washington Blade* 2 October 2017, <http://www.washingtonblade.com/2017/10/02/u-s-opposes-un-resolution-against-death-penalty-sex-relations/> (2 April 2018).

<sup>743</sup> 'PM's wife supports CJ decision' *7 News Belize* 19 August 2016, <http://www.7newsbelize.com/sstory.php?nid=37390> (accessed 17 April 2018).

<sup>744</sup> 'Barrow says "Yes" to the LGBT' *Amandala* 20 August 2016 <http://amandala.com.bz/news/barrow-yes-lgbt/> (accessed 2 April 2018).

<sup>745</sup> Interview with Caleb Orozco, Executive Director of UNIBAM, 17 July 2018, Belize City.

activist's contribution in the fight for human rights in Belize, and acknowledges that a person who speaks up for LGB rights could also be equipped to speak up for the nation at large. In Nepal, the politicians did not oppose the court decision to protect LGB persons, and indeed this protection was included in the Constitution. Sunil Babu Pant was later appointed a member of the Constituent Assembly.<sup>746</sup> The fact that the number of LGB organisations increased from 4 to 40 in the period following the case<sup>747</sup> indicates that the political climate had become much more favourable in respect of LGB rights.

#### 4.4.3 Changes in the social environment

Social perspectives towards LGB persons in the four countries have also undergone profound change in the past 20 years. The changes are going to be considered along the same lines as it was done for Common Law Africa: change in social attitudes; social status; religious stance and attitudes; media coverage; and depiction in popular culture.

##### *a) Changes in societal attitudes towards LGB persons*

There has been positive change in societal attitudes in all the different countries over the past 20 years, although the rates are different. Canada has seen the biggest change, followed by Nepal and finally Belize. More people have become supportive of LGB rights, including same-sex marriage generally in all four countries.

In Canada, there have been major shifts in the past 20 years, although it has to be noted that, by 1998, the only major change that was left was the legalisation of same-sex marriages. The long period between the decriminalisation of consensual same-sex relations and legalisation of same-sex marriages gave an opportunity for mindsets to change more towards equality for everyone in all respects including marriage. The Pew Research Centre found 69% acceptance of homosexuality in 2002; 70% acceptance for homosexuality in 2007; 71% acceptance in 2007; and a 9% increment to 80% in 2013.<sup>748</sup> In a study comparing public opinion before legalisation of same-sex marriages in 2005, and one year after, it was found that half of the population did not support same-sex marriage.<sup>749</sup> However shortly after

<sup>746</sup> 'Nepal's first gay MP speaks — Nation's two largest political parties embrace LGBT rights' *Europe Solidaire Sans Frontieres* 8 May 2008 <https://www.europe-solidaire.org/spip.php?article10398> (accessed 19 April 2018).

<sup>747</sup> Interview with Sunil Babu Pant, n 615 above.

<sup>748</sup> See Pew Research Centre (2013) (n 361 above).

<sup>749</sup> See 'Canadians deeply split on same-sex marriage, poll suggests' *CBC News* 10 April 2005, <http://www.cbc.ca/canadalstory/2005/04/10/gay-marriage-050410.html>.



legalisation, 55% of Canadians favoured legalisation, and within one year (2006), over 60% favoured legalisation.<sup>750</sup> In another study, support for same-sex marriages doubled from 37% in 1993 to 61% in 2011.<sup>751</sup> A 2017 study by CROP found that 74% of Canadians are in favour of same-sex marriages.<sup>752</sup> The Williams Institute study found that acceptance for LGB persons has been steadily increasing over the past 33 years with the highest levels reached in 2010 and a reduction in support since then.<sup>753</sup>

For the USA, change has not been as wide-reaching as that in Canada. The Pew Research Centre tracked changes in the acceptance of homosexuality in the US. In 2002, acceptance of homosexuality stood at 51%; then 49% in 2007; 60% in 2011 and 60% in 2013,<sup>754</sup> and 62% in 2017.<sup>755</sup> A Gallup study in 2014 showed that support for same-sex marriage doubled from 27% in 1996 to 54% in 2014, before same-sex marriage had been legalised nationwide.<sup>756</sup> In 2017, NBC News and the Wall Street Journal found an increase in the support for same-sex marriages to 60% after the decision in the *Obergefell* case.<sup>757</sup> Pew found the support at 53% in 2013 and at 59% in 2015, the year the *Obergefell case*<sup>758</sup> was decided. The Williams Institute study also found increasing acceptance over the 33 years with the period around 2010 being the peak.<sup>759</sup> Social acceptance of LGB persons in the USA varies widely along the different strata of the society, with rural areas more opposed to LGB rights than urban areas,<sup>760</sup> and white communities (64%) being more supportive than African American communities (51%).<sup>761</sup> Younger persons (56%) are also more supportive than older persons (41%).<sup>762</sup> Along

<sup>750</sup> See Press Release, 'Environics Research Group: Canadians for equal marriage' (June 2006), <http://erg.environics.net>.

<sup>751</sup> Canadian Opinion Research Archive (2014). Canadian election studies. Quoted in PR Brewer 'Public Opinion About Gay Rights and Gay Marriage' (2014) 26:3 *International Journal of Public Opinion Research* 279.

<sup>752</sup> B Britten 'Are you in favour of same-sex marriage? 74% of Canadians and 80% of Quebecers support it (and death in Venice by Benjamin Britten)' 20 November 2017 <https://www.crop.ca/en/blog/2017/207/> (accessed 2 April 2018).

<sup>753</sup> Flores & Park, n 358 above, 355.

<sup>754</sup> See Pew Research Centre (n 365 above).

<sup>755</sup> Pew Forum 'Changing attitudes on gay marriage: '26 June 2017 <http://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/> (accessed 15 July 2018).

<sup>756</sup> Gallup, 2014 'Marriage' quoted in Quoted in PR Brewer (n 688 above) 279.

<sup>757</sup> n 500 above. See 'Record percentage of Americans supports gay marriage, Poll Finds' 6 September 2016 NBC News <https://www.nbcnews.com/feature/nbc-out/record-percentage-americans-support-gay-marriage-poll-finds-n799376> (accessed 2 April 2018).

<sup>758</sup> n 614 above.

<sup>759</sup> Flores & Park, n 354 above, 355.

<sup>760</sup> ML Williams, et al 'The social/sexual environment of gay men residing in a rural frontier state: Implications for the development of HIV prevention programs' *The Journal of Rural Health* (2005) 21 (1), 48, show less acceptance in rural areas. However, Anderson et al suggest that there is a growing tendency towards libertarianism in rural areas of the USA, which favours acceptance of same-sex marriages. See RK Anderson, PA. Kindle et al Rural perspectives on same-sex marriage, *Journal of Gay & Lesbian Social Services*, (2015) 27:2, 201-215

<sup>761</sup> Pew Forum, n 755 above. Also see generally, C Delroy (ed) *The greatest taboo: Homosexuality in black communities* 2000.

<sup>762</sup> above.

political lines, more democrats (73%) than republicans favour same-sex marriages (40%).<sup>763</sup> However, what is clear is that there is change happening on the positive side for almost all groups.<sup>764</sup>

For Belize, there is no data for the period before 1998. In 2013 UNAIDS found that 34% of Belizeans accepted homosexuals, and a further 34% considered themselves to be tolerant of homosexuals, making it 68% of all Belizeans who regarded homosexuality favourably.<sup>765</sup> In Nepal, there are no surveys on societal attitudes but indications are that society is still less accepting of homosexuals despite progressive laws.<sup>766</sup> UNDP and USAID found in 2014 that despite the positive laws and court decisions, Nepal remains a conservative patriarchal society that is less accepting of homosexuals.<sup>767</sup> Much progress has been made on issues of *meti* or transgender persons as these have been recognised within the caste system prevalent in Nepal for ages. However, there is less acceptance for LGB persons.<sup>768</sup>

#### *b) Changes in the levels of violence against LGB persons*

Among the four selected countries, the levels of violence against LGB persons have been changing. However, it is important to note that in all the countries, LGB persons still face violence; it is simply the extent of violence which differs.

In Canada, the levels of violence against LGB persons have been high, and indeed they were often not documented or were underreported.<sup>769</sup> The violence continues to date despite the change in laws and change in societal attitudes.<sup>770</sup> In 2016, 176 crimes against LGB persons

<sup>763</sup> Above.

<sup>764</sup> Above.

<sup>765</sup> UNAIDS Caribbean 'A mandate to act' Findings from a poll on public attitudes to sexual and reproductive health, abuse, violence and discrimination. Public Attitude Polls: Belize (2013) 16-17.

<sup>766</sup> See for example A Kaphle and H Nosheen 'Nepal: society lags behind progressive laws on homosexuality' Pulitzer Centre, Kathmandu, Nepal, <http://pulitzercenter.org/reporting/nepal-society-lags-behind-progressive-laws-homosexuality> (accessed 2 April 2018).

<sup>767</sup> UNDP & USAID (n 666 above) 20-21.

<sup>768</sup> UNDP & USAID, n 666 above, 43-44.

<sup>769</sup> ME Faulkner 'empowering victim advocates: Organizing against anti-gay/lesbian violence in Canada' (2001) 10 *Critical Criminology* 123-25. Some of the violence has included murders, for example that of Kenneth Zeller, a gay teacher and librarian in 1985 by five youth in a public park in Toronto; and that of Joe Rose in 1989 in Montreal and Aaron Webster in Vancouver in 2001. A suspected serial murderer of gay men was recently arrested in Toronto and charged with seven murders. See 'Bruce McArthur, alleged Toronto serial killer, faces 7th murder charge' Huffington Post, 11 April 2018, [https://www.huffingtonpost.ca/2018/04/11/bruce-mcarthur-seventh-charge\\_a\\_23408697/](https://www.huffingtonpost.ca/2018/04/11/bruce-mcarthur-seventh-charge_a_23408697/) (accessed 10 November 2018).

<sup>770</sup> See 'Gay men in Canada live with daily violence unimaginable to straight people' *The Globe and Mail*, February 9, 2018 <https://www.theglobeandmail.com/opinion/gay-men-in-canada-live-with-daily-violence-unimaginable-to-straight-people/article37920392/> (accessed 17 April 2018). 'Hate crimes against Asian Canadians and LGBT people increased in B.C. in 2016' *Straight.com* 28 November 2017, <https://www.straight.com/news/1001046/hate-crimes-against-asian-canadians-and-lgbt-people-increased-bc-2016> (accessed 2 April 2018). R Douglas Elliot also confirms that violence continues to date, and he shared that

were recorded, increasing from 141 to 176 incidents.<sup>771</sup> This is higher than the number recorded in Uganda for the same period, with all its repressive anti-gay laws, and yet population-wise, the two countries do not differ much.<sup>772</sup> In the USA, LGB persons have been facing violence since way before 1998,<sup>773</sup> and LGB persons are still one of the most likely groups to suffer violence in the US currently.<sup>774</sup> In 2014, out of the 5,462 hate crimes reported to the FBI, a fifth were against LGB, transgender and intersex persons.<sup>775</sup> These are high rates of violence, which are on the rise even after the achievement of marriage equality.<sup>776</sup> One of the biggest mass shootings in the US occurred in a gay bar in Orlando, Florida when on June 12, 2016, 49 people were shot dead and 58 others wounded.

In Belize, there are reports of violence against LGB persons,<sup>777</sup> but these are not so high as compared to Canada and the USA, and murders in Belize on the basis of sexual orientation are rare. The main motivation behind instituting the *Sunil Pant* case was to take a stand against the violence suffered by LGB persons at the hands of the security forces during the period of political transition in Nepal. Sunil Pant explained the purpose behind the case as follows: 'What we wanted was for the discrimination and violence which was happening on a day-to-day basis to end, and also some security and rights. The primary focus was to end violence from state parties – that was the remedy that we wanted from the courts.'<sup>778</sup> The fact that the Constitution of Nepal makes provision for security and legal rights of LGB persons has made a difference to the levels of violence against this group; violence still occurs but it has become much less common.<sup>779</sup>

there have been death threats against him in the months preceding the interview. Skype interview with Douglas Elliott, Canadian LGB activist and human rights lawyer, 29 July 2018.

<sup>771</sup> Above. Also see EGALE Human Rights Trust 'Hate crimes targeting LGBT community remain most violent in Canada' 12 Apr 2012 <https://egale.ca/2012/04/12/> (accessed 17 April 2018).

<sup>772</sup> In 2016, Canada had a population of 35 million and Uganda a population of 41 million. See Statistics Canada 'Canada at a glance' <http://www.statcan.gc.ca/pub/12-581-x/2017000/pop-eng.htm> and Trading Economics 'Uganda – population growth' <https://tradingeconomics.com/uganda/population-growth-annual-percent-wb-data.html> (accessed 23 April 2018).

<sup>773</sup> For example, as far back as 1973, 32 people were killed in an arson attack in a gay night club in New Orleans. See 'Before Orlando shooting, an Anti-gay massacre in New Orleans was largely forgotten' *New York Times* 14 June 2016.

<sup>774</sup> See for example 'LGBT people are more likely to be targets of hate crimes than any other minority group' *New York Times*, 16 June 2016 <https://www.nytimes.com/interactive/2016/06/16/us/hate-crimes-against-lgbt.html> (accessed 2 April 2018).

<sup>775</sup> n 723 above.

<sup>776</sup> above.

<sup>777</sup> UNIBAM & SRI (n 693 above) 3.

<sup>778</sup> Interview with Sunil Babu Pant, n 615 above.

<sup>779</sup> USAID & UNDP (n 666 above) 47.

c) *Changes in societal attitudes towards LGB persons in public settings*

This section interrogates how LGB persons are treated in public spaces: on the streets; schools, and hospitals in the four study countries. The attitudes differ from country to country, but there is a positive improvement in how LGB persons are treated in public, more so in Canada and the USA.

In Canada, for long LGB persons have been able to freely organise, and organisations are able to carry out their work in compliance with the law. LGB, Transgender and Intersex pride parades take place every year largely uninterrupted by protestors in the major cities.<sup>780</sup> Toronto hosted World Pride in 2014.<sup>781</sup> The pride parades are usually large and the 2017 Toronto Pride had the Prime Minister marching. Uniformed police officers have been marching too until 2017 when this was stopped.<sup>782</sup> For business, there has been a history of business catering to LGB clients, such as the Little Sisters Book Store.<sup>783</sup> Discrimination in schools is limited as most schools offer support to LGB youth.<sup>784</sup> In the USA, LGB organisations are free to operate and pride parades are held every year in many cities. The first pride parades started in 1980 in New York, Los Angeles, Chicago and San Francisco, and pride parades have been going on since then. There are LGB specific businesses, although many businesses still object to serving LGB persons, especially those dealing in wedding-related business.<sup>785</sup> Indeed, the issue of businesses refusing to serve LGB persons is currently before the US Supreme Court in the case of *Masterpiece Cakeshop Ltd. v Colorado Civil Rights Division*,<sup>786</sup> in which a cakeshop refused to make a cake for a gay wedding. In schools, LGB students still face violence and discrimination.<sup>787</sup>

<sup>780</sup> 'Inclusivity energizes Toronto Pride parade' *The Star* 25 June 2017 <https://www.thestar.com/news/gta/2017/06/25/live-justin-trudeau-will-march-in-the-toronto-pride-parade-sunday-afternoon.html> (accessed 23 April 2018).

<sup>781</sup> 'Rainbow of revellers in Toronto World Pride parade' *CTV News* 29 June 2014 <https://www.ctvnews.ca/canada/rainbow-of-revellers-in-toronto-worldpride-parade-1.1891489> (accessed 23 April 2018).

<sup>782</sup> 'Pride around the world: Celebration and protest in 2017' *CBC* June 24, 2017 <http://www.cbc.ca/news/multimedia/pride-around-the-world-celebration-and-protest-in-2017-1.4175294> (accessed 17 April 2017); 'Justin Trudeau marches in Toronto Pride Parade absent of police floats' *Global News* 25 June 2017 <https://globalnews.ca/news/3554175/pride-parade-toronto-2017/> (accessed 23 April 2018).

<sup>783</sup> Fisher (n 613 above) 1194.

<sup>784</sup> 'Canadian schools want to support LGBT youth, study says' *CBC* Jul 08, 2016 <http://www.cbc.ca/news/canada/manitoba/canadian-schools-lgbt-youth-1.3670318> (accessed 17 April 2018).

<sup>785</sup> See for instance the recent Court in the case of *Masterpiece Cakeshop Ltd. v Colorado Civil Rights Division* which upheld a bakery owner's right to refuse to bake a cake for a gay couple.

<sup>786</sup> Petition <http://www.scotusblog.com/wp-content/uploads/2016/08/16-111-cert-petition.pdf> (accessed 5 May 2018).

<sup>787</sup> See for example Human Rights Watch 'United States: LGBT students face discrimination' 7 December 2016, <https://www.hrw.org/news/2016/12/07/united-states-lgbt-students-face-discrimination> (accessed 17 April 2018).

In Belize, registered organisations are allowed to do their work. No Pride parades have been held however due to the fear of attacks and backlash, but different activities are done to celebrate pride week.<sup>788</sup> Nevertheless, LGB students still face discrimination in school, including bullying, expulsion and suspension based on their sexual orientation.<sup>789</sup> In Nepal, LGB organisations are operational, and gay pride parades take place in Kathmandu.<sup>790</sup> Businesses are supposed to cater for all, but discrimination remains rampant. Discrimination in schools still remains and bullying of LGB students is rife.<sup>791</sup>

#### d) *Changes in religious attitudes*

Before 1998, most of the religious attitudes towards LGB persons were conservative. This has undergone some change in the different countries. In Canada, religious groups remain the single biggest and most consistent opposition force against LGB rights in Canada.<sup>792</sup> Of these, evangelical churches and the Catholic Church are some of the leading opponents.<sup>793</sup> Others such as the United Church of Canada, the Society of Friends, and the Unitarian Church are more LGB friendly.<sup>794</sup> LGB specific churches— such as the Metropolitan Community Church (MCC) in Toronto—have also emerged.<sup>795</sup> In the USA, many religious groups remain opposed to homosexuality, but again there are also churches that specifically cater to LGB persons.<sup>796</sup> The Pew Research Centre found that in 2006, 50% of the population in the US believed that homosexuality is never justified, but among Pentecostals, the number was 80%, showing that opposition to homosexuality is higher among Pentecostal groups.<sup>797</sup> In 2017, the Centre found that the evangelicals were still the most opposed to same-sex marriages among the religious groups, but they also noted an increase in acceptance among white evangelical Christians from 27% in 2016 to 35% in 2017.<sup>798</sup>

<sup>788</sup> See for example 'Pride week comes to Belize' *Belize Breaking News* 22 June 2015, <https://www.breakingbelizenews.com/2015/06/22/gay-pride-week-belize/> (accessed 17 April 2018). Also see 'PRIDE week to be celebrated in Belize' *Breaking Belize News* 4 August 2017 <https://www.breakingbelizenews.com/2017/08/04/pride-week-celebrated-belize/> (accessed 17 April 2018).

<sup>789</sup> UNIBAM & SRI (n 693 above) 3-4.

<sup>790</sup> See for example 'Nepal hosts gay pride parade demanding equal rights' 8 August 2017 *Hindustan Times* <https://www.hindustantimes.com/world-news/nepal-hosts-gay-pride-parade-demanding-equal-rights/story-neoWbf7ycUd5BSrZn1ZtHK.html> (accessed 17 April 2018).

<sup>791</sup> USAID & UNDP (n 660 above) 38-39.

<sup>792</sup> DB Cochrane 'Christian opposition to homosexuality' In J McNinch and M Cronin (eds.) *I could not speak my heart: Education and social justice for LGBT youth* Regina, Saskatchewan, Canadian Plains Research Centre (2004).

<sup>793</sup> Above.

<sup>794</sup> Above.

<sup>795</sup> This is the church that held the first same-sex marriage in the world. See RD Elliott 'The Canadian earthquake: same-sex marriage in Canada' (2005) 38:3 *New England Law Review* 591-592.

<sup>796</sup> See for example the United Church of Christ <http://www.ucc.org/lgbt> (accessed 5 May 2018).

<sup>797</sup> Pew Research Center 'Spirit and Power: A 10 country survey of Pentecostals', October 2006, 8.

<sup>798</sup> Pew Forum, n 755 above.



In Belize, one of the main opposing forces to LGB rights has been the church, with the religious groups actively opposing cases in court.<sup>799</sup> During the time that the *Caleb Orozco* case was in court, the applicant was often the subject of rumours and verbal abuse on social media fora at the hands of Christian groups. The Catholic Church was initially one of the appellants in the *Caleb Orozco* case, though they have since withdrawn from the case.<sup>800</sup> The link between conservative groups in the USA and religious opposition to LGB rights in Belize has been established.<sup>801</sup> In Nepal, the majority of the country is Hindu, but the country largely does not have fundamentalists, and so opposition on religious grounds has always been low.<sup>802</sup>

*e) Changes in Media coverage of LGB persons - representation in the media*

Over the past 20 years, there has been a change in the way media portrays LGB persons in the different countries. In Canada, there has been an increase in the portrayal of LGB persons in the media, although this portrayal is often criticised for failing to give lead roles to LGB characters in movies and television series, and an all too common storyline, which usually involves the death of the LGB character.<sup>803</sup> In the USA, there has been an increase in the portrayal of same-sex characters on prime time TV within the past 20 years.<sup>804</sup> However, this was still usually portrayed within heterosexual framings, and therefore shown as an oddity.<sup>805</sup> Usually LGB-specific media covers the issues much more and from an LGB perspective.<sup>806</sup> In Belize, newspapers and other mainstream media houses cover LGB issues, although the main stories reported on are those concerning court processes.<sup>807</sup> However,

<sup>799</sup> The Catholic Church appealed the Supreme Court's decision on the decriminalisation of sodomy in the *Caleb Orozco* case (n 723 above) but withdrew this appeal in March 2018. See RA Parks 'Catholic Church withdraws from section 53 appeal; Evangelicals: "God will make a way"' *Amandla* 10 March 2018 <http://amandala.com.bz/news/catholic-church-withdraws-section-53-appeal-evangelicals-god-way/> (accessed 23 April 2018).

<sup>800</sup> 'Catholic Church withdraws from section53 appeal; Evangelicals: 'God will make a way' *Amandala* 10 March 2018 <http://amandala.com.bz/news/catholic-church-withdraws-section-53-appeal-evangelicals-god-way/> (accessed 12 August 2018).

<sup>801</sup> See generally Southern Poverty Law Centre, above.

<sup>802</sup> USAID & UNDP (n 666 above) 22.

<sup>803</sup> S Shakeri 'Television has a "Bury your gays"; queerbaiting and LGBTQ representation problem' *Huffington Post* 30 June 2017 [https://www.huffingtonpost.ca/2017/06/30/queerbaiting-bury-your-gays-tv\\_a\\_23005000/](https://www.huffingtonpost.ca/2017/06/30/queerbaiting-bury-your-gays-tv_a_23005000/) (ccessed 23 April 2018).

<sup>804</sup> GLAAD (2016). Network responsibility index. - where we are on TV report - 2016. Retrieved from Glaad: <http://www.glaad.org/whereweareontv16>

<sup>805</sup> See R Seif 'The media representation of fictional gay and lesbian characters on television: a qualitative analysis of us TV-series regarding heteronormativity' Masters Thesis, Jon Koping University, School of Education and Communication (2017). Also see J Gutowitz 'LGBTQ Representation on TV Still Sucks' *Vice.com* 11 November 2017 [https://www.vice.com/en\\_us/article/ne3kdk/lgbtq-representation-on-tv-still-sucks](https://www.vice.com/en_us/article/ne3kdk/lgbtq-representation-on-tv-still-sucks) (accessed 17 April 2018).

<sup>806</sup> Above.

<sup>807</sup> International Gay and Lesbian Human Rights Commission (IGLHRC) and United and Strong 'Homophobia & transphobia in Caribbean media: a baseline study from Belize, Grenada, Guyana, Jamaica and Saint Lucia' 19-22.



inaccurate, prejudiced and sensational reporting also occurs, which causes more harm. This is the same for Nepal, where sensational and inaccurate reporting was also found despite increased media coverage of LGB issues.<sup>808</sup>

*f) Changes in representation in popular culture*

Twenty years ago, there were not so many LGB positive role models featured in popular culture in all four countries. This has however changed. For Canada, a number of openly LGB persons have served in key positions and are much respected. These include Kathleen Wynne, serving Premier of Ontario who is married to a woman; Bill Siksay, former member of Parliament; leading attorney Douglas Elliot; Luke MacFarlane, a movie actor and musician; and Mark Leduc, Olympian boxer.<sup>809</sup> There are many LGB films that are regarded as great.<sup>810</sup> In the USA, famous LGB persons recognised across the board include: Harvey Milk, the first openly LGB person to be elected to a public office in the USA; Barney Frank, former representative from Massachusetts; TV hosts Ellen DeGeneres and Rachel Maddow; and artist Andy Warhol. Their popularity cuts across the spectrum. LGB persons have also been featured in great movies.<sup>811</sup> For Belize, this is less so, but LGB activist Caleb Orozco is well known and respected in his own country, and internationally.<sup>812</sup> As mentioned, he has been asked by the Prime Minister of the country to provide support and advice as the country approaches the International Court of Justice to resolve their border dispute with Guatemala. In Nepal there is a popular TV show featuring a gay person.<sup>813</sup> Sunil Pant, who was the first Member of Parliament from the LGB community, is seen by many as a good role model. He is also recognised internationally.<sup>814</sup>

#### 4.4.4 Changes in the economic aspects

Economically, LGB persons have traditionally largely been excluded from employment and economic prosperity in all the four surveyed countries. This is however changing, albeit not at the same rate everywhere. Canada has protection against discrimination based on sexual

<sup>808</sup> UNDP & USAID, n 666 above, 52-54.

<sup>809</sup> See Ranker 'Famous homosexuals from Canada' <https://www.ranker.com/list/famous-homosexuals-from-canada-and-gay-canadians/famous-gay-and-lesbian> (accessed 5 May 2018).

<sup>810</sup> A Davidson '10 great Canadian lesbian, gay and transgender films' *BFI* 8 March 2017, <http://www.bfi.org.uk/news-opinion/news-bfi/lists/10-great-canadian-lgbt-films> (Accessed 17 April 2018).

<sup>811</sup> 'The 30 best LGBT films of all time' *BFI* 21 February 2018, <http://www.bfi.org.uk/news-opinion/news-bfi/features/30-best-lgbt-films-all-time> (accessed 17 April 2018).

<sup>812</sup> He won the David Kato Voice and Vision Award, 2017.

<sup>813</sup> A Joshi 'Reel truth: A new portrayal of LGBT characters in Nepal' 12 June 2017 <https://www.sfcg.org/reel-truth-lgbt-characters-nepal/> (accessed 17 April 2018).

<sup>814</sup> He was one of the signatories of the internationally known Yogyakarta Principles, and a former member of Nepal's Constituent Assembly.

orientation and so there is usually recourse in case of unfair treatment.<sup>815</sup> However, discrimination in employment still goes on and many times it is unreported.<sup>816</sup> 40% of LGBT Canadians recently interviewed stated that they face discrimination at their workplace.<sup>817</sup> The USA on the other hand does not have federal protection against LGB discrimination, and so there is not much recourse in the case of discrimination in employment.<sup>818</sup> Indeed, discrimination, including dismissal on grounds of sexual orientation, still occurs with 21% of LGBT employees reporting discrimination in hiring, pay and promotions.<sup>819</sup> In Belize discrimination against LGB persons in employment still occurs,<sup>820</sup> as it does in Nepal.<sup>821</sup> At the time the *Sunil Pant* case was instituted in Nepal, LGB persons faced such discrimination in society that sex work was one of few options available to LGB persons for making a living.<sup>822</sup> This reality was shared in the case and it was explained to the court that recognising LGB persons would not cause sex work to increase, but that legal protection would allow LGB persons to explore employment options which are not currently available to them.<sup>823</sup> In the years following the *Sunil Pant* case, LGB persons have opened up businesses such as beauty salons, restaurants, modelling agencies and clothing shops, but they are yet to become an economic force.<sup>824</sup>

#### 4.5 Summary of the extent of social change in the selected Common Law countries outside of Africa

All the surveyed countries have been able to achieve a substantive amount of legal change, but changing attitudes and acceptability is still something generally elusive. The progress is as summarised in Table 2 below:

<sup>815</sup> Fisher (n 613 above) 1192-4.

<sup>816</sup> 'For Canada's LGBT community, acceptance is still a work in progress, survey suggests' *CBC* August 9, 2017 <http://www.cbc.ca/news/canada/montreal/canada-lgbt-community-survey-1.4240134> (accessed 17 April 2018).

<sup>817</sup> Above.

<sup>818</sup> See 'LGBTQ workers still face legal discrimination' *Fortune* 25 June 2017, <http://fortune.com/2017/06/25/lgbtq-employment-discrimination/> (accessed 17 April 2018).

<sup>819</sup> K Baksh 'Workplace discrimination: The LGBT workforce' *Huffington Post*, 22 June 2016, [https://www.huffingtonpost.com/kurina-baksh/workplace-discrimination-\\_b\\_10606030.html](https://www.huffingtonpost.com/kurina-baksh/workplace-discrimination-_b_10606030.html) (accessed 17 April 2018).

<sup>820</sup> UNIBAM & Heartland alliance Human rights violations of lesbian, gay, bisexual, and transgender (lgbt) people in Belize: submission to the united nations human rights committee on relevant issues prior to reporting (LOIPR) (Belize), August 2012, Geneva, 1 [https://www.heartlandalliance.org/gihr/wp-content/uploads/sites/12/2016/02/belize-loipr\\_ha\\_unibam.pdf](https://www.heartlandalliance.org/gihr/wp-content/uploads/sites/12/2016/02/belize-loipr_ha_unibam.pdf) (accessed 17 April 2018).

<sup>821</sup> USAID & UNDP (n 660 above) 41-43.

<sup>822</sup> Interview with Sunil Babu Pant, n 615 above.

<sup>823</sup> As above.

<sup>824</sup> As above.

Table 2: The extent of social change among the selected countries outside Common Law Africa

Country	Level of legal change	Extent of social acceptance	Code
Belize	Medium - Progressing	Medium - Progressing	3.0
Canada	High - Progressing	High - Progressing	5.0
Nepal	High - Stagnating	Low - Stagnating	3.5
USA	High - stagnating	Medium - Progressing	4.5

\*\* The level of social change is determined as shown in Table 1 above.

Overall, the highest level of progress has been registered in Canada. Canada protects LGB persons in all respects, including recognising same-sex marriages, and has had the most laws amended to reflect this reality. In this regard, it can be compared to South Africa. The levels of social acceptance are also high and exponentially increasing. The legal change in Canada has spurred social change, perhaps due to the unique legislative scheme which requires court decisions to be implemented through enactment of the required laws, and also the longer period after Canada's decriminalisation of same-sex relations, which happened through the legislative process. However, some violence and hostility towards LGB persons remain. Regardless of this, like Kretz notes, isolated incidents of violence against LGB persons do not imply that the country has not been able to achieve the seventh stage, which is cultural integration, or what this study refers to as significant social change. Canada can therefore be said to have achieved significant social change, and is thus at the seventh stage on Kretz's spectrum, and as such it is marked with a '5' on Table 2 above. The USA follows, with more recent court victories affirming same-sex marriages but after a long and protracted struggle, which means that social acceptance is still a challenge.<sup>825</sup> However, with the court victories, there has also come increasing social acceptance. The prospects of further change are not very bright, at least for the near future, as the Trump administration is more hostile to LGB rights compared to the Obama administration or even to the Bush administration before it. On Kretz's spectrum therefore, the USA would be at stage 5, which is 'Establishment of positive rights.' For this reason, the USA is ranked at '4.5' on Table 2

<sup>825</sup> Human Rights Watch 'Religious exemptions and discrimination against LGBT people in the United States' 19 February 2018 <https://www.hrw.org/news/2018/02/19/united-states-state-laws-threaten-lgbt-equality> (accessed 5 May 2018).

above. The USA is more or less in the same position as South Africa among the selected Common Law countries. Nepal follows next because it has been able to achieve legal change right from the Constitutional level and there is a progressive court judgment which is still being implemented and which, if fully implemented, would most likely lead to same-sex marriages. However, social acceptance is still largely low,<sup>826</sup> although improving. This would put Nepal at Stage 4 of Kretz's Spectrum. As such Nepal gets a '2.5' ranking in Table 2 above, which stands for moderate social change. Among the selected Common Law countries, this can more or less be compared with Botswana. Finally Belize has just recently achieved decriminalisation, and the population is generally accepting, although pockets of violence and discrimination remain.<sup>827</sup> There is also political will in favour of LGB persons. However, positive laws are yet to be put in place, and therefore this puts Belize at Stage 3 of Kretz's spectrum, 'Decriminalization'. Belize therefore merits a '3.0' ranking on Table '2' above, again being more or less at the same stage with Kenya.

These rankings therefore show more social change in the selected countries outside Common Law Africa than those in Common Law Africa, although all countries are moving towards positive social change in favour of LGB persons, with none backtracking in all of the areas considered.

#### **4.6 The extent to which the changes are attributable to litigation**

Many of the legal changes can be directly attributed to the SL victories. The cases also have a large indirect impact particularly through causing a discussion of LGB issues in the public, and thus contributing to changes in public perceptions. However, many other factors are also at play, including developments in other countries, progressive leaders, such as Justin Trudeau in Canada and Barack Obama in the USA, as well as the particular history of political revolution in Nepal which saw LGB persons becoming important allies in the political process. Additionally, Nepalese society was already used to having transgender persons playing traditional roles, so it was easy to accept that that historical discrimination had to be addressed. The change in the law was therefore not completely without basis.

<sup>826</sup> USAID & UNDP (n 666 above) 22-23.

<sup>827</sup> See One Young World 'The challenge of being gay in Belize' 8 March 2017 <https://www.oneyoungworld.com/blog/challenge-being-gay-belize> (accessed 5 May 2018).

Compared to Common Law Africa, Canada can be said to be ahead of South Africa in terms of social change while South Africa leads in terms of legal change as its laws are more progressive. The USA can be compared more or less to South Africa in terms of social change as the society there has also not fully accepted LGB rights, despite very progressive recent Supreme Court decisions. Nepal can also be compared to South Africa in terms of having legal change without much social change. Belize can be compared to Botswana, Kenya and Uganda, with the limited legal change and active opposition from churches. Basically, comparing the four countries outside Africa to those in Africa shows interesting comparable trends and can be very helpful in terms of discerning those factors that make SL successful.

#### **4.7 Conclusion**

The discussion above shows that SL is an integral part of social change. It shows agency on the part of the LGB community, and also helps to actively force the state to make the changes, even when the state is more or less supportive of LGB rights. All the major legal changes were only made through court decisions, even for Canada where the court decisions have to be followed by action on the part of the legislature. The struggle in Common Law Africa would have been very different without SL. Even where other factors have played a role, it has been a supportive role to SL. An example is the decriminalisation of same-sex conduct in Canada in 1969, which did not do much to promote equality until LGB groups took the mantle and started challenging the laws.

Legal change cannot therefore be separated from social change. A change in the law galvanises communities to rally behind the group, since such a group will no longer be criminal or illegal. This explains why opinions change soon after courts make their decisions. When legal change is achieved, then the struggle for acceptance has a basis to go on. So far, no country has achieved this in its entirety, not even Canada that decriminalised in 1969. This implies that social change in favour of LGB persons is something that has to be achieved over a long period of time, and is a continuous process.

Another thing to note is the role of the political leaders in power at the time of major change. In South Africa, it was only after the ANC agreed in principle to the inclusion of LGB rights in the overall struggle for change that the victories were achieved. South Africa has also

resisted any attempts to backtrack, and the history of LGB equality in the USA does show that LGB rights achievements can easily be reversed, as the Trump administration is showing. Therefore, social change cannot be achieved once and for all and simply be taken for granted. It has to be continuously protected. One thing is for sure though, that the general trend is towards positive change rather than retrogression. This is very important for LGB activists as it shows that more efforts towards equality can actually yield results, even though it sometimes appears that there is more backlash than real progress in places like Uganda.



## CHAPTER 5

# FACTORS THAT AFFECT THE POTENTIAL OF LGB STRATEGIC LITIGATION TO BE USED AS AN EFFECTIVE TOOL FOR SOCIAL CHANGE

### 5.1 Introduction

Chapter 4 demonstrated the relatively low levels of social change in the selected Common Law African countries, as none of the countries has yet achieved significant social change in favour of LGB persons. This is so despite a number of legal victories scored in all four of the African case-study countries. Only South Africa is close to achieving significant social change; Botswana and Kenya have recorded very modest gains; and Uganda is largely retrogressing. Among the Common Law countries outside Africa, on the other hand, at least one country, Canada, has been able to achieve significant social change. The other sampled countries: the USA; Nepal; and Belize, are taking important strides towards achieving significant social change, all of them having decriminalised consensual same-sex relations and in the case of the USA, having achieved the legalisation of same-sex marriages, which is usually seen as a major marker in the struggle for LGB equality.

Given the above background, this chapter uses data from the selected Common Law countries to formulate the conditions under which LGB strategic litigation (SL) is most inclined to stimulate social change. Insofar as this study is concerned, ideal social change in respect of LGB rights is a situation in which no one is homophobic or treats people differently because of their sexual orientation. The more realistic level of social change however is 'significant social change'. This is the level of social change that affects the whole nation,<sup>1</sup> in such a way that it leads to the 'modification of basic institutions during a specific period,<sup>2</sup> to such an extent that

<sup>1</sup> GN Rosenberg *Hollow hope: Can courts bring about social change?* (2008) 4.

<sup>2</sup> A Giddens 'Reply to my critics,' in D Held & JB Thompson *Social theory of modern societies: Anthony Giddens and his critics* (1989) 45.

irrelevant considerations such as sexual orientation will cease to matter in access to human rights.<sup>3</sup> The factors relating to such change are identified and then discussed for each of the countries. Conclusions are then drawn as to the significance of each factor to stimulating social change. Lastly, the conditions under which LGB SL can stimulate social change are formulated from each factor.

## 5.2 An overview of the factors that influence LGB SL to stimulate social change

As already discussed in chapter 3, for all the sampled countries, LGB SL is undertaken for the purposes of creating an enabling legal and policy framework for the full equality of LGB persons and to change the hearts and minds of the general community towards LGB persons. Achieving this would amount to achieving significant social change, as it would be progress from a situation in which the persecution of LGB persons was the norm, to a position of general societal acceptance of LGB persons and their full participation as equal citizens.

This chapter aims to identify and discuss the ‘conditions’ under which LGB SL is most likely to induce social change. Gloppen identifies four broad factors that help to ensure that litigation generally leads to social change. These factors are: the existence of opportunities for the marginalised groups to express themselves by turning their concerns into legal claims; how the courts respond to these claims in terms of process; the capability of the courts to give legal redress for the concerns raised; and compliance with the decisions by other bodies.<sup>4</sup> These are broad factors that need to be broken down into specific factors that affect how litigation creates social change for marginalised groups. These specific factors are both exogenous and endogenous to the litigation itself. Those at the exogenous level exist above and beyond the specific cases. The first set of factors are political factors. These largely go to Gloppen’s fourth broad factor: ‘compliance with the decisions by other bodies,’ and they include factors such as the political set up and the state of governance in the country; the existence of a transformative event; and the existence of transformative leaders in favour of LGB rights. The second set is that of legal factors. These go to Gloppen’s first three factors: ‘existence of opportunities for marginalised groups to express themselves by turning their concerns into legal claims,’ ‘how the courts respond to these claims in terms of process,’ as well as the capability of the courts to give

<sup>3</sup> S Gloppen ‘Courts and social transformation: An analytical framework’ in P Domingo et al, (eds) *Courts and social transformation in new democracies: An institutional voice for the poor?* (2006) 37-38.

<sup>4</sup> See generally S Gloppen ‘Public interest litigation: Social rights and social policy’ in AA Anis & A de Haan *Inclusive states: Social policy and structural inequalities, new frontiers of social policy* (2008) 345.

legal redress for the concerns raised'. These factors include: the state of independence of the judiciary, the legitimacy of the Constitution; the legitimacy of the judiciary; the legal culture in place, and the extent of transnational influences. Beyond these however, are the economic factors, which include the nature of the economic system, whether the country is more capitalist or more socialist in nature, and the level of economic development in the country; and finally the social factors, which go to the social set up of the society, for example whether people are more inclined to religious fundamentalism and 'traditional culture 'or not. Finally, there are factors that do not fall in any of the above categories, such as the passage of time. These factors influence the litigation strategy; determine the success of individual cases; and the ability of the successful cases being implemented or lost cases inspiring elites and the community to demand for change and thus leading to the desired change. At the endogenous level, the relevant specific factors go to influencing all broad factors, as they go to how the activists themselves bring and design cases in such a way that they would put courts in a position to make positive judgments that would be capable of implementation. These factors go to the four phases of a strategic case: the overarching strategy phase; the pre-litigation phase; the litigation phase and the post litigation phase. Some of the specific factors are: the nature of the overarching litigation strategy in place; the planning of each individual case; the handling of each case in court; mobilisation and counter-mobilisation of allies; and the enforcement of the court decision. These factors are all key to the individual success of each case, and for the radiating effects that emanate from such cases,<sup>5</sup> whether they succeed or not. Although success is not everything, winning a case is important as it sends clear messages that LGB persons deserve the same rights as everyone else. Whether this spurs backlash or progressively leads to the court-ordered change may largely depend on the exogenous factors, but cannot happen without the cases themselves. It is a combination of these factors, exogenous and endogenous, that may lead to more success in achieving social change through LGB SL.

From the above factors, the conditions under which LGB SL is most likely to lead to social change are derived and these conditions are presented at the conclusion of the discussion on each factor. In order to have a sense of the extent to which the various factors are indicative of or associated with social change, a series of propositions, or assumptions, are postulated, which are then tested with respect of the two groups of states. For each of the factors, an assumption is advanced that posits a tentative relationship between the particular factor and the extent of social change. Conclusions are then drawn from the assumption as a whole. It should be

<sup>5</sup> See M Galanter 'The radiating effects of courts' in K Boyum & L Mather (eds) *Empirical theories about courts* (1983) 117, 125-26.

stressed that the correlation established in this study does not purport to be statistically accurate, but rather indicative of the strength or weakness of a correlative relationship.

### 5.3 Exogenous factors and how they influence LGB SL to stimulate social change

Exogenous factors, which are those factors that go beyond the individual cases, to the general political, economic and social set up of the country in question, are discussed below. These factors can be classified into five major categories: political, legal, transnational, economic and social factors. How they influence LGB SL to stimulate social change are discussed below:

#### 5.3.1 Political factors

The political set up of a country matters much with respect to the ability of SL generally and LGB SL in particular to stimulate social change. This is because constitutional adjudication is a political process and therefore political factors play an influential role in this regard.<sup>6</sup> Judges are usually alive to the political ramifications of their decisions, and to the extent to which they can push the executive and the legislature, which are majoritarian institutions. It is this aspect that usually brings into application the political question doctrine (PQD).<sup>7</sup> This doctrine maintains that within the context of separation of powers, there are questions that are considered to be exclusively within the purview of the executive or the legislature and cannot therefore be looked into by the courts. The PQD has its origins in the United States (US) case of *Marbury v Madison*,<sup>8</sup> in which the US Supreme Court declared that it had the power to review statutes and executive action.<sup>9</sup> Although the doctrine has been questioned particularly in the USA where it originated, it still rears its head in public interest litigation (PIL) cases the world over.<sup>10</sup> The doctrine typically arises in PIL since such litigation usually challenges the actions of the executive or the legislature and is essentially political in nature.<sup>11</sup> Political factors such as the state of democracy in the country; the occurrence of transformative events and the presence of strong and visionary political leadership play an important role in the success of SL generally and LGB SL in particular in creating social change. Each of these is discussed below in turn:

<sup>6</sup> J Oloka-Onyango *When courts do politics: Public interest law and litigation in East Africa* (2017) 1-14. Also see generally, JAG Griffith *The politics of the judiciary* (1991).

<sup>7</sup> See for example R Barkow 'The rise and fall of the political question doctrine' in N Mourtada-Sabbah & BE Cain (eds) *The political question doctrine and the Supreme Court of the United States* (2007) 24.

<sup>8</sup> 5 US 137 (1803).

<sup>9</sup> Above, 177-178.

<sup>10</sup> Oloka-Onyango (n 6 above) 50.

<sup>11</sup> See generally R Abel *Politics by other means: Law in the struggle against apartheid 1980-1994* (1995).

a) *The state of democracy in the country*

It is posited that the more entrenched democracy is in a country, the more likely it is that LGB SL will lead to significant social change. The inverse is also true, namely, that the less entrenched democracy is, the less likely it will be for LGB SL to lead to significant social change. This is because the power of the judiciary to influence laws and therefore to change public opinion and check the excesses of both the executive and the legislature is inherently based in the twin democratic doctrines of separation of powers and checks and balances.<sup>12</sup> These possibilities do not generally exist in autocratic states. Therefore, it is in democracies that courts can meaningfully contribute to the process of creating social change. It is only in democracies that court decisions would be respected and enforced and also a culture of respect for difference will develop over time in line with democratic principles, which would make it easier for people to respect the equality of LGB persons. Omar Encarnación explored the role of democracy in enabling the acceptance of LGB rights in the world.<sup>13</sup> In his view democracy more than economic factors and religion spurs legal change and social acceptance. This is because democracy creates an environment where courts are strong enough to make pro-LGB rights decisions, knowing that such decisions will be respected without the courts facing any repercussions.<sup>14</sup> Also in democracies, space for LGB people to come out of the closet, live more openly and express themselves through pride parades and in other ways is much more readily available.<sup>15</sup> It also affirms the citizenship of all individuals and the rights that come with that, facilitates civil society action, and international collaborations, all of which help to open up the space.<sup>16</sup> He concludes that whereas democracy can indeed be used to curtail LGB rights as the case was with the backlash that followed the initial legal victories on same-sex marriage in the USA,<sup>17</sup> it provides the best avenue for LGB rights to be realised. He demonstrates that most recent progress in LGB equality has been made, by and large, in strongly democratic countries, while most of the regression has been in less democratic ones.<sup>18</sup> This view is also supported by the Human Dignity Trust, which found that the less democratic a country was, the more

<sup>12</sup> JH Ely *Democracy and distrust: A theory of judicial review* (1980) 153.

<sup>13</sup> OG Encarnación 'Gay rights: Why democracy matters' (2014) 25:3 *Journal of democracy* 90.

<sup>14</sup> Above, 99-100.

<sup>15</sup> Above, 100

<sup>16</sup> Above, 99.

<sup>17</sup> The initial wave of backlash followed the case of *Baehr v Lewin* 74 Haw. 530, 597, 852 P.2d 44, 74 (1993) (decided by the Hawaii Supreme Court) questioning the justification of outlawing same-sex marriages in Hawaii. The backlash that followed eventually led to the enactment of the Defence of Marriage Act (DOMA) at the federal level.

<sup>18</sup> Above, 98-99.

likely it was to criminalise homosexuality.<sup>19</sup> Tocqueville classically linked social change to democracy, and based his views on the fact that democracy puts the individual at the centre and therefore allows the individual to be free to make different choices and to create change.<sup>20</sup> This implies that barring other factors, successful LGB litigation in a country that is democratic is bound to spur social change, faster than in those countries where democracy is not entrenched.

This suggestion holds true for both the selected Common Law African countries and Common Law countries outside the region. All the countries covered in this study claim to be democracies and are regarded as such by the different indices that rank democracies.<sup>21</sup> The Economist's Intelligence Unit classifies countries as 'full democracies', 'flawed democracies', 'hybrid regimes', or 'autocracies'. The classification considers five criteria: electoral process and pluralism; functioning of government; political participation, political culture and civil liberties.<sup>22</sup> The Freedom House Index classifies countries as: 'free', 'partly free' and 'not free'.<sup>23</sup> It also uses political rights and civil liberties to classify countries. The World Justice Forum also produces an annual Rule of Law Index, which is based on constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice, and criminal justice.<sup>24</sup> The Ibrahim Index of African Governance considers the aspects of 'safety and rule of law', 'participation and human rights', 'sustainable economic opportunity and human development' to rank countries on the Index.<sup>25</sup> Taken together, all these indices agree about the extent to which democracy is practised in each of the countries. The different rankings are summarised in Table 1 below:

<sup>19</sup> See generally Human Dignity Trust 'Criminalising homosexuality and democratic values' 2015 [http://www.humandignitytrust.org/uploaded/Library/Other\\_Material/Criminalising\\_Homosexuality\\_and\\_Democratic\\_Values.pdf](http://www.humandignitytrust.org/uploaded/Library/Other_Material/Criminalising_Homosexuality_and_Democratic_Values.pdf) (accessed 16 May 2018).

<sup>20</sup> A Tocqueville *Democracy in America Historical-critical edition of De la démocratie en Amérique* trans J Schleifer (2010) quoted in É Keslassy *Question sociale et démocratie chez Tocqueville* (2004).

<sup>21</sup> Four indices are used in this study, the Economist Intelligence Unit's Democracy Index; Freedom House's 'Freedom in the World' Index; the World Justice Project's 'Rule of Law Index' and the Mo Ibrahim Foundation's 'Ibrahim Index of African Governance.' The study acknowledges that each of these indices is biased, with all of them using westernised conceptions and biases about how democracy should be, which in many cases gives an unfair view of African countries and how they practice their democracy. Specifically for Freedom House indices see, ND Steiner 'Comparing Freedom House democracy scores to alternative indices and testing for political bias: Are US allies rated as more democratic by Freedom House?' (2016) 18:4 *Journal of Comparative Policy Analysis: Research and Practice* 329. Again, quantitative data, which all the indices use, may not correctly bring out the real situation on the ground. See for example RJ Goldstein 'The limitations of using quantitative data in studying human rights abuses' in TB Jabine & RP Claude (eds) *Human rights and statistics: Getting the record straight* (1992) 35.

<sup>22</sup> For the latest report, see The Economist Intelligence Unit 'Democracy Index 2017: Free speech under attack' (2018) 63.

<sup>23</sup> For the latest report see Freedom House 'Freedom in the World 2017' 651.

<sup>24</sup> See World Justice Project 'The WJP Rule of Law Index 2017-2018' 156.

<sup>25</sup> For the latest report, see Mo Ibrahim Foundation 'Ibrahim index of African Governance 2017' (2017) 9.



**Table 1: Proximate levels of democracy in the selected African Common Law countries**

<b>Country</b>	<b>Nature of regime as per the Democracy Index</b>	<b>Status of Freedom as per the Freedom House Index</b>	<b>Global Ranking as per the Rule of Law Index</b>	<b>Ranking in Africa as per the Ibrahim Index</b>
<b>Botswana</b>	Flawed Democracy (28 <sup>th</sup> in the world and 3 <sup>rd</sup> in Africa)	Free	45 <sup>th</sup>	3 <sup>rd</sup>
<b>Kenya</b>	Hybrid Regime (95 <sup>th</sup> in the world and 15 <sup>th</sup> in Africa)	Partly Free	95 <sup>th</sup>	13 <sup>th</sup>
<b>South Africa</b>	Flawed Democracy (41 <sup>st</sup> in the world and 4 <sup>th</sup> in Africa)	Free	44 <sup>th</sup>	4 <sup>th</sup>
<b>Uganda</b>	Hybrid Regime (98 <sup>th</sup> in the world and the 17 <sup>th</sup> in Africa)	Not Free	104 <sup>th</sup>	19 <sup>th</sup>

**Sources:**

World Justice Project 'The WJP Rule of Law Index 2017-2018' 2018

Mo Ibrahim Foundation 'Ibrahim Index of African Governance 2017' 2017

Economist Intelligence Unit 'Democracy Index 2017: Free speech under attack' 2018

Freedom House 'Freedom in the World' 2017

Among the African countries covered, Botswana ranks highest on the different indices being the 28<sup>th</sup> most democratic country in the world and the third African country on the Democracy Index although it is classified as a 'flawed democracy'.<sup>26</sup> It was ranked as 'free' by Freedom House in 2017 although it was noted that there was increasing authoritarianism underway in the country.<sup>27</sup> It is ranked 45<sup>th</sup> on the Rule of Law Index,<sup>28</sup> and it is one of the countries that are above 'medium and improving' in terms of the rule of law.<sup>29</sup> The Ibrahim Index also ranked Botswana as the third-best performing country in Africa, but also noted that it was increasingly deteriorating.<sup>30</sup> Indeed, Botswana's level of social change is only next to South Africa among the selected African Common Law countries. Parliament in Botswana was able to include protection against discrimination on sexual orientation, among other grounds, in the Employment (Amendment) Act, 2010.<sup>31</sup> This implies that the ground is more or less set for social change in Botswana. More LGB SL needs to be done in Botswana, as the chances of court success as well as implementation of court decisions and societal acceptance of the decisions are quite high within the current democratic dispensation.

South Africa is also one of the good performers in terms of democracy, being classified by the Economist's Intelligence Unit as a 'flawed democracy' but ranked as 41<sup>st</sup> in the world and fourth in Africa.<sup>32</sup> It is also ranked 44<sup>th</sup>, ahead of Botswana on the Rule of Law Index,<sup>33</sup> and is classified as having 'stable rule of law'.<sup>34</sup> Freedom House regards it as 'free', albeit with mounting challenges to its democracy.<sup>35</sup> The Mo Ibrahim Index ranks it sixth in Africa,<sup>36</sup> and although it is regarded as being still among those that have retrogressed, it is slowly 'bouncing back'.<sup>37</sup> South Africa also lends support to the proposition that the more democratic a country is, the more likely it is that LGB SL will lead to social change, as the relatively high democratic levels have supported legal change and the country is increasingly achieving social acceptance. Also, activists in South Africa, unlike in Botswana, have effectively used the state of democracy in the country to bring many cases that have contributed to achieving legal change and relatively high social acceptance for LGB persons.

<sup>26</sup> The Economist Intelligence Unit (n 22 above) 32, 33.

<sup>27</sup> Freedom House (n 23 above) 68-70.

<sup>28</sup> World Justice Project (n 24 above) 16.

<sup>29</sup> Above, 26.

<sup>30</sup> Mo Ibrahim Foundation (n 25 above) 22.

<sup>31</sup> Section 23(d).

<sup>32</sup> Economist's Intelligence Unit (n 22 above) 33.

<sup>33</sup> World Justice Project (n 24 above) 16.

<sup>34</sup> Above, 26.

<sup>35</sup> Freedom House (n 23 above) 465-471.

<sup>36</sup> Mo Ibrahim Foundation (n 25 above) 152.

<sup>37</sup> Above, 21.

Kenya is a more recently democratising state having only moved from a period of authoritarianism to democracy with the enactment of the 2010 Constitution. It is ranked as 95<sup>th</sup> in the world and 15<sup>th</sup> in Africa, and classified as a ‘hybrid regime’ on the Democracy Index.<sup>38</sup> It is also ranked as 44<sup>th</sup> in the world on the Rule of Law Index,<sup>39</sup> and it is among countries that are improving.<sup>40</sup> It ranks as ‘partly free’ on the Freedom House Index,<sup>41</sup> and as 13<sup>th</sup> in Africa on the Ibrahim Index,<sup>42</sup> albeit with increasing improvement.<sup>43</sup> The relatively lower levels of democracy than the other two countries is also reflected in a progressive Constitution giving rise to progressive LGB decisions, but with little in terms of implementation, as well as the changing of mind-sets. Nevertheless, the improvement in democracy in recent times can also be seen in increasing court victories in favour of LGB persons. The fact that Kenya’s democracy is steadily improving reveals a better future for LGB SL as well as for the potential contribution to social change in the near future.

On the various democracy rankings, Uganda consistently ranks lower than the other three countries. It is classified as a ‘hybrid regime’ in the Democracy Index, the 98<sup>th</sup> in the world and the 17<sup>th</sup> in Africa.<sup>44</sup> It also ranks as the 104<sup>th</sup> in the world on the Rule of Law Index,<sup>45</sup> and is regarded as one of the ‘improving countries.’<sup>46</sup> It is regarded as ‘not free’ by Freedom House,<sup>47</sup> and ranks 19<sup>th</sup> on the Ibrahim Index,<sup>48</sup> although it is regarded as ‘slowly improving’.<sup>49</sup> It follows that Uganda’s relatively poor record of democracy supports the proposition. It is the country that most aggressively opposes LGB rights among those surveyed, and where the least legal change has been achieved and also where social acceptance is lowest. Perhaps the fact that it is improving in terms of democracy accounts for the recent court victories on LGB rights, and the fact that the legislature has not yet passed a revived Anti-Homosexuality Act (AHA). However, it is clear that Uganda still has a long way to go if social change in favour of LGB rights is to be achieved within the current political dispensation.

The proposition is also supported by information from the selected Common Law countries

<sup>38</sup> The Economist’s Intelligence Unit (n 22 above) 33.  
<sup>39</sup> World Justice Project (n 24 above) 16.  
<sup>40</sup> Above, 26.  
<sup>41</sup> Freedom House (n 23 above) 277-283.  
<sup>42</sup> Mo Ibrahim foundation (n 25 above) 132.  
<sup>43</sup> Above, 33.  
<sup>44</sup> Above.  
<sup>45</sup> Above, 16.  
<sup>46</sup> Above, 33.  
<sup>47</sup> Freedom House (n 23 above) 544-549.  
<sup>48</sup> Mo Ibrahim Foundation (n 25 above) 159.  
<sup>49</sup> Above, 48.

outside of Africa as shown in Table 2 below:

**Table 2: Proximate levels of democracy in the selected countries outside of Common Law Africa**

Country	Nature of regime and ranking as per the Democracy Index	Status of freedom as per the Freedom House Index	Global Ranking according to the Rule of Law Index
Belize	-	Free	81 <sup>st</sup>
Canada	Full Democracy (9 <sup>th</sup> in the world)	Free	9 <sup>th</sup>
Nepal	Flawed Democracy (94 <sup>th</sup> in the world)	Partly Free	58 <sup>th</sup>
USA	Flawed Democracy (26 <sup>th</sup> in the world)	Free	19 <sup>th</sup>

**Sources:**

World Justice Project 'The WJP Rule of Law Index 2017-2018'

Economist Intelligence Unit 'Democracy Index 2017: Free speech under attack' 2018

Freedom House 'Freedom in the World 2017'

Canada, which is the most progressive of all the countries as regards achieving social change in favour of LGB persons, also scores the highest on the different indices. On the Democracy Index, it is classified as a full democracy occupying the sixth position in the world,<sup>50</sup> and it has been described as a consistent top performer.<sup>51</sup> It is ranked ninth in the world on the Rule of Law Index,<sup>52</sup> and is described as 'stable'.<sup>53</sup> Freedom House classifies it as 'free'.<sup>54</sup> For Canada, the proposition is thus supported. The country's record as a well-established democracy is reflected in the fact that its court decisions have been respected and implemented and the population has largely accepted that LGB persons have the same

<sup>50</sup> The Economist Intelligence Unit (n 22 above) 20.

<sup>51</sup> Above, 21.

<sup>52</sup> World Justice Project (n 24 above) 16.

<sup>53</sup> Above, 33.

<sup>54</sup> Freedom House (n 23 above) 88-90.

rights as everyone else including the right to marry a person of one's choice.<sup>55</sup>

The USA follows, being classified as a 'flawed democracy' and having the 26<sup>th</sup> rank in the world.<sup>56</sup> This is a more recent ranking that arose in 2016, as before the country had been consistently ranked as a full democracy.<sup>57</sup> It is ranked as 19<sup>th</sup> in the World on the Rule of Law Index,<sup>58</sup> but noted among those countries whose rule of law is in decline.<sup>59</sup> Freedom House ranks it as 'free' but also notes the deterioration.<sup>60</sup> For the USA, the proposition is thus supported, although not to the same extent as in Canada. The USA's democracy ranking has only recently gone down, but nevertheless its democracy credentials have been able to see the country reach the extent of declaring same-sex marriages lawful nationwide in 2015.<sup>61</sup> However, the wide opposition to LGB rights shows why social acceptance is much lower than it is in Canada. Nevertheless, being a democracy is a key reason as to why social change in favour of LGB persons has been able to progressively occur in the USA.

Belize does not appear on the Democracy Index, but is ranked 81<sup>st</sup> on the Rule of Law index and described as being stable in terms of rule of law. It is classified as 'free' by Freedom House, putting it above Nepal but with no information on why it got this ranking.<sup>62</sup> Other studies show that although Belize has maintained a strong parliamentary democracy since independence, it is increasingly under strain with acute corruption,<sup>63</sup> and curtailment of press freedoms.<sup>64</sup> Belize's stable democracy is also reflected in the fact that it was possible for decriminalisation to happen despite strong opposition to the measure. The court decision was respected, even though the state appealed against it. However, democracy in Belize faces immense challenges, a fact reflected in the single case on LGB issues and given the existence of only a handful of LGB organisations.

<sup>55</sup> This however is not absolute, and many persons still oppose LGB rights, and the struggle for equality continues in Canada. Skype interview with Douglas Elliott, Canadian LGB activist and human rights lawyer, 29 July 2018. See generally See RD Elliott 'The Canadian earthquake: Same-sex marriage in Canada' (2005) 38:3 *New England Law Review* 591-592.

<sup>56</sup> The Economist Intelligence Unit (n 22 above) 20.

<sup>57</sup> The Economist Intelligence Unit 'Democracy Index 2016: Revenge of the "deplorables"' (2016) 44.

<sup>58</sup> World Justice Project (n 24 above) 16.

<sup>59</sup> Above, 33.

<sup>60</sup> Freedom House (n 25 above), 567-575.

<sup>61</sup> *Obergefell et al. v Hodges, Director, Ohio Department of Health, et al.* 576 US (2015).

<sup>62</sup> Freedom House (n 25 above), 567-575.

<sup>63</sup> See generally M Nowotny 'No tyrants here linger': Understandings of democracy in modern Belize' MSc Dissertation Latin American Politics Institute for the Study of the Americas, 2007.

<sup>64</sup> See for example 'Belize drops in press freedom ranking' *Breaking Belize News* 23 April 2016 <https://www.breakingbelizenews.com/wp-content/uploads/2016/04/press-freedom.jpg> (accessed 15 May 2018).

Finally Nepal is regarded as a 'hybrid regime' and the Economist Intelligence Unit ranks it as 94<sup>th</sup> in the world.<sup>65</sup> Freedom House regards it as 'partly free,' noting the increased political conflicts, corruption and crackdown on the press<sup>66</sup> while the World Justice Project ranks it at 58 in the world on the Rule of Law Index,<sup>67</sup> with improving rule of law.<sup>68</sup> Nepal's openness to LGB rights is rather surprising given that the country is struggling to establish a democracy that works. However, the move from a monarchy to a republic was more of a revolutionary moment that LGB people got involved in, and this contributed to the legal recognition. The real situation of a struggling democracy reflects in the failure to legalise same-sex marriage despite the Supreme Court generally clearing the way for it in the case of *Sunil Babu Pant and Others v Government of Nepal and Others (Sunil Babu Pant case)*<sup>69</sup> as well as the continued violence against LGB persons in Nepal.<sup>70</sup>

Therefore, there is a positive correlation between the level of democracy and LGB SL stimulating social change as all the different countries show. The more democratic a country is, the more likely it is for LGB SL to lead to social change, barring other factors. As such, one of the conditions under which LGB SL will lead to social change is the existence of a strong democratic system of governance in the country in question.

#### *b) Periods of political and social transformation*

This study adopts the proposition that LGB SL is more likely to lead to social change in favour of LGB persons soon after a country has undergone a transformative event. A transformative event is a set of circumstances that radically alters the existing political or social landscape.<sup>71</sup> Such events can occur at the end of a long-standing political regime, or they can be events such as a defiant action by an individual who in turn inspires others, or a watershed judicial decision, which puts into motion a series of events.<sup>72</sup> Such events 'produce radical turning points in collective action and affect the outcome of social movements'.<sup>73</sup> LGB rights are such social movements that are affected by transformative

<sup>65</sup> The Economist Intelligence Unit (n 22 above) 7.

<sup>66</sup> Freedom House (n 23 above) 365-366

<sup>67</sup> World Justice Project (n 24 above) 16.

<sup>68</sup> Above, 26.

<sup>69</sup> 1 Writ No 917. 2064 BS (2007 AD) 2NJALJ (2008) 261 where the Supreme Court established a committee to look into the issue of same-sex marriages and make recommendations to the government.

<sup>70</sup> See Astraea Lesbian Foundation for Justice 'Bridges to justice: case study of LGBTI rights in Nepal' 2015.

<sup>71</sup> See D McAdam & WH Sewell Jr *It's about time: Temporality in the study of social movements and revolutions' Silence and voice in the study of contentious politics* (2001) 102.

<sup>72</sup> See generally EA Andersen 'Transformative events in the LGBTQ rights movement' (2017) 5 *Indiana Journal of Law and Social Equality* 441.

<sup>73</sup> A Morris 'Reflections on social movement theory: Criticisms and proposals' (2000) 29 *Contemporary Sociology* 445, 452.



events, and being a minority movement, it usually takes advantage of such moments to mobilise such ‘concentrated moments of political and cultural creativity’.<sup>74</sup> These events are usually associated with a feeling of destiny and euphoria for the future, and people are usually more welcoming and accepting of change at such times. They also usually involve a commitment not to go back to the past. Political transformations also usually starkly portray the difference between the times before, when discrimination was rife and the period after, when difference is embraced. Political leaders usually want this to be seen, and LGB rights are usually the beacons of such displays in some countries.<sup>75</sup>

The proposition that LGB SL is likely to spur social change after the occurrence of a transformative event is supported by all the selected Common Law African countries that have made key strides towards achieving LGB as discussed below:

In terms of political transformations that affected the whole nation, South Africa takes the lead. There, the change from apartheid to democracy affected the whole country. There was a determination especially among the political leadership not to appear hypocritical, claiming rights for themselves while denying them to minority groups, even if this meant recognising the rights of LGB persons.<sup>76</sup> The LGB leadership recognised this and made the strategic decision to align itself with the ANC. Brown regards this action as ‘one of the most important strategic decisions’ that the movement leadership made in the struggle for equality.<sup>77</sup> As a result, LGB rights were protected within the Constitution, despite many citizens expressing their disapproval during the drafting of the Interim Constitution.<sup>78</sup> There was a commitment to transformative constitutionalism, which was about using the Constitution to ensure equality for all after a long period of legalised segregation.<sup>79</sup> The instrument firmly put LGB persons on the road to equality, despite the fact that the general population did not largely approve of these specific provisions.<sup>80</sup> Therefore, there is a positive correlation between the political transformation in South Africa and the level of

<sup>74</sup> McAdam & Sewell (n 69 above) 102.

<sup>75</sup> For a discussion on how LGB rights has been used to display transformation in Latin American political transitions, see E Friedman ‘Gender, sexuality, and the Latin American left: Testing the transformation’ (2009) 30(2) *Third World Quarterly* 415, 431. Also, specifically for Nicaragua see K Kampwirth ‘Organising the hombre nuevo gay: LGBT politics and the second sandinista revolution’ (2014) 33:3 *Bulletin of Latin American Research* 319.

<sup>76</sup> See generally T Brown ‘South Africa’s gay revolution: the development of gay and lesbian rights in South Africa’s Constitution and the lingering societal stigma towards the country’s homosexuals’ (2014) 7 *Elon Law Review* 455.

<sup>77</sup> Above, 475.

<sup>78</sup> C Dunton & M Palmberg ‘Human rights and homosexuality in Southern Africa’ (1996) 19 *Current African Issues* 46.

<sup>79</sup> KE Klare ‘Legal culture and transformative constitutionalism’ (1998) 14 *South African Journal of Human Rights* 146, 150.

<sup>80</sup> See generally Brown, n 76 above.

social change spurred by LGB SL.

For Kenya, the retirement of long-term president Daniel Arap Moi in 2007 saw the adoption of a new, more liberal Constitution, which was intended to consolidate the move from authoritarianism to democracy.<sup>81</sup> This also affected the whole country and political system. Kenya's Constitution was drafted in a mould similar to that of South Africa, but the circumstances are rather different particularly since the former was not entirely born out of a process of national consensus and the power structure remains almost the same.<sup>82</sup> Since 2010, four LGB cases have been brought before the courts and so far two have been decided, and two are pending in the courts. The pending cases actually concern decriminalisation of same-sex relations, a matter which could not be thought about only ten years back.<sup>83</sup> Therefore, the political transformation in Kenya has positively influenced LGB SL in the creation of social change.

Botswana's transformative event can be said to be the negative decision in the case of *State v Kanane*,<sup>84</sup> which helped to galvanise the LGB movement, and put the courts in the spotlight on how they treated LGB rights.<sup>85</sup> Indeed, the next case that was brought before the courts met with success even though there was no constitutional change on LGB issues.<sup>86</sup> It was, however, a more contained change largely affecting human rights groups, and therefore not as transformative as a countrywide political regime change would have been. Therefore, this factor plays a less important role in spurring social change in favour of LGB persons in Botswana than other factors, such as the state of democracy in the country, but nevertheless it made a contribution.

In the case of Uganda, such a moment could be said to have been the tabling of the Anti-Homosexuality Bill (AHB) in Parliament in 2009.<sup>87</sup> The Bill was intended to protect the 'traditional African family' through criminalising homosexuality and its promotion. It had

<sup>81</sup> See generally, YP Ghai & JC Ghai *Kenya's Constitution: An instrument for change* (2011).

<sup>82</sup> See H Varney 'Breathing life into the new constitution: A new constitutional approach to law and policy in Kenya: Lessons from South Africa' International Center for Transitional Justice (2011) 4-5.

<sup>83</sup> For example, Ghai & Ghai stated in 2011 that they could not see a court finding the laws criminalising same-sex relations unconstitutional basing on the new Constitution. See Ghai & Ghai (n 81 above) 57.

<sup>84</sup> [2003] 2 BLR 67 (CA).

<sup>85</sup> See for example the discussion in M Tabengwa & N Nicol 'The development of sexual rights and the LGB movement in Botswana' in Lennox & Waites (eds) *Human Rights, Sexual Orientation and Gender Identity in The Commonwealth: Struggles for Decriminalisation and Change* (2013) 339.

<sup>86</sup> *Rammoge & 19 Others v The Attorney General of Botswana* [2014] MAHGB-000175-13 (High Court of Botswana) (*LEGABIBO Registration case*).

<sup>87</sup> The Anti-Homosexuality Bill, Bill No. 18 of 2009, Bills Supplement to the Uganda Gazette No. 47 Volume CII, 25 September, 2009. This Bill was tabled before Parliament by Ndorwa West Member of Parliament, Hon. David Bahati in October 2009.

provisions widely defining homosexuality as ‘acts’ rather than as an orientation, imposing reporting obligations on parents and other ‘persons in authority’, granting immunity to anyone who committed any crime as a way of protecting themselves against homosexuality, criminalising aiding and abetting homosexuality and the promotion of homosexuality, and nullifying international instruments that allegedly promoted homosexuality.<sup>88</sup> The harshness of the Bill led to the galvanising of efforts by civil society groups to oppose the Bill, leading to a political struggle that affected largely civil society and the state. It led to eight different cases being filed challenging discrimination against LGB persons with a high degree of success.<sup>89</sup> The tabling of the Bill furthermore affected many more people beyond the LGB community, with the aid cuts affecting such persons those living with HIV/AIDS.<sup>90</sup>

The selected case-study countries outside Common Law Africa further support the proposition. The country that underwent a major political transformation is Nepal. Its transformation saw the end of the monarchy and the beginning of a republic.<sup>91</sup> LGB groups made use of this transformation to politically position themselves to such an extent that a leader in the movement, Sunil Babu Pant, was offered a seat as a member of the Constituent Assembly by the Communist Party of Nepal (United). This was in recognition of his mobilisation of LGB groups to support the party. LGB SL cases eventually led to legal changes<sup>92</sup> and the new Constitution that was adopted expressly protected LGB persons from discrimination. This made Nepal one of the few countries in the world to have such protection embedded in the Constitution. This ensured that the community also started respecting LGB persons even though the level of acceptance is not very high. However, the change was not as drastic for LGB persons as it was in South Africa, since generally the political forces were largely using LGB persons to secure their support, rather than truly being entirely committed to non-discrimination the way it was in South Africa.

For the USA, the transformative event, during the period under review came in the form of a radical change in the federal government’s attitude to LGB rights during President Obama’s

<sup>88</sup> See generally A Jjuuko & F Mutesi ‘The multifaceted struggle against the Anti-Homosexuality Act in Uganda, accepted for publication in N Nicol et al (eds) *Envisioning global LGBT human rights: (Neo)colonialism, neoliberalism, resistance and hope* (2018) 269.

<sup>89</sup> As discussed in Chapter 3, section 3.4 above.

<sup>90</sup> ‘Anti-gay group fires all staff’ *The Observer*, 1 August 2018 [https://www.observer.ug/index.php?option=com\\_content&view=article&id=33371:anti-gay-group-fires-all-staff](https://www.observer.ug/index.php?option=com_content&view=article&id=33371:anti-gay-group-fires-all-staff) (accessed 12 November 2018).

<sup>91</sup> For a detailed history of this political transformation, see C Mishra ‘What led to the 2006 democratic revolution in Nepal?’ *The Mahesh Chandra Regmi lecture* 2014, 2015, 1-6.

<sup>92</sup> Particularly in the Sunil Babu Pant case (n 69 above) where the court made orders for protection of LGB persons in Nepal.

administration. This change in attitude galvanised the LGB community and led to a series of events that saw change happening both in terms of the laws and in societal attitudes to some degree. The positive change in attitude also saw the biggest successes in LGB SL, which came ten years after *Lawrence v Texas*<sup>93</sup> which are: *United States v Windsor*,<sup>94</sup> *Hollingsworth v Perry*,<sup>95</sup> and *Obergefell et al v Hodges, Director, Ohio Department of Health, et al.*<sup>96</sup>

For Canada, the most recent transformative event in the last 20 years happened when the Supreme Court decided the case of *M v H*.<sup>97</sup> In that case it was found that a statute defining a 'spouse' as only a person of the opposite sex was discriminatory. This case led to many statutes being amended all over Canada.<sup>98</sup> Also, same-sex marriage was later legalised through statute,<sup>99</sup> after the Supreme Court of Canada found the proposed Act constitutional.<sup>100</sup> This change was also drastic as it affected many laws regulating families.<sup>101</sup>

It is only in Belize that no transformative event has happened yet. It is hoped that the decision in the case of *Caleb Orozco v Attorney General*,<sup>102</sup> which decriminalised consensual same-sex relations in Belize, will be such an event. The absence of such an event also explains why there is only one court victory, which is also recent, and why social acceptance levels are still low.

The above discussion reflects a positive correlation between the occurrence of a transformative/revolutionary political-legal event and social change in favour of LGB persons. The intensity of the event and its nature are responsible for the differences in the magnitude of social change. Therefore, one of the conditions under which LGB SL can lead to social change in situations of lesbophobia, biphobia and homophobia is when there is a transformative event that has happened, including transformative judicial decisions. Such events are far and few in Common Law Africa, apart from South Africa, and are not as intense thus explaining the low levels of social change despite the LGB litigation.

<sup>93</sup> *Lawrence v Texas* 539 US 558.

<sup>94</sup> 570 US \_\_\_ (2013).

<sup>95</sup> 570 US \_\_\_ (2013).

<sup>96</sup> *Obergefell* case (n 61 above).

<sup>97</sup> 142 DLR (4th) 1 (Ont CA), aff'd [1999] 2 SCR 3 (20 May 1999).

<sup>98</sup> See J Pierceson *Courts liberalism and rights: Gay law and politics in the United States and Canada* (2005) 1.

<sup>99</sup> The Civil Marriage Act, 2005.

<sup>100</sup> *Reference Re Same-Sex Marriage* [2004] 3 S.C.R. 698, 2004 SCC 79.

<sup>101</sup> Skype interview with Douglas Elliott, n 55 above.

<sup>102</sup> *Caleb Orozco v The Attorney General of Belize*, Supreme Court Claim No. 668 of 2010 (10 August 2016).

### c) *Strong and pro-rights political leadership*

Strong, human rights-minded and equality-oriented political leaders coming into power increases the chances of LGB SL leading to social change. This is because such strong leaders come with what Northouse refers to as major leadership traits, namely: integrity, intelligence, self-confidence, determination, and sociability.<sup>103</sup> They lend credence to what they believe in and persuade others to believe in them and their vision, thus intentionally or unintentionally making many persons follow their lead and accept LGB persons.<sup>104</sup> Also, leaders at the highest political levels appoint judges for the highest courts in all of the selected jurisdictions.<sup>105</sup> The leaders usually appoint judges whose value systems rhyme with their own,<sup>106</sup> and this therefore increases the possibility of LGB-friendly judges being appointed, and thus the possibility of LGB friendly court decisions being made.

In the selected Common Law African countries, this proposition is largely supported. South Africa stands out as a country that has had strong and visionary leaders believing in the idea of equality and then embracing LGB rights. The ruling party – the African National Congress (ANC) – leadership moved from hostility against LGB issues to support even before it came into power.<sup>107</sup> It thus became easier for LGB groups to forge alliances with the ANC and be able to drive their litigation agenda once democracy was restored in South Africa.<sup>108</sup> International icon Nelson Mandela, the country's first post-apartheid President, believed in equality for all including LGB persons.<sup>109</sup> As leader of the ANC, he ensured that the equality clause was maintained in the Final Constitution with its express protection of

<sup>103</sup> PG Northouse *Leadership: Theory and practice* (2016) 24-25.

<sup>104</sup> LE Ford et al *American government and politics today 2017-2018 edition: Without policy chapters* (2018) 215.

<sup>105</sup> Judges in some US states are elected by the public and are therefore subjected to political forces and influences. For example in New Mexico. For details see RA Schotland 'New challenges to judicial selection' (2007) 95 *Georgetown Law Journal* 1077, 1085. However, Lambda Legal found in 2015 that such judges are the ones most opposed to LGB rights, because of the need to please the public. See Lambda Legal 'The impact of judicial selection on LGBT rights cases' <https://www.lambdalegal.org/justice-out-of-balance/impact-of-judicial-selection> (accessed 12 November 2018).

<sup>106</sup> Ideology is an important factor in such selections, and for the situation in the USA, see N Dorsen 'The selection of U.S. Supreme Court justices' (2006) 4:4 *International Journal of Constitutional Law* 652, 655.

<sup>107</sup> Despite its earlier stance of hostility to LGB rights, the ANC later became very supportive of LGB rights, to the extent of proposing the constitutional text that best protected LGB rights. For a discussion of this process, see Brown (n 77 above) 462-469. Also see discussion in Chapter 4, section 4.2.2.

<sup>108</sup> Brown, n 77 above, 462-469.

<sup>109</sup> For a detailed discussion of Mandela and his role in the struggle for LGB rights, see 'The overlooked battle: Madiba and the gay rights movement' 12 December 2013, *The Daily Maverick* <https://www.dailymaverick.co.za/opinionista/2013-12-12-the-overlooked-battle-madiba-and-the-gay-rights-movement/#.WwhAVKm-mgQ> (accessed 25 May 2018). However, Gevisser qualifies this support by explaining that Mandela did not lead the LGB support in the ANC as he was rather conservative in this regard, but he strongly believed in non-discrimination and could see the similarities between racial discrimination and discrimination on the basis of sexual orientation. See 'Nelson Mandela's impact on gay rights discussed by South African journalist Mark Gevisser' *Queer Voices* 12 August 2013 [https://www.huffingtonpost.com/2013/12/08/nelson-mandela-gay-rights\\_n\\_4406307.html](https://www.huffingtonpost.com/2013/12/08/nelson-mandela-gay-rights_n_4406307.html) (accessed 25 May 2018).



persons against discrimination based on sexual orientation.<sup>110</sup> Mandela appointed judges who in one way or another had supported the anti-apartheid struggle to the Constitutional Court.<sup>111</sup> These same judges were crucial to the eventual LGB court victories, which saw a complete change from a country that criminalised and discriminated against LGB persons to one that did not. His successor, Thabo Mbeki, equally believed in equality and was the first ANC senior official to express the position that the ANC supported LGB rights.<sup>112</sup> He also continued to support LGB rights during his presidency and at one time equated LGB discrimination to apartheid.<sup>113</sup> By the time the more hostile Jacob Zuma<sup>114</sup> assumed the presidency, the legal changes had been completed. Archbishop Desmond Tutu, the influential then-chairperson of the Truth and Reconciliation Commission, also firmly believed in LGB equality.<sup>115</sup> All these key leaders helped to galvanise the acceptance of LGB persons in South Africa and to make the LGB legal victories meaningful.

Conversely, in countries where no strong, human rights-minded leaders have actively supported LGB equality, court victories have not translated fully into social change. For Botswana, Kenya, and Uganda, no strong political leadership has emerged in favour of LGB rights and indeed it is the inverse that is rather true for countries like Uganda, where President Museveni<sup>116</sup> and the Speaker of Parliament, Rebecca Kadaga, were leading

<sup>110</sup> Brown (n 76 above) 462-469.

<sup>111</sup> For some of his first appointees to the Constitutional Court and their backgrounds see 'Mandela swears in first constitutional court' *The Washington Post* 15 February 1995 [https://www.washingtonpost.com/archive/politics/1995/02/15/mandela-swears-in-first-constitutional-court/3915edf7-0554-4ed2-980e-b12bf2f14a40/?noredirect=on&utm\\_term=.17a536600eea](https://www.washingtonpost.com/archive/politics/1995/02/15/mandela-swears-in-first-constitutional-court/3915edf7-0554-4ed2-980e-b12bf2f14a40/?noredirect=on&utm_term=.17a536600eea) (accessed 25 May 2018).

<sup>112</sup> See telegram from Thabo Mbeki to Peter Tatchell, dated 24 November 1987 quoted in P Tatchell, 'The moment the ANC embraced gay rights' in N Hoad, K Martin & G Reid (eds) *Sex and politics in South Africa* (2005) 140, 145. Indeed, same-sex marriages became legal in South Africa during his presidency.

<sup>113</sup> 'Thabo Mbeki compares laws against gays to apartheid' *GBM News* <http://gbmnews.com/wp/archives/710> (accessed 25 May 2018).

<sup>114</sup> Jacob Zuma largely kept silent about LGB rights when he was in power, neither opposing nor doing much to protect LGB rights. See 'LGBT rights: Why Cyril Ramaphosa is a massive step up from Jacob Zuma' *The South African* 22 February 2018 <https://www.thesouthafrican.com/lgbt-rights-cyril-ramaphosa-jacob-zuma/> (accessed 25 May 2018). He also refused to condemn Uganda's Anti-Homosexuality Act. See 'Zuma's support of Uganda anti-gay law 'an insult to Mandela' *The South African* 11 April 2014 <https://www.thesouthafrican.com/zumas-support-of-uganda-anti-gay-law-an-insult-to-mandela/> (accessed 25 May 2018). As Deputy President, he had made comments to the effect that same-sex marriages were a disgrace, which attracted much backlash. See 'Zuma's anti-gay comments lead to backlash' *iol* 27 September 2006 <https://www.iol.co.za/news/politics/zumas-anti-gay-comments-lead-to-backlash-295249> (accessed 25 May 2018).

<sup>115</sup> For a detailed discussion of his position on LGB rights, see 'Analysis: Why Tutu's support for gay rights matters' *The Daily Maverick* 29 July 2013. <https://www.dailymaverick.co.za/article/2013-07-29-analysis-why-tutus-support-for-gay-rights-matters/#.WwhSJqm-mgQ> (accessed 25 May 2018).

<sup>116</sup> He started out strongly opposed to homosexuality, and then at the height of the Anti-Homosexuality Bill in Uganda, he seemed to backtrack as he weighed the implications of the Bill on Uganda's foreign relations, ('Museveni warns NRM on Homosexuality Bill' *New Vision* 12 January 2010) and then he finally signed the Bill into law, and therefore entrenched himself as a key opponent of LGB rights in the country. ('Joy, anger as Museveni signs law against gays' *Daily Monitor*, 24 February 2014). He also has not stopped the rampant persecution of LGB persons in the country.



opponents of LGB rights.<sup>117</sup> In Botswana, former President Ian Khama was publicly opposed to LGB rights.<sup>118</sup> Former President Festus Mogae only started supporting LGB rights when he left power, when he did not have much influence to drive the agenda.<sup>119</sup> In Kenya, President Uhuru Kenyatta has also spoken out before against LGB rights.<sup>120</sup> It is therefore not surprising that the extent of LGB social change is limited in these countries.

For the countries outside Common Law Africa, the relationship is as follows:

In USA, this kind of leadership in the past 20 years has been seen with Barack Obama who ensured that LGB equality was a key component of the country's domestic and foreign policy.<sup>121</sup> This has however been affected by Obama's immediate replacement with Donald Trump, who is largely undoing what Obama put in place before.<sup>122</sup> Indeed, there has been much social change in favour of LGB persons since Obama came to power. For Canada, the leader that stands out in the past 20 years is current Prime Minister Justin Trudeau as already discussed in section 4.4.2 of chapter 4. His positive stance on LGB rights made a clear statement that LGB persons are equal to other persons, and contributed to the significant social change seen in Canada. However, Trudeau is relatively newer having been in power for three years and therefore more is expected from him. In Belize, Prime Minister Barrow has actively supported LGB persons as has his wife, but this is more or less limited support.<sup>123</sup> This lukewarm support is also reflected in the extent of social change, which is not great. In Nepal, the political leadership have not come up strongly in support of LGB rights,<sup>124</sup> despite the Communist Party of Nepal (United) including Sunil Babu Pant among

<sup>117</sup> She made the passing of the AHB a personal mission and eventually did it. 'Kadaga wants anti-gay bill tabled' *Daily Monitor*, 16 November 2012. She promised Ugandans the Anti-Homosexuality Bill as a Christmas gift. See 'Uganda to pass anti-gay law as "Christmas gift"' *BBC News* 13 November 2012.

<sup>118</sup> 'Gay row rips Botswana's political elite apart' *Sunday Standard Reporter* 24 January 2016. <http://www.sundaystandard.info/gay-row-rips-botswana%E2%80%99s-political-elite-apart> (accessed 25 May 2018).

<sup>119</sup> 'Mogae would not stick his neck out for gays' *Mail & Guardian* 14 March 2011 <https://mg.co.za/article/2011-03-14-mogae-would-not-stick-his-neck-out-for-gays/> (accessed 25 May 2018).

<sup>120</sup> 'Uhuru Kenyatta dismisses gays rights as a non-issue in Kenya' *Daily Nation* 25 July 2015 <https://www.nation.co.ke/news/Uhuru-Kenyatta-gays-rights-barack-obama-kenya/1056-2808676-751bh/index.html> (accessed 24 March 2018).

<sup>121</sup> For discussion of their work in this regard, see Chapter 4, section 4.4.2.

<sup>122</sup> 'Trump at anti-LGBT summit: 'The times are changing back again'' *Washington Blade* 3 October 2017 <http://www.washingtonblade.com/2017/10/13/trump-at-anti-lgbt-summit-the-times-are-changing-back-again/> (accessed 17 April 2018). Also see detailed discussion in Chapter 4, section 4.4.2.

<sup>123</sup> All the actions of these leaders were discussed in detail in section 2.2.4 of Chapter 4, above.

<sup>124</sup> United Nations Development Programme (UNDP) & United States Agency for International Development (USAID) *Being LGBT in Asia: Nepal country report* (2014) 34. Also, interview with Sunil Babu Pant, former leader of the Blue Diamond Society, 16 July 2018.

its representatives to the Constituent Assembly. Indeed, many believe that the political leaders simply use LGB persons as 'vote banks' without real commitment to the cause.<sup>125</sup>

It therefore becomes clear that where there is strong political leadership that favours LGB rights, considerable progress will be made towards social change and the inverse is also true: where there is no such strong leadership or where the strong leadership is against LGB rights. As such, one of the conditions that should ideally be in place for LGB SL to lead to social change is the existence of strong and human rights-minded political leaders who are supportive of LGB equality. Strong leadership that is committed to equality of LGB persons is rare in the selected Common Law African countries, with the exception of the Mandela and Mbeki regimes in South Africa. This therefore also explains why there is low social change in the selected Common Law countries despite some legal victories in favour of LGB persons, and why there is relatively more social change in South Africa.

Overall, the above discussion shows that among the most relevant exogenous political factors for ensuring that LGB SL leads to social change is the level of democracy. This is the overarching political factor, within which all the others operate. With a strong and stable democracy, activists in countries like Canada and the USA have been able to use the space created by democracy to bring cases that have eventually helped to stimulate social change. All the other political factors, such as periods of political and social transformations, as well as the presence of strong, human rights-minded leaders, are secondary to the state of governance. This is why a country like Canada which has not had such transformative events such as the end of apartheid in South Africa, and such inspirational leaders to the extent of Nelson Mandela, have nevertheless seen more significant social change than South Africa. Countries that are rapidly democratising such as South Africa, Botswana, and Belize are also seeing much faster social change in favour of LGB rights. On the other hand, countries that have weak democracies, such as Uganda, Kenya, and Nepal, have also not made great strides towards LGB equality. Even when cases are successful, in weak democracies they will be ignored and not implemented and no one will value them.

<sup>125</sup> As above.

### 5.3.2 Legal factors

Closely related to the political factors are the legal ones. These concern the legal set-up of the country: the Constitution and the powers it gives to the judiciary, the extent to which judicial independence is entrenched in the Constitution and in practice; inclusion of sexual orientation among the protected grounds against discrimination in the Constitution; the formulation of the rights in the Bill of Rights; the extent of adherence to international and regional human rights standards; the legitimacy of the constitutional protections of LGB persons; the institutional legitimacy of the judiciary; the existence of alternative avenues for conflict resolution; and legal culture. These are discussed below:

*a) The extent to which judicial independence is entrenched in the Constitution and in practice*

The principle of separation of powers and the doctrine of checks and balances have their roots in the constitution of a country. This study makes the proposition that it is easier for LGB SL to spur social change in favour of LGB persons in a country where judicial independence is entrenched in the Constitution and is respected in practice. In such cases, such powers can then be used without the judiciary being accused of usurping the roles of elected officials. Entrenching judicial independence does not necessarily imply that the courts will be immune from the counter-majoritarian criticism, which inherently exists wherever there is constitutionalism.<sup>126</sup> However, they would not have to second guess themselves as to whether they actually have the powers to nullify statutes or executive actions and will not have to fear what will happen if they actually do nullify such statutes or actions. Judicial independence may be included in the Constitution as a principle but in practice the courts are not independent enough to make decisions without fear of backlash.

In many countries, the judiciary is not respected by the other two organs of the state, as it does not control either the 'sword or the purse'.<sup>127</sup> It is the easiest organ to be brushed aside and trampled upon either by stopping or reducing funds that go to it or directly threatening or harming the judges. Judicial independence is generally seen at two levels: the individual judge level, where the judge is free to make impartial and independent decisions; and the

<sup>126</sup> See S Holmes 'Precommitment and the paradox of democracy' in J Elster and R Slagstad (eds) *Constitutionalism and democracy* (1988) 195.

<sup>127</sup> A Hamilton *The federalist papers* (1961) 465 quoted in Rosenberg (n 1 above) 3.

institutional level, where the judiciary is able to appoint its own staff and control its own administration.<sup>128</sup>

For the selected Common Law African countries, the proposition plays out as follows:

All the constitutions of the selected African Common Law countries do indeed give the courts powers to nullify statutes or executive action.<sup>129</sup> They also guarantee judicial independence although in different ways. Once again the country with the most protection is South Africa. The Constitution of the Republic of South Africa, 1997 (Final Constitution)<sup>130</sup> guarantees the independence of the judiciary,<sup>131</sup> and prohibits any other organ of the state from interfering with the courts.<sup>132</sup> The appointment of judges is by the President on the advice of the Judicial Service Commission.<sup>133</sup> Judicial tenure is guaranteed under section 176 of the Constitution, which sets the limit for Constitutional Court judges at the age of 70 or after serving 12 years and for other judges as provided in an Act of Parliament.<sup>134</sup> Removal of judges is guided by section 177 of the Constitution, which requires the Judicial Service Commission to make the decision based on a judge's misconduct, incapacity or gross incompetence. The decision is then confirmed by a two-thirds majority in the National Assembly, after which the President can then dismiss the judge. This was done in order to allow all the organs to have a say before a judge can be removed, something that is in line with the principle of checks and balances.<sup>135</sup> Section 176(3) of the Constitution requires that judges' emoluments may not be reduced.<sup>136</sup> In practice, South Africa has had a slightly longer history of respecting judicial independence than the other selected Common Law African countries, and the courts there have since the end of apartheid been able to make independent decisions which have been respected by the executive and the judiciary. Positive decisions on LGB rights have largely been made by the courts, but nevertheless, for

<sup>128</sup> L Siyo & JC Mubangizi 'The independence of South African judges: A constitutional and legislative perspective' [www.nylawreview.com/wp-content/uploads/sites/16/2014/11/Mubangizi.pdf](http://www.nylawreview.com/wp-content/uploads/sites/16/2014/11/Mubangizi.pdf) (accessed 29 May 2018).

<sup>129</sup> Chapter 2, section 2.2.3.

<sup>130</sup> Constitution of the Republic of South Africa 108 of 1996.

<sup>131</sup> Above, section 165(2).

<sup>132</sup> Above, section 165(3).

<sup>133</sup> Above, section 174.

<sup>134</sup> This Act is the Judges Remuneration and Conditions of Employment Act, 47 of 2001.

<sup>135</sup> Siyo & Mubangizi (n 128 above) 13.

<sup>136</sup> This is once again addressed in detail in the Judges Remuneration and Conditions of Employment Act, 47 of 2001.

the more controversial issues, the courts couch their remedies in such a way that the legislature and the executive are given an opportunity to remedy the situation first.<sup>137</sup>

Botswana is another country where judicial independence is taking root.<sup>138</sup> Judges of the High Court and the Court of Appeal are appointed by the President in consultation with the Judicial Service Commission,<sup>139</sup> except for the Chief Justice and the President of the Court of Appeal who are appointed by the President alone.<sup>140</sup> Judges have security of tenure until they reach retirement age and can only be removed for inability to perform their functions or for misconduct.<sup>141</sup> The judges have financial independence as their emoluments are drawn from the consolidated fund<sup>142</sup> and cannot be varied to their disadvantage.<sup>143</sup> In practice, the courts are free to operate.<sup>144</sup> However, the immense powers given by the Constitution to the President to appoint judges as well as to dismiss them make it easy for an incumbent president to abuse judicial independence.<sup>145</sup> An example is immediate former President Ian Khama who used his powers to appoint and to dismiss judges to disrupt the judiciary by suspending judges who were largely seen as independent.<sup>146</sup> The relative independence of the courts explains why LGB litigation has been successful more recently, and the increased executive interference with the courts also shows why LGB SL is yet to lead to significant social change.

After a period of domination of the judiciary by the executive,<sup>147</sup> Kenya is finally picking up in terms of judicial independence. Article 160(1) of the 2010 Constitution provides that in the exercise of judicial authority, the judiciary shall only be subject to the Constitution and the law, and shall not be subject to 'the control or direction of any person or authority'. Appointment of judges is done by the President in accordance with the recommendation of

<sup>137</sup> This is for example what it was for same-sex marriages in *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (Fourie case) where the legislature was given one year to come up with a law.

<sup>138</sup> CM Fombad & EK Quansah *The Botswana legal system* 2006, 134-137.

<sup>139</sup> Constitution of the Republic of Botswana, section 96(2) and 100(2).

<sup>140</sup> Above, Section 96(1) and 100(1).

<sup>141</sup> Above, Section 97(2) and 101(2).

<sup>142</sup> Above, section 122(5).

<sup>143</sup> Above, section 122(2) and (3).

<sup>144</sup> See generally, CM Fombad 'The separation of powers and constitutionalism in Africa: The case of Botswana' (2005) 25 *Boston College Third World Law Journal* 301.

<sup>145</sup> Above, 302-303.

<sup>146</sup> 'Botswana: How a president 'captured' the judiciary' *AllAfrica.com* 16 June 2017 <http://allafrica.com/stories/201706160515.html> (accessed 29 May 2018).

<sup>147</sup> For discussions of the state of judicial independence under Kenya's Independence Constitution, see W Mitullah, et al (eds) *Kenya's democratisation: Gains or losses* (2005) 34. Also see JO Oseko 'Judicial independence in Kenya: Constitutional challenges and opportunities for reform' Thesis submitted for the degree of Doctor of Philosophy at the University of Leicester, November 2011, 124-182.

the Judicial Service Commission, and with approval of the National Assembly for the Chief Justice and Deputy Chief Justice.<sup>148</sup> It gives the judges security of tenure,<sup>149</sup> and judges can only be removed on the grounds of inability to perform the functions of office, a breach of the code of conduct for judges, bankruptcy, incompetence; or gross misconduct or misbehaviour.<sup>150</sup> It provides that their salaries shall not be varied to their disadvantage,<sup>151</sup> the salaries for judges are drawn from the consolidated fund,<sup>152</sup> while the funds to run the judiciary are drawn from the judiciary fund,<sup>153</sup> and judges have immunity for their decisions.<sup>154</sup> The above protections actually do operate in practice as confirmed by Kenyan judges Isaac Lenaola<sup>155</sup> and Monica Mbaru.<sup>156</sup> They both noted that as judges in Kenya they feel independent enough to make decisions that they think are correct, even on issues as controversial as LGB rights. Indeed Justice Lenaola stated that there is need for more LGB cases to be brought to the courts as the state of judicial independence is conducive to making any decisions that are in line with the constitutional guarantees.<sup>157</sup> Justice Monica Mbaru narrated how the issue of her work on LGB rights came up during her interviews, and how this did not prevent her from securing the position.<sup>158</sup> However these guarantees are more recent, and are constantly being challenged. One scenario that highlights this is the recent wave of disrespect of court orders, particularly in the matter involving political activist Miguna Miguna, who was deported despite court orders to the contrary.<sup>159</sup> Also, the direct attacks on the judges by the President and the Vice President after they nullified the 2017 elections demonstrated that the judges may not be fully immune from attacks by the executive.<sup>160</sup> Indeed, this may explain why, although there have been LGB court cases, they have not necessarily been implemented and have largely not led to much social change.

<sup>148</sup> Constitution of the Republic of Kenya, 2010, article 166(1).

<sup>149</sup> Above, article 167.

<sup>150</sup> Above, article 168(1).

<sup>151</sup> Above, article 160(4).

<sup>152</sup> Above, article 160(3).

<sup>153</sup> Above, article 173 (1).

<sup>154</sup> Above, article 160(5) of the Constitution.

<sup>155</sup> Justice of the Supreme Court of Kenya.

<sup>156</sup> Judge of the High Court of Kenya.

<sup>157</sup> Interview with Justice Isaac Lenaola, Supreme Court of Kenya, Nairobi, 26 July 2017.

<sup>158</sup> Interview with Justice Monica Mbaru, High Court of Kenya, Nairobi, 26 July 2017.

<sup>159</sup> TF Hodgson and S Sidu '(Re)deportation of activist lawyer highlights continued judicial independence in the face of crumbling rule of law in Kenya' *Opinio Juris* 11 April 2018

<http://opiniojuris.org/2018/04/11/redeportation-of-activist-lawyer-highlights-continued-judicial-independence-in-the-face-of-crumbling-rule-of-law-in-kenya/>. Also see Kenya Human Rights Commission 'Statement on Miguna case and disregard for judicial authority' 29 March 2018 <https://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/649-statement-on-miguna-case-and-disregard-for-judicial-authority.html> (accessed 9 May 2018)

<sup>160</sup> 'Kenya president Uhuru terms Supreme Court ruling as 'coup' by four judges' *The East African* 21 September 2017.



In respect of Uganda, the Constitution also guarantees judicial independence.<sup>161</sup> The courts are not supposed to be under the control or direction of any person or authority.<sup>162</sup> It also provides for the immunity of judicial officers for their actions,<sup>163</sup> administrative expenses of the judiciary are charged to the consolidated fund,<sup>164</sup> and the salaries of judges shall not be varied to the detriment of the judges.<sup>165</sup> However, it is the President who appoints judges on the advice of the Judicial Service Commission.<sup>166</sup> This effectively leaves the President with full powers of appointment, and political cadres without any judicial or scholarly background have indeed been selected to the court.<sup>167</sup> Judges have been threatened by the executive before when they make politically-sensitive decisions, and on at least two occasions the army raided court premises to re-arrest persons who had just been released on bail.<sup>168</sup> Again, the courts are perennially underfunded.<sup>169</sup> It is therefore not surprising that Ugandan judges rarely issue orders to the state to do something and are simply content with declarations. Even then, when declarations are made for example invalidating a statute, the legislature usually does not take any steps to take the law off the books.<sup>170</sup> Judges are reluctant to give Parliament a timeframe in which to formally repeal laws declared unconstitutional. It is therefore not surprising that although Uganda has a high number of LGB cases and even victories, most of them are superficial and only apply to the parties to the case.

For the selected countries outside Common Law Africa, the situation is as follows:

All the constitutions give the courts powers to nullify statutes and to question executive actions. In the case of Canada, independence of the judiciary is entrenched within the Constitution Act in section 96 on appointment of judges, section 99 on holding of office

<sup>161</sup> Constitution of the Republic of Uganda, 1995 (Uganda Constitution), article 128(1).

<sup>162</sup> Above, article 128(1).

<sup>163</sup> Above, Article 128(4).

<sup>164</sup> Above, Article 128(5).

<sup>165</sup> Above, Article 128(7).

<sup>166</sup> Above, article 142(2).

<sup>167</sup> Among these is the current Chief Justice Bart Katureebe, who worked as a minister in various portfolios. See 'Who is Justice Bart Katureebe' *The Observer* 6 March 2015 <https://observer.ug/news-headlines/36674-who-is-justice-bart-katureebe> (accessed 30 August 2018).

<sup>168</sup> For details see B Kabumba 'The practicability of the concept of judicial independence in East Africa: Successes, challenges and strategies' Paper presented at 2016 Conference of the East African Magistrates and Judges Association (EAMJA), October 30 – November 2, 2016, Speke Resort, Munyonyo, 14-19. For the period before 2007, see generally, American Bar Association 'Judicial independence undermined: A report on Uganda' 2007.

<sup>169</sup> American Bar Association, above.

<sup>170</sup> For example, both the AHA and section 15(6)(d) of the Equal Opportunities Commission Act, remain on the law books despite having been nullified by the Constitutional Court in *Prof. J Oloka-Onyango & 9 Others v Attorney General Constitutional Petition No. 008 of 2014 Constitutional Court of Uganda (AHA case)* and the *Adrian Jjuuko v Attorney General Constitutional Petition No. 1 of 2009 (Adrian Jjuuko case)* respectively.

during good behaviour, and section 100 on financial security.<sup>171</sup> It is also a matter of practice that independence of the judiciary is so highly respected in Canada that it would be unthought-of for the executive and legislature to erode it.<sup>172</sup> In practice, the courts in Canada make their rulings independently and even for LGB cases, they have not been attacked or their recommendations not adhered to by Parliament or the executive. This state of judicial independence explains why social change in favour of LGB rights is also able to happen.

Judicial independence in the USA is guaranteed under the Constitution, as article III section 1 requires that judges shall hold office 'during good behaviour' and their pay shall not be diminished while they hold office. The President appoints the Supreme Court judges in a highly political process.<sup>173</sup> However, in practice judicial independence after appointment is respected and judges' decisions, even on LGB rights, have been adhered to. Nevertheless, the courts have before faced backlash when they ruled in favour of LGB rights. The first time was when the Supreme Court of Hawaii ruled that the state of Hawaii's prohibition of same-sex marriages was discriminatory on the basis of sex.<sup>174</sup> This decision led to a wave of legislative changes at both state and federal levels with the most pronounced being the Defence of Marriage Act, which was expressly enacted in response to the *Baehr v Lewin* decision by The Supreme Court of Hawaii in 1993.<sup>175</sup> The second time was in 2008 in California when the Supreme Court's decision that denial of marriage to same-sex couples was a violation of due process guarantees in that state's constitution.<sup>176</sup> This time voters voted in favour of Proposition 8, which amended California's constitution to limit marriage to a man and woman and effectively reversed the Supreme Court's decision. However, the Supreme Court of the United States again struck down both the DOMA<sup>177</sup> and Proposition 8<sup>178</sup> and these decisions were respected. The Supreme Court of the United States of America has traditionally commanded respect, which helps to ensure that its decisions are implemented, even when unpopular. The level of independence also explains why social change on LGB rights has not been effected to the extent of Canada. So where judicial

<sup>171</sup> These were recognised by the Privy Council as protecting judicial independence in Canada in *Toronto Corporation v York Corporation* [1938] A.C. 415 at p. 426.

<sup>172</sup> See Justice Ian Binnie 'Judicial independence in Canada' Paper submitted to the World Conference on Constitutional Justice on behalf of the Supreme Court of Canada in anticipation of its Second, Congress to be held in Rio de Janeiro, 16-18 January 2011 [http://www.venice.coe.int/WCCJ/Rio/Papers/CAN\\_Binnie\\_E.pdf](http://www.venice.coe.int/WCCJ/Rio/Papers/CAN_Binnie_E.pdf) (accessed 26 May 2018).

<sup>173</sup> See Dorsen, n 105 above.

<sup>174</sup> *Baehr v Lewin* (n 15 above).

<sup>175</sup> For a broader discussion of the backlash that followed *Baehr v Lewin*, see A Sant, D Michael, & SA Law 'Baehr v. Lewin and the long road to marriage equality' (2011) 33 *University of Hawaii Law Review* 721-726.

<sup>176</sup> *In re Marriage Cases* 183 Pjd 384, 400-04 (Cal. 2008).

<sup>177</sup> *United States v Windsor* 570 US \_\_\_ (2013) (26 June 2013).

<sup>178</sup> *Hollingsworth v Perry* 570 US \_\_\_ (26 June 2013).

independence is respected both in law and fact, successful LGB SL cases are most likely to be implemented, and eventually lead to social change.

For Belize, articles 98 and 102 of the 1981 Constitution protect the tenure of judges. Judges are appointed by the Governor General in accordance with the advice of the Prime Minister given after consultation with the Leader of the Opposition for the case of the Chief Justice, and for other judges with the addition of advice of the Judicial and Legal Services section of the Public Services Commission.<sup>179</sup> However, in practice this process is fraught with excessive executive control making the judges to serve at the whim of the executive.<sup>180</sup> However, after appointment the government largely respects the independence of the judiciary.<sup>181</sup> This state of judicial independence shows why the decision decriminalising same-sex relations was respected and all the government did was to appeal, but also why it took long for such a case to come before the courts.

In Nepal, the Courts are meant to be independent and this is included in the Preamble to the Constitution. The President appoints judges to the Supreme Court on the recommendation of the Constitutional Council for the Chief Justice, and the Judicial Council for other judges.<sup>182</sup> Despite the new constitution, the country still grapples with issues of judicial independence, more so due to the socialist/communist outlook of the constitution and the key political players.<sup>183</sup> It may also explain why the 2008 decision on LGB rights has not been fully implemented to date.

The above discussion illustrates that the nature of the constitutional provisions concerning the judiciary's powers, as well as the practical realisation of judicial independence is important in determining whether LGB SL would spur social change. Thus, one of the conditions necessary for LGB SL to create social change is the existence of express constitutional provisions or conventions giving the courts explicit powers to nullify statutes or actions of the executive, and judicial independence should be respected in practice.

<sup>179</sup> Constitution of the Republic of Belize, 1981, article 97(2).

<sup>180</sup> EA Marshalleck 'Political interest in judicial appointments: A case for reform' Belize Bar Association [www.belizebar.bz/downloads/POLITICAL\\_INTEREST.docx](http://www.belizebar.bz/downloads/POLITICAL_INTEREST.docx) (accessed 31 August 2018).

<sup>181</sup> 'Belize' <https://www.state.gov/documents/organization/160154.pdf> (accessed 25 May 2018)

<sup>182</sup> Constitution of the Republic of Nepal, article 129(2).

<sup>183</sup> See generally D Pimentel 'Judicial independence at the crossroads: grappling with ideology and history in the new Nepali constitution' (2011) 21:2 *Indiana International & Comparative Law Review* 207.

*b) Inclusion of sexual orientation among the protected grounds against discrimination in the Constitution*

A major proposition of this study is that the inclusion of sexual orientation as a protected ground against discrimination is more likely to lead to court victories in LGB cases and eventually the stimulation of social change. It is well-known that once a justiciable right is included within the Constitution, it is often given greater priority in the courts of law as it turns political demands into crisp legal claims,<sup>184</sup> although this is not always the case.<sup>185</sup> Nevertheless, constitutional protection helps. Concerning LGB rights, where sexual orientation is included as a protected ground against discrimination, the courts find it easier to find laws and conduct discriminatory on the grounds of sexual orientation, as in South Africa. Where it is not explicit, the courts usually do not enforce the right, and where they do they have to find other provisions to rely on. It is easier to articulate the rights where sexual orientation is a protected ground than where it is not. Inclusion in the Constitution presupposes that the population, or at least its elected representatives, have agreed that there is need for protection of LGB persons from discrimination.

Among the selected Common Law countries, the situation is as follows:

The country that most clearly supports the above proposition is South Africa. The inclusion of 'sexual orientation' among the protected grounds against discrimination in section 9(3) of the Constitution worked like a magic bullet that immediately gave the courts the leeway to decide each of the nine cases brought thereafter in favour of LGB persons.<sup>186</sup> The general population has not vehemently objected to the court decisions and there is increased acceptance of the need for protection of LGB persons.<sup>187</sup> The court cases simply built upon a foundation that was already laid in the Constitution, and the courts did not have to create justifications beyond section 9(3). The inclusion of sexual orientation as a protected ground against discrimination also partly explains why LGB SL has been able to contribute more to achieving significant social change in South Africa than elsewhere.

<sup>184</sup> See RE Case & TE Givens, 'Re-engineering legal opportunity structures in the European Union? The starting line group and the politics of the racial equality directive' (2010) 48 *Journal of Common Market Studies* 221-241. Also see KM Kelmor 'Legal formulations of a human right to information: defining a global consensus' (2016) 25:1 *Journal of Information Ethics* 101-113, 149-150, where the argument is made that explicit protection gives more meaning to the rights.

<sup>185</sup> Also see FB Cross 'The Relevance of law in human rights protection' (1999) 19 *International Review of Law and Economics* 87-98.

<sup>186</sup> Each of the eleven LGB cases was based on this right, either exclusively or in combination with other rights.

<sup>187</sup> Chapter 4, section 4.2.3.

All the other sampled countries do not provide such express protection. In Kenya, the non-discrimination clause in the 2010 Constitution provides that ‘everyone’ is equal before and under the law,<sup>188</sup> and then defines equality to include the ‘full and equal enjoyment’ of all rights.<sup>189</sup> It lists grounds upon which the state cannot discriminate in an open-ended way, and therefore even if sexual orientation is not included, it can be implied.<sup>190</sup> The High Court in the *Eric Gitari* case interpreted the words ‘every person’ in article 27 and found that they meant exactly that – ‘every person’. The Court held that article 27(4) was inclusive and therefore sexual orientation could also be implied. It also went beyond implying the right, and invoked articles 20(4)(a) and (b) enjoining the Court, to promote ‘the values that underlie an open and democratic society based on human dignity, equality, equity and freedom’ as well as the ‘spirit, purport and objects of the Bill of Rights’ when interpreting the Bill of Rights. This was judicial activism and the court could have easily ruled the other way. Indeed in *COL & GMN v Resident Magistrate Kwale Court & 4 Others*,<sup>191</sup> the High Court found that anal examinations were constitutional as they were crucial for verification that anal intercourse had taken place. This was however reversed by the Court of Appeal which found that the order for anal examinations was made under the wrong law and therefore violated the right to dignity, privacy and freedom from self-incrimination of the appellants.<sup>192</sup> Although there is no express protection, the non-discrimination clause is nevertheless expansive enough. This expansive nature of the protection explains why activists in Kenya have recently met with success while undertaking LGB SL. Also, the non-express protection explains the limited social change.

Uganda also has an inclusive non-discrimination clause, which emphasises that the broad non-discrimination in article 21(1) is paramount.<sup>193</sup> It has a closed list of the grounds upon which someone cannot be discriminated against in article 21(2). Despite this, the whole scheme of the non-discrimination clause is cast in such broad and general terms that it can be argued that sexual orientation can be considered as a protected ground against discrimination in article 21(2).<sup>194</sup> The courts have only once relied on the non-discrimination clause to find in favour of equality and this was in *Adrian Jjuuko v Attorney General* (the

<sup>188</sup> Constitution of the Republic of Kenya, 2010, article 27(1).

<sup>189</sup> Above, article 27(2).

<sup>190</sup> Above, article 27(4).

<sup>191</sup> Petition No. 51 of 2015.

<sup>192</sup> *COL & Another v Chief Magistrate Ukunda Law Courts & 4 Others*, Civil Appeal 56 of 2016 [2018] eKLR. (COL case).

<sup>193</sup> Constitution of the Republic of Uganda, article 21(1).

<sup>194</sup> Human Rights Awareness and Promotion Forum (HRAPF) A guide to the normative legal framework on the human rights of LGBTI persons in Uganda (2015) 16-17.

*Adrian Jjuuko* case).<sup>195</sup> This was however done in passing without any discussion of the normative content of the right.<sup>196</sup> In all the other related cases, they have done the opposite of what the Kenyan courts did. Where they have found in favour of LGB persons, they have relied on other rights.<sup>197</sup> The right was however expressly discussed by Musota J in the *Kasha Jacqueline Nabagesera & 3 Others v Attorney General and Hon. Rev. Fr Simon Lokodo* (the *Lokodo* case),<sup>198</sup> but he decided to rely on the limitation clause to find that persons breaking the criminal law prohibiting same-sex conduct could not 'enjoy the same protection of the law as persons who were acting in accordance with the law were enjoying'.<sup>199</sup> Indeed, the non-express protection was relied on to deny LGB persons protection with the judge in that case making it clear that, unlike the other countries referred to by the petitioners, Uganda criminalised same-sex relations, and therefore defined public interest differently.<sup>200</sup> This reasoning was again used to deny registration to an organisation working on LGB issues in *Frank Mugisha, Dennis Wamala & Ssenfuka Warry Joanita v Uganda Registration Services Bureau (URSB) (SMUG Registration case)*.<sup>201</sup> The limited level of social change in Uganda also reflects this limited interpretation of the non-discrimination clause. Therefore, express constitutional protection is important in ensuring that LGB SL contributes to social change.

Botswana's non-discrimination clause is more limited. Sections 15(1) and (2) of the Constitution prohibit the making of discriminatory laws or the discrimination of anyone by public officials, but these are subjected to claw-back clauses which restrict certain areas of the law from being subjected to the non-discrimination clause, including divorces, marriages and personal law, and things done under such laws.<sup>202</sup> Section 15(3) lists the protected grounds in a closed manner, which does not include sexual orientation. The court in *Attorney General v Thuto Ramogge & 19 Others (LEGABIBO Registration case)*,<sup>203</sup> therefore did not rely on this clause but rather on other rights to find in favour of registration of LEGABIBO. Botswana has also not yet achieved significant social change and this is one of

<sup>195</sup> n 170 above.

<sup>196</sup> Above, line 370-380.

<sup>197</sup> These will be discussed in the discussion on other rights below. In *Victor Mukasa & Yvonne Oyoo v Attorney General* (2008) AHRLR 248 (High Court of Uganda) 22 November 2008 (*Victor Mukasa* case), the court relied on the rights to privacy and dignity; in *Kasha Jacqueline Nabagesera, David Kato Kisuule & Pepe Julian Onziema v The Rolling stone Newspaper* Miscellaneous Cause No. 163 of 2010 (High Court of Uganda) 30 December 2010 (*Rolling stone* case), the court relied on the rights to dignity and once again privacy; while in the *Adrian Jjuuko* case (n 170 above), the court relied on the right to freedom from discrimination and the right to a fair trial.

<sup>198</sup> High Court Miscellaneous Cause No. 33 of 2012 (High Court of Uganda).

<sup>199</sup> Above, 23.

<sup>200</sup> Above.

<sup>201</sup> Miscellaneous Cause No. 96 of 2016.

<sup>202</sup> Above, section 15(4)(c).

<sup>203</sup> (2014) CACGB-128-14, which was an appeal against the High Court's decision to register LEGABIBO.



the factors that may explain this situation, as indeed not many cases have been brought relying on the non-discrimination clause.

For the selected countries outside Common Law Africa, this is how constitutional protection against discrimination on the basis of sexual orientation correlates with social change:

Among these, the only country with express constitutional protection of LGB persons is Nepal.<sup>204</sup> However, unlike South Africa, sexual orientation is not specifically listed as a ground protected from discrimination, but sexual minorities are mentioned among persons that should be specifically protected. This is also a development brought by the 2015 Constitution. However, even before that, the courts had relied on article 13 of the 1990 Constitution as well as international law to find that protection for LGB persons was justified.<sup>205</sup> The Court held that sexual minorities are among those to be protected, even in the absence of their express inclusion. This does not necessarily reflect the extent of social change and this can be explained more by other factors, such as the extent of democracy rather than the express protection in the Constitution.

For Canada and the USA, protection has also been simply deduced and developed over time, as it was not expressly included in the USA Constitution<sup>206</sup> or the Canadian Charter.<sup>207</sup> This also explains the longer struggles to have LGB rights recognised in those countries. However, once the protection was deduced and made part of the constitutional jurisprudence, there has been consistency in protection, as well as social change, especially in Canada. Belize has no express protections. However, the Court was able to find a violation of the right to equality and freedom from discrimination by the judge extending the term 'sex' to include 'sexual orientation.'<sup>208</sup>

From the preceding it is possible to conclude that there is a positive correlation between express protection against discrimination based on sexual orientation in the Constitution and the courts' affirmation of LGB rights, which then leads to social acceptance, and eventually social change. As such, one of the conditions under which LGB SL can stimulate

<sup>204</sup> Article 18 of the 2015 Constitution lists sexual minorities among disadvantaged groups, and article 42 ensures their inclusive participation in state structures.

<sup>205</sup> *Sunil Babu Pant* case, n 67 above.

<sup>206</sup> See discussion in Chapter 4, section 4.4.1.

<sup>207</sup> As above.

<sup>208</sup> *Caleb Orozco* case (n 101 above) paras 90-96.

social change is when there is clear language in the constitution protecting LGB persons from discrimination.

*c) The formulation of the rights in the Bill of Rights*

Beyond the non-discrimination clause, the other rights on which the courts have commonly relied to uphold LGB rights are the right to privacy and the right to dignity. Therefore, much of the court's decisions depend on how these rights are formulated in the Bill of Rights. On this basis, this study makes the proposition that the more open and inclusive the constitutional provisions on privacy and dignity are, the easier it is for courts to find in favour of LGB persons and thus to spur the movement towards social change in favour of LGB persons. This is because the courts would not be seen as labouring too much to affirm the rights, and as such this would give the judgments legitimacy as they flow directly from the Bill of Rights. However much a court is attuned to judicial activism, it would be difficult for it to rule in favour of LGB rights where the provisions are restrictive. Where claw-back clauses exist and where the limitation clause is framed very widely, again, it would be easier for the courts to rule against LGB rights.

Among the selected Common Law African countries, the proposition plays out as follows:

The South African Constitution is perhaps the one with the most open and inclusive provisions. In its preamble it denounces the legacy of apartheid and makes a commitment to building an inclusive society based on 'democratic values, social justice and fundamental human rights'.<sup>209</sup> It has an expansive Bill of Rights that binds all the organs of state.<sup>210</sup> It protects the right to 'human dignity',<sup>211</sup> as well as the right to freedom and security of the person,<sup>212</sup> which protects against violence, torture and cruel, inhuman and degrading treatment.<sup>213</sup> It also includes the right to privacy, which protects from unlawful searching of persons and homes.<sup>214</sup> Therefore with this wide array of rights that are usually used to vindicate LGB rights, it is not surprising that the courts there are able to make judgments based on various provisions beyond the express protection against discrimination on the basis of sexual orientation in section 9(3).<sup>215</sup> Its limitation clause is also broad and clearly

<sup>209</sup> The Constitution of the Republic of South Africa, preamble.

<sup>210</sup> Above, section 8(1).

<sup>211</sup> Above, section 10.

<sup>212</sup> Above, section 12.

<sup>213</sup> Above, section 12(1)(c)-(e).

<sup>214</sup> Above, section 14(a).

<sup>215</sup> For example, the Sodomy case was decided on the rights to: equality and non-discrimination; dignity; and privacy.

restricted in nature, giving more effect to the rights than the limitation.<sup>216</sup> The limitation is in section 36 of the Constitution. It subjects the right to what is 'reasonable and justifiable in a free and democratic society'. It also goes ahead to state that limiting the right must be with due regard to the importance of the purpose, the nature and extent, and the relationship between the limitation and its purpose and whether there are other means of achieving that purpose.<sup>217</sup> This expansive protection of human rights may also explain why the Court has been able to make the decisions that it has, and the legislature and the executive have implemented the decisions. The general population has accepted the decisions in LGB cases as they are based on constitutional provisions that clearly came out of a general consensus within the population.

Kenya's 2010 Constitution is also more expansive, with the preamble showing the nation's commitment to the 'essential values of human rights, equality, freedom, democracy, social justice and the rule of law.'<sup>218</sup> Like the South African Constitution, its Bill of Rights clearly elaborates the different rights showing that they belong to all persons. Apart from the right to freedom from discrimination, it also contains the rights to dignity,<sup>219</sup> privacy,<sup>220</sup> and freedom and security of the person,<sup>221</sup> which are all more or less couched in the same language as in the South African Constitution. Indeed, the courts have relied on these provisions to find in favour of LGB persons. In the *Eric Gitari* case, the court went beyond the right to freedom from discrimination and also relied on the right to freedom of association,<sup>222</sup> as the case concerned registration of an organisation. However, the fact that the Constitution has been in operation for only a few years, means that it has not yet been tested as much as for example the 22-year-old South African Constitution. Therefore, the legal change that it has so far brought about as regards LGB rights is not so great. The expansive nature of the Bill of Rights also explains the recent LGB court victories and the increasing level of social acceptance.

The Constitution of Uganda also contains expansive rights, which can be used to vindicate LGB rights. The right to dignity is couched as the right to freedom from torture, inhuman

<sup>216</sup> For a complete discussion of how the limitation clause applies in South Africa, see I Currie & J De Waal *The bill of rights handbook* (2005) 163-186.

<sup>217</sup> Section 36 (1)(a)-(e).

<sup>218</sup> Constitution of the Republic of Kenya, 2010, preamble.

<sup>219</sup> Above, article 28.

<sup>220</sup> Above, article 31.

<sup>221</sup> Above, article 29.

<sup>222</sup> Protected in article 36 and which applies to 'every one'.

and degrading treatment or punishment.<sup>223</sup> It also contains the right to privacy, which is largely restricted to searches.<sup>224</sup> The courts finding in favour of LGB persons have relied on these rights before. In the *Rollingstone* case, the court relied on the right to dignity and to privacy to issue an injunction against a newspaper for publishing the personal details of LGB persons and calling for their hanging. In the *Victor Mukasa* case, the court relied on the rights to freedom from inhuman and degrading treatment and the right to property. However, there is an express prohibition of same-sex marriages in article 31(2)(A) of the Constitution, which would easily persuade a court to rule that such an express prohibition within the Constitution clearly showed the intention of the framers not to protect against discrimination on the grounds of sexual orientation. This is what happened in the *Lokodo* case, and more recently in the *SMUG Registration* case, where the judge expressly relied on article 31(2)(A) in addition to section 145 of the Penal Code to uphold the denial of registration to SMUG. As such, the express prohibition of same-sex marriages, despite more inclusive provisions may also explain the low levels of positive social change despite the LGB SL.

Botswana's Constitution is more restrictive with many clawback clauses to the various rights, including to the right to dignity<sup>225</sup> and to privacy.<sup>226</sup> The courts have nevertheless found for LGB persons based on the right to freedom of association, which directly concerned the matter in issue: the registration of LEGABIBO.<sup>227</sup> The fact that the courts have been able to go beyond the limitations and find in favour of LGB rights does not contradict the proposition but rather supports it. This is because it extends much more to the phenomenon of judicial activism and the willingness of the courts to push the constitution to its limits. Indeed, the fact that the state appealed this decision shows that the rights are highly contested and it is largely the fact that democracy has taken root in this country that ensured that the court decision was respected. Botswana's more restrictive Constitution explains why social change is still relatively low despite LGB SL cases.

Progress so far made in all the other selected countries outside Common Law Africa also support the proposition as follows:

<sup>223</sup> Constitution of the Republic of Uganda, article 24.

<sup>224</sup> Above, article 27.

<sup>225</sup> Section 7.

<sup>226</sup> Section 9.

<sup>227</sup> *LEGABIBO Registration* case, n 87 above.

Of these countries, Nepal's Constitution is the more expansive in terms of text with the inclusion of LGB persons among the groups protected from discrimination, and inclusion of the rights to dignity<sup>228</sup> and privacy of the person, including a person's character,<sup>229</sup> rights that have been used to find in favour of LGB persons elsewhere. The Constitution has not yet been tested in respect of LGB rights as it is still relatively new, and by the time it came into force, the Supreme Court had already made decisions vindicating these rights.

The Constitution of the USA includes the due process and privacy clauses, which have also been relied on to find in favour of LGB rights.<sup>230</sup> The USA Constitution, although brief in its framing of rights has benefitted from the over 200 years of interpretation. With time, the interpretation has progressed from being conservative to being progressive as regards LGB rights. The Canadian Charter has also benefitted from a longer history of interpretation as regards LGB rights than all the sampled African Common Law countries. Belize has a more restrictive Constitution with claw-back clauses to the rights to dignity<sup>231</sup> and privacy.<sup>232</sup> Indeed, the Constitution has only recently been used to challenge laws criminalising same-sex conduct, albeit successfully despite the claw-back clauses. Perhaps the reason why there has been limited use of the Constitution for LGB SL is this constitutional limitation. However the positive interpretation by the court in the Caleb Orozco case<sup>233</sup> shows that even such a restrictive Constitution can be used to ameliorate LGB rights. This may be explained more by judicial activism than by a very progressive constitution. Any other judge could have ruled differently. Therefore, in relation to social change, the slow progress regarding social change may be explained by the fact that the Constitution is more restrictive in terms of the way the rights are framed therein.

Open and inclusive language in constitutions makes it much easier for courts to rule in favour of LGB persons, which starts a conversation that may eventually lead to social change. As such, one of the conditions that contribute to LGB SL leading to social change is the inclusion of broad and expansive liberty-related rights in the Bill of Rights.

<sup>228</sup> Constitution of the Republic of Nepal, 2015, article 16(1).

<sup>229</sup> Above, article 28.

<sup>230</sup> The Due Process clause was also the basis of the Obergefell decision which legalised same-sex marriage, while the privacy clause was used in the *Lawrence v Texas* case to strike down the statute.

<sup>231</sup> Article 7.

<sup>232</sup> Constitution of the Republic of Belize, articles 9 and 14.

<sup>233</sup> Caleb Orozco case, n 102 above.

*d) The extent of application of international human rights standards*

The extent to which a country applies international human rights standards is another factor that contributes to LGB SL leading to social change. LGB rights have recently gained more prominence in the international human rights arena. Even though no single international instrument specifically recognises or protects LGB rights, interpretation by the different treaty bodies of the different human rights provisions has largely been in favour of LGB rights. The most outstanding of these is the Human Rights Committee, which has interpreted the inclusion of 'sex' in article 26 of the International Covenant on Civil and Political Rights as including 'sexual orientation'.<sup>234</sup> The Yogyakarta Principles on the application of international human rights law, which codify international human rights standards and how they apply to LGB persons, are also increasingly respected as a source of international law, albeit as a soft law source.<sup>235</sup>

At the regional level, the African Commission on Human and Peoples' Rights (African Commission) has interpreted the African Charter on Human and Peoples' Rights (African Charter) in a way that protects LGB rights. This has, for example, been in its concluding remarks upon review of state reports, such as the one for Cameroon in 2006.<sup>236</sup> At the sub-regional level, the East African Court of Justice has heard a case challenging Uganda's Anti-Homosexuality Act,<sup>237</sup> and although it ruled that the case was moot as the Act had already been nullified by the Constitutional Court in Uganda, this was the first time that such a case came before courts in the regional human rights system.

Since international law binds states that are parties to the different instruments, how the states fulfil their obligations under these instruments goes a long way to make international law useful in influencing court decisions at the domestic level, and thus social change. Furthermore, the extent of this adherence translates into the local courts using international decisions to justify the protection of LGB persons. It also theoretically matters whether a country is monist or dualist with regards to the domestication of international law, since international law immediately becomes part of domestic law as soon as a country ratifies a treaty in monist countries, but must be incorporated by an Act of Parliament in dualistic

<sup>234</sup> *Toonen v Australia* Communication No. 488/1992.

<sup>235</sup> The official version of the Yogyakarta Principles can be found at [http://www.yogyakartaprinciples.org/principles\\_en.pdf](http://www.yogyakartaprinciples.org/principles_en.pdf) (accessed 26 May 2018).

<sup>236</sup> See African Commission on Human and Peoples' Rights 'Concluding observations on the first periodic report of Cameroon' adopted at the Commission's 39<sup>th</sup> ordinary session, 11-25<sup>th</sup> May 2005, Para 14.

<sup>237</sup> *Human Rights Awareness and Promotion Forum (HRAPF) v Attorney General of Uganda and the Secretariat of the Joint United Nations Programme on HIV/AIDS (UNAIDS)* Reference 6 of 2014 (HRAPF case).



countries.<sup>238</sup> In practice, what matters is how the country itself applies and respects international law rather than whether it is monist or not.<sup>239</sup> Another reason why the extent of respect for international law matters is because states are peer-reviewed by the different treaty bodies and the UN Human Rights Council through the Universal Periodic Review (UPR) process,<sup>240</sup> and for African countries that have consented, also by the African Union through the African Peer Review Mechanism.<sup>241</sup> This leads to accountability to peers, which helps to influence a country to respect human rights, including LGB rights, and enforce court decisions.

This is how this proposition plays out among the selected African Common Law countries:

South Africa and Kenya have the highest level of application of international law. The South African Constitution specifically declares customary international law to be part of South African law.<sup>242</sup> It however still requires ratification of treaties before they become binding.<sup>243</sup> The interpretation clause expressly requires international law to be considered in the interpretation of the Bill of Rights.<sup>244</sup> Indeed, in many cases international instruments have been expressly referred to,<sup>245</sup> including those on LGB rights.<sup>246</sup> For the case of Kenya, article 2(5) of Kenya's Constitution provides that the general rules of international law are part of the laws of Kenya. Treaties, once ratified, automatically become part of the laws of Kenya.<sup>247</sup> This was a departure from the purely dualist approach that existed before.<sup>248</sup> However, despite this, the Constitution also maintains supremacy over all other laws, which

<sup>238</sup> F Viljoen *International human rights law in Africa* (2007) 531.

<sup>239</sup> For a discussion of how states apply international law, see M Killander & H Adjohoun 'International law and domestic human rights litigation in Africa: An introduction' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 1-22.

<sup>240</sup> The UPR is a peer review process of the UN Human Rights Council, whereby each of the 192 member states are reviewed after every four years for their human rights record.

<sup>241</sup> The APRM is a voluntary peer review mechanism for African countries under the auspices of the New Partnership for Africa's Development (NEPAD). Its base document can be accessed at 'African Peer Review Mechanism (APRM) Base Document' NEPAD/HSGIC/03-2003/APRM/MOU/Annex II, adopted at the 6th Summit of the NEPAD Heads of State and Government Implementation Committee, 9 Mar. 2003, Abuja, Nigeria, (2003).

<sup>242</sup> Final Constitution, section 232.

<sup>243</sup> Above, section 231(2).

<sup>244</sup> Above, section 39(1)(b). Also section 233 requires courts to prefer a position that is in line with international law. Also see the statement of Chaskalson P in *S v Makwanyane and Another* 1995 3 SA 391 (CC), 34 endorsing the use of international law.

<sup>245</sup> In the context of children's rights see generally K Ngidi 'The role of international law in the development of children's rights in South Africa: A children's rights litigator's perspective' in Killander (n 239 above) 173.

<sup>246</sup> See for example the judgment of Sachs J in the *Fourie* case (n 137 above) para 99 -105.

<sup>247</sup> Constitution of the Republic of Kenya, article 2(6).

<sup>248</sup> For a discussion of how the judiciary applied international law before the 2010 Constitution see J Osogo Ambari 'Navigating past the 'dualist doctrine': the case for progressive jurisprudence on the application of international human rights norms in Kenya' in Killander M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 25.

then includes international law, and parliament maintains power to make its own laws, which makes Kenya more of a hybrid than a purely monist state.<sup>249</sup> Article 20(3)(b) of the Constitution requires the Bill of Rights to be interpreted in a way that most favours the enforcement of the right. Kenyan courts have also been freely referring to international law in their judgments on LGB rights.<sup>250</sup>

Botswana and Uganda are generally dualist. However, Uganda is more progressive as its Constitution requires the country to fully subscribe to all its international treaty obligations ratified prior to the passing of the 1995 Constitution.<sup>251</sup> Principle XXVIII of the National Objectives and Directive Principles of State Policy sets ‘respect for international law and treaty obligations’ as one of the principles that the state is obliged to follow. According to article 8A, Uganda is to be governed based on these principles, and this has led to the assertion that the principles are now justiciable.<sup>252</sup> Article 123 requires treaties to be ratified, and the Ratification of Treaties Act governs this.<sup>253</sup> This therefore implies that international law is generally binding on Uganda.<sup>254</sup> The courts however do generally refer to international instruments,<sup>255</sup> even in LGB cases. Botswana’s Constitution is silent about international law. However, section 24(1) of the Interpretation Act 1984 allows the courts to refer to ‘any relevant international treaty, agreement or convention...’ for the purposes of interpreting enactments.<sup>256</sup> The courts have however adopted the principle of incorporation, which is to the effect that the signed treaties are binding unless they conflict with an express provision of the law.<sup>257</sup> The courts indeed do make reference to international judgments in their decisions including on LGB rights. Therefore, in all the countries, international law is referred to, and the countries are all amenable to the different international processes, although to different extents. The ones that are more open, particularly South Africa, have also seen more social change. Kenya still lags behind in terms of social change despite a

<sup>249</sup> J Maina ‘Do articles 2(5) and 2(6) of the Constitution of Kenya 2010 transform Kenya into a monist state?’ (September 30, 2013) <https://ssrn.com/abstract=2516706> (accessed 31 August 2018).

<sup>250</sup> See for example the case of *Eric Gitari v Attorney General (Eric Gitari case)* Petition 150 of 2016 (High Court of Kenya para 77-87).

<sup>251</sup> Constitution of Uganda, article 287.

<sup>252</sup> C Mbazira ‘Public interest litigation and judicial activism in Uganda: Improving the enforcement of economic, social and cultural rights’ (2009) Human Rights and Peace Centre Working Paper No. 24. See also the Supreme Court decision in *CEHURD v Attorney General*, Constitutional Appeal No.1 of 2016, judgment of Kisaakye JSC, where article 8A was considered in the court’s decision.

<sup>253</sup> Cap 2014.

<sup>254</sup> B Kabumba ‘The application of international law in the Ugandan judicial system: A critical enquiry’ in Killander (n 238 above) 83-87.

<sup>255</sup> Above.

<sup>256</sup> EK Quansah ‘An examination of use of international law as an interpretative tool in human rights litigation in Ghana and Botswana’ in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 37.

<sup>257</sup> *Republic of Angola v Springbok Investments (Pty) Ltd* [2005] 2 BLR 159 (HC) – Botswana.

more open framework, but this is attributable more to the limited time within which the Constitution has been in force (eight years). Uganda follows, although its usage of international law in LGB cases has been more to limit rights than vindicate them, as was done in both the *Lokodo* and *SMUG Registration* cases. This also shows the downside of using international law as judges can selectively apply it against LGB rights, since generally positive developments for LGB rights at the international level have also just recently emerged. Botswana applies international law despite a restrictive framework, and it has helped in vindicating LGB rights, thus supporting the quite higher levels of social change compared to countries like Uganda.

The selected countries outside Common Law Africa still support the proposition as discussed below:

Belize is a dualist country. The preamble to its Constitution requires respect for international law and treaties,<sup>258</sup> while the Interpretation Act<sup>259</sup> requires the courts to interpret the Constitution in a manner consistent with its obligations under relevant international law.<sup>260</sup> The courts also refer to international standards, and indeed did so extensively in the *Caleb Orozco* case.<sup>261</sup> For Canada, the Supreme Court confirmed its dualistic approach in the case of *Canada (AG) v Ontario (AG) [Labour Conventions]*.<sup>262</sup> Nevertheless, the courts apply international law as if it is 'persuasive rather than obligatory.'<sup>263</sup> However, despite this, Canada's position as regards LGB rights is alive to and in line with the international law standards as regards LGB rights, and also the different court decisions have been able to create social change. For Nepal, article 51(m)(1) of the Constitution requires the state to pursue respect for international law as one of the policies of the state. Courts extensively apply international law including in LGB cases as was seen in the *Sunil Babu Pant* case. Finally, the USA is a dualist country, and traditionally its courts have been resistant to applying international standards to domestic decisions.<sup>264</sup> Nevertheless, on LGB issues, the USA is in line with international standards. But also its own international law isolation may explain why, for a long time, it remained behind many other states in recognising LGB

<sup>258</sup> Constitution of the Republic of Belize, Preamble, para (e).

<sup>259</sup> Cap 1, 2000.

<sup>260</sup> Above, section 65.

<sup>261</sup> n 101 above, para 93-94.

<sup>262</sup> [1937] AC 326.

<sup>263</sup> J Brunnee & SJ Toopex 'A hesitant embrace: The application of international law by Canadian Court' (2002) 40 *Canadian Yearbook of International Law* 5.

<sup>264</sup> CA Bradley & JL Goldsmith 'Customary international law as federal common law: A critique of the modern position' (1997) 110 *Harvard Law Review* 815.

rights. Canada and the USA respect the international standards on LGB rights much more than they respect international law generally. This therefore is still in line with the proposition as far as it is restricted to LGB rights.

One of the factors influencing LGB SL to spur social change is the extent to which a country adheres to international law standards. South Africa clearly brings this out, as do Canada and the USA despite the fact that they do not expressly apply international law standards. As such, one of the conditions under which LGB SL stimulates social change is respect for international law by the country in question.

*e) The legitimacy of constitutional protections of LGB rights*

LGB rights claims are usually based on constitutions, which either directly protect LGB rights, or indirectly do so through providing for the rights of all persons.<sup>265</sup> Whereas most persons who criticise courts as unable to create social change have discussed this within the context of courts being counter-majoritarian,<sup>266</sup> this proposition rather considers the additional challenge in most of the Common Law African countries themselves that even the constitutions together with their bills of rights as well as the human rights regime generally are not regarded as legitimate, and can therefore be ignored at will. Legitimacy is about acceptance by the people of a certain framework as good for them and as binding.<sup>267</sup> In respect of constitutions, this means the acceptance of the constitution as binding and imposing a duty upon people to act as it requires without being forced to do so.<sup>268</sup> This is brought about by a number of factors, one of which is the source of the constitution,<sup>269</sup> and the second being whether it is fair or just and providing systems of law making that are fair and just.<sup>270</sup> Two types of legitimacy have been identified: vertical legitimacy and horizontal legitimacy. Vertical legitimacy is about how people relate with institutions, while horizontal legitimacy is about what the people agree to be binding and important regardless of what the institutions or laws may say.<sup>271</sup> According to Englebert, imposed systems are generally

<sup>265</sup> See generally, A Jjuuko 'Using the constitution to litigate on the rights of LGBTI persons in Uganda: Successes, challenges, and prospects' Paper presented at Harvard Law School, 18<sup>th</sup> September 2013.

<sup>266</sup> See for example Rosenberg (n 1 above) 339-429, AM Bickel The least dangerous branch: The Supreme Court at the bar of politics (1962) 16-17; JF Handler Social movements and the legal system: A theory of law reform and social change (1978) 22.

<sup>267</sup> AMB Manguown 'Constitutions and legitimacy of power in Southern Africa' Institute for Research and Governance (<http://www.institut-gouvernance.org/en/chapitrage/fiche-chapitrage-59.html>) (accessed 31 August 2018)

<sup>268</sup> See generally RE Barnett 'Constitutional legitimacy' (2003) 103 *Columbia Law Review* (2003) 111-148.

<sup>269</sup> P Englebert *State legitimacy and development in Africa* (2000) 173.

<sup>270</sup> Above.

<sup>271</sup> KJ Holsti *The state, war, and the state of war* (1996) 97.

illegitimate, as they are not homegrown and indigenous.<sup>272</sup> If this is to be followed, it implies that when constitutional protections of LGB rights are not homegrown and are rather imposed upon people, then they will not be seen as legitimate by the majority, or the legislature and the executive and will thus be unable to spur social change.

The proposition is that in countries where the constitutions and the human rights framework, which protect LGB rights either directly or indirectly, were imposed, court decisions in favour of LGB rights are less likely to be respected. This is despite the constitutions being regarded as the supreme law of the land and therefore that any other laws that contravene it are invalid to the extent of their inconsistency. The two strands of the argument are that imposed LGB protections within constitutions will not be regarded as legitimate even when they expressly protect LGB rights, and that for negotiated and homegrown constitutions, the aspect of LGB protection will remain illegitimate since it is usually not expressly agreed upon. On imposition, whereas constitutions are negotiated documents, Bills of Rights with expansive language, which can be used to include different groups, have become more or less a standard component of such constitutions. Nevertheless, human rights remain largely seen as foreign impositions. This view emanates from three sources: the European origins of human rights,<sup>273</sup> the way they were selectively employed during colonial times,<sup>274</sup> and the way they are promoted today which largely regards the African as 'savage' and the European/American as the saviour.<sup>275</sup> This triggers a high degree of scepticism about human rights in general.<sup>276</sup> The situation is worse with respect to LGB rights, which are largely considered a western imposition.<sup>277</sup> So, even when LGB cases are included expressly in an otherwise legitimate Constitution, that aspect may be regarded as illegitimate, and court decisions made based on it may be simply brushed aside as not based on the values of the people but rather on alien human rights arguments. Where the rights are not expressly included, but rather implied or derived, then the argument of

<sup>272</sup> Englebert, n 269 above.

<sup>273</sup> It should be noted that what is largely western about human rights is the modern conceptualisation and their inclusion in binding documents. Otherwise, African origins of human rights can clearly be traced even long before the Magna Carta, such as the Kurukan Fuga Charter, see J Amselle 'Did Africa invent human rights?' (2013) 1 *Anthropetics* XIX. For a broader discussion of African human rights origins see generally, B Ibhawoh *Human rights in Africa* (2018).

<sup>274</sup> For a discussion of how human rights were used in the colonial period see, B Ibhawoh *Imperialism and human rights: Colonial discourses of rights and liberties in African history* (2007).

<sup>275</sup> See generally M Mutua 'Savages, victims, and saviors: The metaphor of human rights' (2001) 42 *Harvard International Law Journal* 201-245. Also see FPC Endong 'LGBT rights movement in Africa and the myth of the whiteman's superiority' (2016) 7:1 *Journal of Globalization Studies* 139.

<sup>276</sup> See Carnegie Council for Ethics in International Affairs 'Why more Africans don't use human rights language' (1999) 2.1 *Human Rights Dialogue* 5 December 1999 [https://www.carnegiecouncil.org/publications/archive/dialogue/2\\_01/articles/602](https://www.carnegiecouncil.org/publications/archive/dialogue/2_01/articles/602) (accessed 16 June 2018).

<sup>277</sup> Endong, n 275 above.

illegitimacy becomes even stronger. However, the second aspect of legitimacy, which is about how people own up to the systems,<sup>278</sup> as well as the internal fairness and checks embedded in the system<sup>279</sup> also come into play to tamper the effect of the first aspect. The argument would be that many of these constitutions left at independence were amended or adopted and used as a basis for benefitting society and have thus become more or less accepted and legitimate, and the recent constitutional processes have been more inclusive and embracing and are largely seen as legitimate. As such, LGB rights can be vindicated within this very system and accepted by the majority since this is a system that people work with and understand. So where LGB rights are included in a constitution, or general protections for everyone, this is enough to indicate legitimacy.

In the selected Common Law countries, this proposition plays out in the following ways:

In almost all countries, imposed constitutions no longer exist, and the current legal systems have largely been embraced and legitimised. All the countries have a hierarchy of laws with the Constitution being the supreme law while customary law is placed lowest in the hierarchy. South Africa is perhaps the only country that has a Constitution borne out of a genuine national consensus.<sup>280</sup> Indeed Heinz Klug believes that the level of public participation in this process was perhaps unprecedented in the world.<sup>281</sup> However, even there, the protection of LGB rights was controversial,<sup>282</sup> and there are still voices that want the constitutional protection removed,<sup>283</sup> with arguments based on a supposed African culture. This explains why the court decisions have largely been accepted and enforced, but also may be one of the reasons why although the level of social change is quite high, it is yet to reach to the level of 'significant social change'.

For Kenya, despite the fairly inclusive process of constitutional development, which was even subjected to a referendum, the development of the 2010 Constitution cannot be said to have been fully a process of national consensus.<sup>284</sup> More so, express prohibitions of same-sex

<sup>278</sup> See Manguown, n 267 above.

<sup>279</sup> Barnett, n 268 above.

<sup>280</sup> Varney, n 83 above.

<sup>281</sup> H Klug *The Constitution of South Africa: A contextual analysis* (2010) 54.

<sup>282</sup> Brown, n 77 above.

<sup>283</sup> The House of Traditional Leaders for example called upon the ruling African National Congress party to remove constitutional protection for LGBT people. See 'Stop protecting gays: Traditional leaders tell the ANC' *City Press* 5 May 2012 <http://www.citypress.co.za/news/stop-protecting-gays-traditional-leaders-tell-anc-20120505/> (accessed 7 July 2018).

<sup>284</sup> Varney, n 83 above.



marriages were introduced in that Constitution<sup>285</sup> indicating that the majority were against recognition and protection of LGB persons, which have been argued to exist,<sup>286</sup> and which have indeed been vindicated by courts in the *Eric Gitari* case and the *COL* Appeal. Therefore, protections of LGB persons, which are largely derived, may not be seen as legitimate interpretations of the Constitution. This corresponds with the relatively lower levels of social change as regards LGB persons.

For Uganda, the making of the 1995 Constitution involved different groups of people and representatives.<sup>287</sup> However, some of the matters included were never agreed upon by all at the time, reflecting an absence of real consensus.<sup>288</sup> On the issue of LGB protections, this was not expressly anticipated as seen from a later amendment prohibiting same-sex marriages,<sup>289</sup> and laws excluding LGB persons from legal protection.<sup>290</sup> Therefore it is more likely that protections by the judiciary based on the constitution would be regarded more as illegitimate, something shown by the most recent High Court decisions criticising earlier decisions that vindicated the rights of LGB persons. This also corresponds with the limited social change.

Finally, Botswana's Constitution is one of those independence constitutions left by the departing colonialists, which were imposed on Africans without meaningful consultations.<sup>291</sup> It however somehow survived the widespread repudiation of such constitutions soon after independence, which brought in one party rule.<sup>292</sup> It thus continues to reflect the restrictive approaches of those times,<sup>293</sup> however, it is at the same time lauded

<sup>285</sup> Article 45(2) of the 2010 Constitution provides for marriages only between adult persons of the opposite sex, which was not the case before, when marriage was undefined.

<sup>286</sup> See for example M Mutua 'Why Kenya's new Constitution protects gays' *Daily Nation* 11 December, 2010.

<sup>287</sup> HBJ Odoki 'The challenges of Constitution-making and implementation in Uganda' Paper read at International Conference on Constitutionalism in Africa, at International Conference Center, Kampala, Uganda (1999).

<sup>288</sup> See for example '1995 Constitution wasn't built on consensus' *Uganda Media Centre* 26 September 2017 <http://www.mediacentre.go.ug/opinion/1995-constitution-wasn%E2%80%99t-built-consensus> (accessed 26 May 2018).

<sup>289</sup> See JD Mujuzi 'The absolute prohibition of same-sex marriages in Uganda' (2009) 23 *International Journal of Law, Policy and the Family* 278, 282-283.

<sup>290</sup> Section 15(6)(d) of the Equal Opportunities Commission Act, which excluded groups regarded as immoral and socially unacceptable from accessing the equal opportunities Commission.

<sup>291</sup> For a deep discussion of what the features and aims of these constitutions were see CM Fombad 'The evolution of modern African constitutions: A retrospective perspective' in CM Fombad (ed) *Separation of powers in African constitutionalism* (2016) 15-18.

<sup>292</sup> CM Fombad 'Some perspectives on durability and change under modern African constitutions' (2013) 11:2 *International Journal of Constitutional Law* 382, 389.

<sup>293</sup> BR Dinokopila 'The justiciability of socio-economic rights in Botswana' (2013) 57:1 *Journal of African Law* 108, 110.

for having supported one of Africa's most developed democracies,<sup>294</sup> gaining a high level of legitimacy from that, and it has been variously amended to reflect what the people supposedly wanted.<sup>295</sup> The Constitution has recently been used to vindicate LGB rights in the *LEBABIBO Registration* case, something the government and churches opposed. Nevertheless, there have been no amendments to it to make such protection difficult, or reversal of court decisions to that effect, or even public demonstrations against the courts, or refusal to implement the decision. This shows a high level of legitimacy for the constitutional protection of LGB rights in Botswana's Constitution, which, surprisingly, has only been derived in recent years. This explains the higher levels of social change compared to countries like Uganda.

Although the different constitutions enjoy high levels of legitimacy generally, on the issue of LGB rights, it is almost unanimous among all the selected countries that they are seen as illegitimate. This reduces the levels of legitimacy of constitutional protections of LGB rights. Nevertheless, in countries where the process of constitution-making involved various voices and stakeholders (South Africa and Kenya) the levels of legitimacy are higher than in those where the process involved fewer role-players and citizenry (Uganda and Botswana), showing that such protections are considered as part of the process, perhaps part of the price to pay for other protections.

A comparison with countries outside Africa shows the same situation as discussed below:

Belize is a legally pluralistic country, with customary laws of groups such as the Mayans existing alongside English Common Law as well as the Constitution.<sup>296</sup> It still has its independence constitution, which was largely imposed upon the country, although Belizeans have been able to amend it.<sup>297</sup> The Constitution has also been used as a basis to affirm LGB rights in the *Caleb Orozco* case. However, the extent of opposition in the case and outside court, as well as the government's partial appeal indicate that the protections as interpreted by the court are not fully accepted. Constitutional legitimacy of the protections are generally hinged on one court decision and more open constitutional provisions. The

<sup>294</sup> Above, 390.

<sup>295</sup> The Constitution of Botswana has been amended a number of times with the Constitution (Amendment) Act, 2005 - Act No. 9 of 2005, being the latest amendment.

<sup>296</sup> *Aurelio Cal et al. v Attorney General of Belize* Supreme Court of Belize (Claims No. 171 and 172 of 2007) (18 Oct 2007) and *Maya indigenous community of the Toledo District v Belize*, Case 12.053, Report No. 40/04, Inter-Am. CHR OEA/Ser L/V/II 122 Doc 5 rev 1 at 727 (2004).

<sup>297</sup> The Constitution has been amended many times, through Belize Constitutional Amendment Acts 14 of 1985; 26 of 1988; 42 of 1999; 2 of 2001; 39 of 2001; 23 of 2005; 13 of 2008; and 4 of 2010.

extent of legitimacy also rhymes with the level of social change in favour of LGB persons, which is not great but nevertheless positive. For Canada, the Canadian Charter on Rights and Freedoms (Canadian Charter) is seen as legally legitimate as it was home grown. However, it initially did not expressly protect LGB rights, and these were only read in by the courts. However, the high legitimacy of the courts themselves and the belief in their capacity to interpret the Charter as well as the long period over which it has been interpreted, with very limited opposition at the moment, shows that the protection is more or less accepted. Similarly, in the USA, LGB rights were not initially included in the Constitution but have been vindicated and included through a long court struggle. Again the legitimacy of the Supreme Court and people's faith in it and its decisions has ensured that the protections are accepted, albeit with much more resistance to date than in Canada. Within the context of the USA, Prof Paul Smith opines that the court is largely seen as legitimate because it is the structure that by and large holds together a country of immigrants that is founded on ideals rather than clans or tribes.<sup>298</sup> Finally, Nepal underwent a revolution and a highly contested constitution-making process. Nevertheless, constitutional protections for LGB persons were expressly included in the new Constitution, following a court decision. This implies a high level of legitimacy of the changes, but the refusal to recognise same-sex marriages as well as the continued violence show that not all are fully agreed about the legitimacy of the protections. This corresponds with the not so high levels of social change.

Therefore it is clear that there is a direct and positive relationship between the legitimacy of constitutional protections of LGB rights, and the ability of LGB SL to spur social change. As such, LGB SL is more likely to spur social change in situations where constitutional protections of LGB rights are seen as legitimate.

*f) The institutional legitimacy of the judiciary among the population*

When the population sees the judiciary as legitimate, then the decisions it makes will be seen as legitimate and therefore they will be enforced. Such processes eventually lead to social acceptance and social change, and the inverse is also true. The proposition here is based on the fact that the general population, which is the main constituency that the courts serve, does not see the courts as legitimate. For the judiciary to be viewed as legitimate, it should be established in line with people's own expectations. The courts themselves have to be seen as protectors of the people, rather than furthering the interests of states that may not care about their citizens. This is the 'legitimacy theory,' which is to the effect that courts can only

<sup>298</sup> Interview with Prof. Paul Smith, Washington DC, 2 August 2018.

be effective if they are seen as legitimate by those they serve.<sup>299</sup> Legitimacy extends to the idea of courts being respected by the general public, and the other state organs. Legitimacy is something that is both exogenous and endogenous to the courts. Legitimacy ensures that court decisions are respected even if the majority sees the decisions as wrong.<sup>300</sup> The exogenous factors mainly have to do with how the courts were established, whether imposed upon people or put in place by the people themselves. Where a judicial system was superimposed through colonialism or apartheid and as such the courts are largely seen as part of the machinery of oppression,<sup>301</sup> then it would take a lot for the courts to prove themselves as being on the side of the people. Institutional legitimacy is earned rather than existing as a matter of right. How the courts continue to behave is important. India is a good example. When the courts started serving the interests of former premier Indira Gandhi, they lost their legitimacy in the eyes of the people and only picked it up later after PIL had become popular in India through the courts' own efforts.<sup>302</sup>

For the selected Common Law African countries, this proposition is supported by the information from different countries as follows:

All the judiciaries have their origins in colonialism, and as such were impositions that served the purposes of the colonialists rather than protecting the rights of the indigenous populations. In South Africa, after a period of the courts being complicit in apartheid, the Constitutional Court was established which restored legitimacy of the judiciary. Initially the Constitutional Court had very little institutional legitimacy, which led to backlash against its more controversial decisions especially on the death penalty.<sup>303</sup> The Court nevertheless continued to grow in terms of institutional legitimacy.<sup>304</sup> As a result even its most controversial decisions such as that on same-sex marriage have been respected and enforced. Over time the Constitutional Court has gained increased respect in the country, as

<sup>299</sup> See TR Tyler 'Psychological perspectives on legitimacy and legitimation' (2006) 57 *Annual Review of Psychology* 375 – 400.

<sup>300</sup> JL Gibson 'Reassessing the institutional legitimacy of the South African Constitutional Court: new evidence, revised theory' (2016) 43:1 *Politikon* 53-54.

<sup>301</sup> Oloka-Onyango (n 6 above) 26-34.

<sup>302</sup> See generally A Bhuwania 'Courting the people: The rise of public interest litigation in post emergency India' (2014) 34 *Comparative Studies of South Asia, Africa and the Middle East* 314-335; and V Gauri 'Public interest litigation in India: overachieving or underachieving' *Policy Research Working Paper* 5109 (2009) 2.

<sup>303</sup> JL Gibson & GA Caldeira 'Defenders of democracy? Legitimacy, popular acceptance, and the South African Constitutional Court' (2006) 65 *The Journal of Politics* 1.

<sup>304</sup> JL Gibson 'The evolving legitimacy of the South African Constitutional Court in justice and reconciliation' in F du Bois & A du Bois-Pedain (eds) *Post-Apartheid South Africa* (2008) 229.

it has largely remained independent.<sup>305</sup> This legitimacy is also reflected in the largely progressive level of social change.

In Botswana, the courts started out as illegitimate colonial institutions.<sup>306</sup> With time they have gained the respect of the people as they have maintained their independence despite executive interference. Also, this independence has largely seen increased social change for LGB persons. In Kenya, after a period of executive domination of the courts, the courts are regaining their legitimacy and have been able to make many decisions against the state on sensitive political issues, including being the only judiciary to nullify a presidential election in recent times.<sup>307</sup> Again, increasingly the courts have made LGB friendly decisions and the increasing social acceptance of LGB persons can be partly attributed to this factor.

Finally in Uganda, after a long period of domination by the executive, the courts had started to make independent decisions and began to appear like the bastion of rights they are supposed to be.<sup>308</sup> In more recent times however, the executive has once again eroded their legitimacy by seeking to appoint cadres of the ruling party as judges<sup>309</sup> and illegally extending the tenure of the former Chief Justice.<sup>310</sup> The continued re-arresting of accused persons released on bail within court premises with only feeble protests from the judiciary reflects on a greatly weakened legitimacy. Regarding LGB rights, the courts initially ruled in favour of LGB persons even if they tried as much as possible to show that the decisions had nothing to do with homosexuality.<sup>311</sup> The level of legitimacy of the judiciary may explain the slow process of social change. Of recent, the decisions are more negative and less

<sup>305</sup> J Widner 'Building judicial independence in Common Law Africa' in A Schedler, L Diamond & M Plattner (eds) *The self-restraining state: power and accountability in new democracies* (1999).

<sup>306</sup> Mackenzie for example refers to the Tswana people regarding the courts and other legal artefacts that the English used to establish colonialism as a way of war. See J Mackenzie 'Austral Africa: Losing it or ruling it' (1887) cited in JL Comaroff 'Colonialism, culture, and the law: A foreword' (2001) 26:2 *Law & Social Inquiry* 305.

<sup>307</sup> 'Kenya court sets world record' *The New Vision* 1 September 2017.

<sup>308</sup> For a history of the erosion of judicial independence in Uganda prior to 1995 see J Oloka-Onyango, 'Judicial power and constitutionalism in Uganda' in J Oloka-Onyango & M Mamdani (eds) *Studies in living conditions, popular movements and constitutionalism* (1994) 463.

<sup>309</sup> One such judge was former Deputy Chief Justice, Steven Kavuma, a long time ruling party supporter, whose decisions on the bench usually were suspiciously in favour of the ruling party. See for example The Spear team 'Political judge Steven Kavuma, a disgrace to justice' *The Spear* 25 February 2017. <http://thespearnews.com/2017/02/25/political-judge-steven-kavuma-disgrace-justice/> (accessed 16 January 2017).

<sup>310</sup> The President extended the tenure of former Chief Justice Benjamin Odoki by two years, and this action was declared illegal by the Constitutional Court in *Hon. Gerald Kafureeka Karuhanga v Attorney General* Constitutional Petition No. 0039 of 2013.

<sup>311</sup> See *Victor Mukasa* case (n 197 above) and *Rollingstone* case (n 197 above).

protective<sup>312</sup> and this seems to reflect the general political hostility against LGB rights in the country. The decisions that come out of the courts, even when in favour of LGB rights, are regarded as illegitimate by the state and are not enforced.

The judiciary in Belize is also a remnant from the colonial times, and until recently appeals from the Supreme Court of Belize went to the Judicial Committee of the Privy Council in London, a hang-on from colonial times.<sup>313</sup> The judiciary in Belize is currently headed by a non-citizen Chief Justice which brings the court's own legitimacy into question.<sup>314</sup> The same Chief Justice made the decision on the decriminalisation of consensual same-sex relations. However, the judiciary is largely respected.

In the case of Nepal, the Supreme Court is a powerful institution, with wide powers to nullify statutes and interpret the Constitution, which power was borne out of a political compromise.<sup>315</sup> Therefore it is largely seen as a better option to decide political matters rather than leaving them to political parties, something that gives it legitimacy. Such understanding explains why the court decision on LGB issues was largely respected and enforced. The slow social change is therefore largely due to other factors rather than judicial legitimacy. In Canada and the USA on the other hand, the supreme courts of both countries are legitimate bodies that are respected by most people,<sup>316</sup> and their decisions are usually respected and enforced. According to Prof. Paul Smith, since the USA was not founded on tribes but rather on ideals, the judiciary remains an important unifying ideal.<sup>317</sup> The levels of legitimacy of the highest courts explain the difference between Belize and Nepal on the one hand and the USA and Canada on the other as regards social change in favour of LGB persons.

<sup>312</sup> For example the *Lokodo* case (n 198 above) and *Prof. J Oloka-Onyango & 9 Others v Attorney General* Constitutional Petition No. 008 of 2014 Constitutional Court of Uganda (the AHA case) which did not consider the human rights issues raised.

<sup>313</sup> Belize replaced appeals to the Privy Council with appeals to the Caribbean Court of Justice in its recent amendment to its 1981 Constitution. See Belize Constitution (Seventh Amendment) Act, 2009.

<sup>314</sup> The current Chief Justice of Belize is Kenneth Andrew Charles Benjamin, a dual citizen of Guyana and Antigua and Barbuda. Use of foreign commonwealth judges as chief justices in other countries was common in the years following the gaining of independence by colonised states.

<sup>315</sup> R Stith 'Unconstitutional constitutional amendments: The extraordinary power of Nepal's Supreme Court' (1996) 11:1 *American University International Law Review* 47, 55.

<sup>316</sup> For USA Supreme Court and its source of legitimacy see generally OR Bassok 'The Supreme Court's new source of legitimacy' (2013) 16:1 *Pennsylvania University Journal of Constitutional Law* 153. For the source of legitimacy of the Canadian Supreme Court, see V Radmilovic 'Strategic legitimacy cultivation at the Supreme Court of Canada: Quebec secession reference and beyond' (2010) 43:4 *Canadian Journal of Political Science* 843.

<sup>317</sup> Interview with Prof. Paul Smith, n 298 above.



In conclusion, legitimacy of the court is an important factor determining whether social change would happen as a result of LGB SL. As such, one of the conditions that contribute to LGB SL increasing the rate of social change is the institutional legitimacy of the courts.

*g) The existence of alternative avenues of dispute resolution within the context of legal pluralism*

Whereas the formal judiciary is what is usually recognised as the main avenue for resolving disputes, situations of legal pluralism by their very nature create alternative ways of resolving disputes. Legal pluralism recognises different legal norms, and therefore different mechanisms of resolution of disputes. Where the other justice mechanisms are equally respected as the courts, or even more respected, then the courts simply become one of the avenues through which disputes can be resolved, and usually the less preferable avenue. This implies that LGB activists have to be able to work with the alternative ways of dispute resolution too, even as they work with the formal judiciary.

The different Common Law Africa case study countries fare as follows as regard the existence of alternative justice mechanisms:

In Botswana, the Constitution recognises traditional institutions and establishes a *Ntlo ya Dikgosi* - House of Chiefs - which is an advisory body to the upper house of parliament.<sup>318</sup> The Chieftainship Act<sup>319</sup> recognises chiefs and their authority within the areas that they control, subject to the central government's authority.<sup>320</sup> Botswana goes ahead and formally recognises traditional courts. These courts are an important component of the justice system,<sup>321</sup> handling many disputes including criminal matters,<sup>322</sup> and indeed handle more cases than magistrates courts.<sup>323</sup> The courts' powers are laid out in the Customary Courts Act, 1969,<sup>324</sup> and as such the courts are subjected to statutory regulation and therefore do not exactly operate the way they would have operated traditionally. Their jurisdiction is as

<sup>318</sup> Sections 77-85 of the Constitution of the Republic of Botswana, 1966.

<sup>319</sup> Cap 41:01

<sup>320</sup> For a detailed discussion on how this system works see, KC Sharma 'Role of traditional structures in local governance for local development: the case of Botswana' Community Empowerment and Social Inclusion Program (CESI), World Bank Institute <https://europa.eu/capacity4dev/file/8471/download?token=om9Pghuq> (accessed 22 August 2018).

<sup>321</sup> S Roberts 'The survival of the traditional Tswana courts in the national legal system of Botswana' (1972) *Journal of African Law* 103.

<sup>322</sup> DG Koko 'Fair trial and the customary courts in Botswana: Questions on legal representation' (2000) 11 *Criminal Law Forum* 455-456.

<sup>323</sup> CM Fombad 'Customary courts and traditional justice in Botswana: Present challenges and future perspectives' (2004) 15 *Stellenbosch Law Review* 166, 181.

<sup>324</sup> Cap 04:04.

provided for in their mandate documents, but they handle both civil and criminal matters.<sup>325</sup> Appeals lie from these courts to the High Court.<sup>326</sup> The traditional courts are thus formally part of the justice system, and not an alternative. However, even then, recognition of these forums ensures that they operate and they sometimes do operate out of the set rules. For the other three countries, the judiciary also administers customary law, and traditional dispute resolution mechanisms are not formally regulated. Nevertheless, they are recognised. For Kenya, article 159(2)(c) of the Constitution enjoins the courts to promote alternative forms of dispute resolution including traditional mechanisms. However, article 159(3) requires that such mechanisms should not contravene the Bill of Rights; be repugnant to justice and morality, or be inconsistent with the Constitution or any written law. Indeed these justice mechanisms are in use in Kenya, and Chopra identified that many persons in the Northern parts of Kenya choose these mechanisms over the formal judiciary, as they understand them well, and they are in line with their views on what constitutes a crime.<sup>327</sup> For South Africa, section 211(1) of the Constitution, 1997 recognises traditional institutions, but traditional courts have not yet been recognised, although there is currently a firm proposal to do so pending before Parliament.<sup>328</sup> Nevertheless, traditional justice mechanisms are used.<sup>329</sup> Similarly, in Uganda, the Constitution recognises traditional institutions in article 246. Part of the traditional institutions recognised are traditional conflict resolutions mechanisms, which may not necessarily be through courts. These continue to be used in different parts of Uganda.<sup>330</sup> All the three countries therefore have alternative means of conflict resolution that are loosely regulated and are not part of the formal judiciary. Many of these mechanisms are both respected and understood by the people, and they are more geared towards reconciliation than punishment – mainly centring around mediation, reconciliation and diplomacy.<sup>331</sup>

For the selected countries outside of Common Law Africa, the situation is as follows:

<sup>325</sup> Above, sections 11, 12, and 13.

<sup>326</sup> Above, section 42(3).

<sup>327</sup> T Chopra 'Peace vs Justice in Northern Kenya: Dialectics of state and community laws' in JC Ghai & Y Ghai (eds) *Marginalised communities and access to Justice* (2010) 185, 190 -193

<sup>328</sup> Traditional Courts Bill B1-2017.

<sup>329</sup> For a detailed discussion of the use of these traditional mechanisms in South Africa, see for example R Choudree 'Traditions of conflict resolution in South Africa' 24 Apr 1999 <http://www.accord.org.za/ajcr-issues/traditions-of-conflict-resolution-in-south-africa/> (accessed 20 August 2018).

<sup>330</sup> Perhaps the most famous of the Ugandan conflict resolution mechanisms is 'mato oput' among the Acholi of Northern Uganda which focuses on cleansing. See for example J Wasonga 'Rediscovering Mato Oput: The Acholi justice system and the conflict in Northern Uganda' (2009) 2:1 *Africa Peace and Conflict Journal* 17-26.

<sup>331</sup> See Ben-Mensah, F 'Indigenous approaches to conflict resolution in Africa' in World Bank (ed) *Indigenous knowledge: Local pathways to global development* 39-44.

Only Nepal, formally recognises customs as protected, and makes it an objective of the state to protect against discrimination, exploitation and injustice based on among other issues, custom.<sup>332</sup> Article 29 recognises the right to freedom from exploitation including on the basis of custom.<sup>333</sup> Article 127 allows for alternative means of dispute resolution.<sup>334</sup> Article 50(k) calls for policies that provide for alternative means of dispute resolution. For Belize, Canada and the USA, there is no discussion of traditions or customs in their constitutions. Also one judicial system applies in all the three countries. However, all these countries have minority groups that have their own system of dispute resolution and although nothing is said about them, they do exist.

Therefore, from the above, where other viable and respected avenues of dispute resolution besides the courts and other formally regulated systems exist such as in Nepal, LGB SL is less likely to spur social change. This is because the judiciary is not the only legitimate avenue for resolving issues, and as such its decisions may not be respected. In countries where the judiciary and other formal systems operate, the opposite is also correct.

#### *h) Legal culture*

Legal culture refers to the particular way in which the legal system is organised in a country, how much the law is respected generally, how lawyers behave and react, how judges are appointed and respected, the training of lawyers and how society perceives the law and the legal system generally.<sup>335</sup> Legal culture determines whether the law is an important tool in society. Different countries therefore have different legal cultures even though they may all subscribe to one major system of law such as the Common Law system. Generally, the more a country attaches importance to litigation as a way of developing disputes, the faster LGB SL will lead to social change.

In terms of legal culture, the selected Common Law African countries fare as follows:

South Africa leads in terms of respecting the laws and processes. This is something that comes from years of apartheid where legal formalism was used to oppress people.<sup>336</sup> Since the dawning of democracy, South Africa has embraced the use of litigation to ensure

<sup>332</sup> Constitution of Nepal, article 50(2) and 51(c).

<sup>333</sup> Above, article 29(2).

<sup>334</sup> Article 127(2).

<sup>335</sup> See for example D Nelkin 'Using the concept of legal culture' (2004) 29 *Australian Journal of Legal Philosophy* 1.

<sup>336</sup> Klare, n 79 above, 170.

transformation.<sup>337</sup> For this reason, lawyers, judges and even the state are committed to make the law, and particularly the Constitution, work. This is followed by Botswana since the country largely respects its Constitution, which has been in place since 1963, and largely respects the legal profession. Kenya follows since the law is respected in an increasing measure since the adoption of the 2010 Constitution.<sup>338</sup> In Uganda, people barely respect the formal legal system and its decisions, being more attuned to the traditional justice mechanisms.<sup>339</sup> The same applies to Kenya.<sup>340</sup> The judiciary plays a limited role in peoples' day-to-day lives. It is therefore not surprising that even the level of social change rhymes with the level of respect for the law.

The situation is replicated for the selected countries outside Common Law Africa:

The USA has much respect for the formal law and the courts enforce this. It is also largely a litigious country, with most people choosing to take their disputes before the courts of law.<sup>341</sup> The Constitution is largely respected. It is followed in this respect by Canada, where the Canadian Charter on Rights and Freedoms is also much respected<sup>342</sup> and people regularly resort to the formal justice mechanisms for resolution of disputes.<sup>343</sup> In Belize and Nepal, whereas the law is important, there are a number of other factors and avenues through which justice is accessed. This is still in line with the assertion that the more a country respects its formal legal system and uses it, the more it is that LGB SL is likely to create impact and eventually stimulate social change.

Therefore, one of the conditions necessary for LGB SL to stimulate social change is the existence of a legal culture that respects the formal laws, in terms of its application, enforcement and binding force.

<sup>337</sup> Above, generally.

<sup>338</sup> See for example Ghai & Ghai (n 81 above) 57.

<sup>339</sup> For the case of Northern Uganda, and within the context of transitional justice, see generally D Zartner 'The culture of law: Understanding the influence of legal tradition on transitional justice in post-conflict societies' (2012) 22 *Indiana International & Comparative Law Review* 297.

<sup>340</sup> For the case of Northern Kenya, see Chopra, n 327 above.

<sup>341</sup> According to C Wollschlager, the US is among the top five most litigious countries in the world. See C Wollschlager 'Exploring global landscapes of litigation rates' in J Brand and D Stempel (eds) *Soziologie des rechts: Festschrift für Erhard Blankenburg zum 60* (1998) 587-88.

<sup>342</sup> See generally, J Gundel 'Effects of judicial review on Canadian judicial culture' (2000) 7 *South Western Journal of Law and Trade in the Americas* 157.

<sup>343</sup> See for example S Dykstra 'The view from up North: Who's more litigious, Canada or the United States?' 10 June 2015 <https://abovethelaw.com/2015/06/the-view-from-up-north-whos-more-litigious-canada-or-the-united-states/> (accessed 2 July 2015).

Overall, since SL is primarily a legal matter, legal factors are critical as to its success, both in terms of successful cases, but also in terms of its ability to mobilise allies and elites. Of these factors, the most important one is the state of judicial independence. Only countries that truly exercise judicial independence have been able to have important decisions made by their courts and respected by the executive and legislature. Canada leads in this regard, followed by the USA, and then South Africa, and Botswana. Countries where judicial independence still faces major challenges such as Kenya, and Uganda also still lag behind in terms of social change, while countries such as Belize and Nepal, where judicial independence is taking root have been able to make more progress. All the other legal factors can be said to be sub-factors. However well written a constitution is, if it cannot be enforced in court then it is not worth much. It also does not matter whether a country adheres to international standards, or has a legal culture that respects judgments, if the judiciary is not functional and independent.

### 5.3.3 Transnational factors

Another important set of factors goes to what is happening internationally with regard to LGB rights. These are the transnational factors, namely: the extent to which a country is affected by numerous decisions of international bodies on LGB rights; and the extent to which the country is affected by developments in other countries as well as the foreign policy of other countries as regards LGB rights. These are discussed below:

*a) The extent to which a country is affected by numerous decisions of international bodies on LGB rights*

Where a country is subjected to many different international political decisions in favour of LGB rights, LGB SL is more likely to spur social change than in countries subjected to only a limited number of such decisions. After the Second World War, the world has increasingly moved towards international cooperation and coordination. This is done largely through the United Nations at the global level and through regional and sub-regional bodies at those levels. These bodies deal with human rights issues and make decisions, resolutions and take other political actions that affect individual states. States that depart from what has been agreed are seen as pariah states and may sometimes be subjected to sanctions. This fear of

being shamed in the eyes of the international community forces countries to align with what has been collectively decided in these bodies.<sup>344</sup>

At the global level, the UN General Assembly, which is made up of all the heads of state and government of all the member states, meet and make resolutions. Indeed, a number of such resolutions have been made on LGB rights. Decisions are usually made by majority vote. Increasingly consensus is moving towards the protection of LGB rights. So far, the UN General Assembly has adopted seven resolutions that expressly include protections based on sexual orientation.<sup>345</sup> Similarly, at the UN Human Rights Council, three resolutions have been adopted on the issue.<sup>346</sup> The African group<sup>347</sup> at the UN usually does not vote in favour of LGB resolutions. Nevertheless, African countries are also bound by the resolutions made by the African Commission on Human and Peoples' Rights, including the resolution on violence against LGB persons,<sup>348</sup> as well as decisions of the Summit and the other organs of the African Union. The African Commission eventually granted observer status to the Coalition of African Lesbians (CAL)<sup>349</sup> after initially refusing to do so.<sup>350</sup> However, the African Union's Executive Committee ordered the African Commission to reverse its

<sup>344</sup> D Cassell 'Does international human rights law make a difference?' (2001) 2:1 *Chicago Journal of International Law* 129; S Gopalan & R Fuller 'Enforcing international law: States, IOs, and courts as shaming reference groups' (2014) 39:1 *Brooklyn Journal of International Law* 74

<sup>345</sup> These are all resolutions on extrajudicial, summary or arbitrary executions. These are resolutions: A/RES/69/182; A/RES/67/168; A/RES/65/208; A/RES/63/182; A/RES/61/173; A/RES/59/197 and A/RES/57/214. These are all

<http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBTUNResolutions.aspx> (accessed 5 June 2018).

<sup>346</sup> These are: Protection against violence and discrimination based on sexual orientation and gender identity (adopted 30 June 2016) - A/HRC/RES/32/2; Human rights, sexual orientation and gender identity (adopted 17 June 2011) - A/HRC/RES/17/19; and Human rights, sexual orientation and gender identity (adopted 26 September 2014) - A/HRC/RES/27/32. These are all available at

<http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBTUNResolutions.aspx> (accessed 5 June 2018).

<sup>347</sup> The African group is one of the UN regional groupings and it is made up of all African states. See United Nations organisation: Department of General Assembly and Conference Management 'United Nations Regional Groups of Member States' <http://www.un.org/depts/DGACM/RegionalGroups.shtml> (accessed 5 June 2018).

<sup>348</sup> The African Commission on Human and Peoples' Rights 'Resolution on the protection against violence and other human rights violations against persons on the basis of their real or imputed sexual orientation or gender identity': Adopted at the African Commission on Human and Peoples' Rights (the African Commission) meeting at its 55<sup>th</sup> Ordinary Session held in Luanda, Angola, from 28 April to 12 May 2014

<http://www.achpr.org/sessions/55th/resolutions/275/> (accessed 5 June 2018). The other resolutions are: The resolution on the establishment of a committee on the protection of the rights of people living with HIV and those at risk, vulnerable to and affected by HIV, 26 May 2010 which includes men who have sex with men; the Draft guidelines and principles on economic, social and cultural rights in the African Charter on Human and Peoples' Rights, also includes sexual orientation and sexuality among the grounds upon which sexual harassment can amount to discrimination. For a full discussion of these see A Jjuuko 'The protection and promotion of LGBTI rights in the African regional human rights system: Challenges and opportunities' in S Namwase & A Jjuuko *Protecting the human rights of sexual minorities in contemporary Africa* (2017) 260.

<sup>349</sup> African Commission on Human and Peoples' Rights '38<sup>th</sup> Activity report of the African Commission on Human and Peoples' Rights' Para 14. [http://www.achpr.org/files/activity-reports/38/actrep38\\_2015\\_eng.pdf](http://www.achpr.org/files/activity-reports/38/actrep38_2015_eng.pdf)

<sup>350</sup> African Commission on Human and Peoples' Rights '28<sup>th</sup> activity report' para 33, EX.CL/600(XVII), 8



decision of granting observer status to CAL,<sup>351</sup> something that was the subject of a request for an advisory opinion before the African Court on Human and Peoples' Rights but which the Court refused to hear on jurisdictional grounds.<sup>352</sup> After the Executive Committee gave the African Commission the deadline of 31<sup>st</sup> December 2018 to withdraw CAL's observer status,<sup>353</sup> the Commission relented and revoked CAL's observer status by a letter dated 8 August 2018 and addressed to CAL.<sup>354</sup> This indicates a decline in protection of LGB persons at the African regional level. Belize, Canada, and the USA all belong to the Organisation of American States (OAS), which is largely in favour of protecting LGB rights,<sup>355</sup> and imposes further obligations. Only Nepal does not belong to a sub-regional grouping and therefore has no other international obligations in this regard.

Belonging to these international bodies implies that states have political obligations to respect and protect LGB rights. Even if a state decides not to respect these resolutions, it does so when it is aware of what the political position is. In the usual way that international law binds and makes states to obey it, such resolutions influence states to behave in line with their requirements.<sup>356</sup>

When tested among the selected Common Law African countries the proposition that the extent to which a country is affected by multiple commitments on LGB rights at different international bodies determines the extent to which LGB SL stimulates social change holds true as shown below:

<sup>351</sup> African Union decision on the thirty-eighth activity report of the African Commission on Human and Peoples' Rights, DOC.EX.CL/Dec 887 (XXVII).

<sup>352</sup> Request for advisory opinion by the Centre for Human Rights of the University of Pretoria and The Coalition of African Lesbians, Request No. 002 of 2015 (African Court on Human and Peoples' Rights).

<sup>353</sup> African Union 'Decision on the Report of the Joint Retreat of the Permanent Representatives Committee (PRC) and the African Commission on Human and Peoples' Rights (ACHPR)' *Executive Council Decisions*, Doc. EX.CL/1089 (XXXIII) I, EX.CL/Dec 1015(XXXIII), para8(vii), EX.CL/Dec.1008-1030(XXXIII), 33<sup>rd</sup> Ordinary Session 28-29 June 2018, Nouakchott, Mauritania (accessed 31 August 2018).

<sup>354</sup> See Coalition of African Lesbians 'Women and sexual minorities denied a seat at the table by the African Commission on Human and Peoples' Rights' <https://www.cal.org.za/2018/08/17/women-and-sexual-minorities-denied-a-seat-at-the-table-by-the-african-commission-on-human-and-peoples-rights/> (accessed 31 August 2018)

<sup>355</sup> The Inter-American Commission on Human Rights included focus on LGB persons within its strategic plan, and has a rapporteur on LGB and transgender and intersex persons' rights, which monitors how states fulfil, protect and respect these rights. For more details see Organisation of American States: Inter-American Commission on Human Rights 'Rights of lesbian, gay, bisexual, trans and intersex persons' <http://www.oas.org/en/iachr/lgtbi/> (accessed 5 June 2018).

<sup>356</sup> For an in-depth discussion on these reasons, see HH Koh 'Why do nations obey international law?' (1997) 106 *Yale Law Journal* 2599. Also see generally, TM Franck *Fairness in international law and institutions* (1995).

All four Common Law African countries are equally affected by international developments on LGB rights both at the UN and at the African Commission level in terms of commitments. However, South Africa has for long been a trailblazer for LGB rights internationally and therefore usually votes in favour of LGB rights, thus differing from the other three countries in that regard. The need to maintain its status as a trailblazer on LGB issues makes South Africa to live up to these political commitments. Botswana, Kenya and Uganda, almost always vote 'No' on all international resolutions involving LGB rights.<sup>357</sup> In this regard, they are affected less by the positive resolutions on LGB rights. The fact that South Africa set itself as an international trailblazer on LGB rights partly explains why almost all its court cases succeed and get implemented and lead to social change, while the others are still struggling to achieve this.

For the selected countries outside Common Law Africa, the proposition that multiple commitments on LGB rights at different international bodies affects the pace at which LGB SL stimulates social change in a country is still justified as follows:

Belize, Canada and the USA are all party to UN and OAS decisions. As such they have multiple commitments to fulfil in both systems. Nepal is only bound by UN commitments and it usually votes in favour of LGB protections. As such it does not have many such commitments. In all the countries surveyed, LGB SL has been able to spur social change although to different levels, and therefore other factors such as the nature of the political system and the legal system account more for the social change than the extent of multiple commitments at the international level.

Generally, one of the conditions necessary for LGB rights to stimulate social change is the presence of multiple commitments at different international levels concerning LGB rights.

*b) The extent to which a country is affected by developments in other countries regarding LGB rights*

The more a country is influenced by developments on LGB rights and the foreign policy of other countries, the easier it would be for LGB SL to lead to social change in that country. Different countries are affected differently by developments elsewhere. There are countries whose historical and economic connections to other countries ensure that they are affected by what happens elsewhere. For example, the golden age of LGB rights in the USA was

<sup>357</sup> See Chapter 4, section 4.2.2.

arguably from 2003 after the *Lawrence v Texas* case and up to 2017 with the end of the Obama presidency. Much was done to promote LGB rights within the USA and through its foreign policy practices elsewhere in the world. Pressure was put on countries to protect LGB rights through US foreign policy. Uganda, Nepal, Kenya and Belize were all affected by this position.

Countries get influenced in at least three different ways by developments in other countries as regards LGB rights. The first is by socialisation where countries relate to each other and to international organisations and are usually influenced by their positions, democracy promotion and aid conditions.<sup>358</sup> The second way is through 'policy diffusion,' which happens as a result of different countries influencing each other's policies as they belong to similar groups.<sup>359</sup> The third way is by 'Global Queering,' which is largely about the influence of popular culture depicting gays in other countries and finding its way into other countries, which also begin to identify with such a culture.<sup>360</sup> Court decisions as well as cultural changes in one country affect the others and this may spur both legal and social change in other countries that follow a similar culture.

Among the selected African Common Law countries, the proposition that the more a country is affected by developments in other countries on LGB rights, the more LGB SL stimulates social change in such a country, holds as follows:

South Africa and Uganda have been affected to a much greater extent by developments elsewhere than Botswana and Kenya. For South Africa, the struggle against apartheid was a struggle involving many different countries. Hence, the country was always alive to the need to set an example and not to disappoint, ensuring that LGB persons were also included. Uganda is also largely affected by international developments. Indeed, international pressure on Uganda from the time the Anti-Homosexuality Bill was tabled until it was nullified played an important role in how the passing and subsequent nullification of the law played out. The fact that it took such a popular law five years to be passed, and the fact that it was nullified soon after its adoption, definitely had a connection to international developments including the reaction of the USA to the tabling of the law

<sup>358</sup> See T Risse and K Sikkink 'The socialization of international human rights norms into domestic practices' in T Risse, SC Ropp & K Sikkink (eds) *The power of human rights* (1999).

<sup>359</sup> EM Rogers *Diffusion of innovations* (2003).

<sup>360</sup> PA Jackson 'Capitalism and global queering: National markets, parallels among sexual cultures, and multiple queer modernities' (2009) 15:3 *Gay and Lesbian Quarterly* 357-95.

and its signing.<sup>361</sup> Also important was the USA-Africa Summit that came immediately after the law was nullified.<sup>362</sup> Botswana and Kenya are also affected by international developments on LGB rights, but not to the same extent as South Africa and Uganda, which are more in the spotlight.

For countries outside Common Law Africa, the correlation is as follows:

For Canada and the USA, developments in England in particular with whom they both share important legal and political ties, and in Europe at large influenced how the courts decided the cases and the eventual legal change. One particular example is Justice Kennedy in the USA pointing out the fact that other countries had already decriminalised same-sex relations as a reason to also rule the same way.<sup>363</sup> Also, Canada's legalisation of same-sex marriages certainly influenced the USA to do the same, as their legal systems are similar and the countries are close to each other.<sup>364</sup> Social acceptance in Canada is already high and largely growing in the USA. Belize and Nepal have also been subjected to international attention, and the successful cases may also be reflecting these developments. Hence, all countries are affected by developments elsewhere almost to the same extent. However, they also all maintain a certain degree of indifference to international developments, attributable to the need to maintain state sovereignty. The difference in terms of social change can therefore be attributed more to other transnational factors such as developments in the international human rights regime than to this factor. Therefore, one of the conditions that can help to influence social change in cases of LGB SL is the country's state of being connected and influenced by other countries.

Transnational factors are therefore important in determining whether LGB SL succeeds in stimulating social change in favour of LGB persons. Countries do not exist in a vacuum and do influence each other. Since LGB rights have now become a matter of international

<sup>361</sup> The USA announced a series of sanctions following the signing into law of the Act. These went to withdrawal of military aid, stopping funding of anti-gay groups, and travel bans on key individuals who supported the bill. 'US punishes Uganda for anti-gay law: withdraws support to Police, UPDF and Health' Saturday Monitor 20 June 2014 <http://www.monitor.co.ug/News/National/-US-cancels-exercise-with-UPDF--withdraws-support-to-police/688334-2355208-k8qa0t/index.html> (accessed 9 September, 2017).

<sup>362</sup> 'Museveni behind gay law victory?' *The Observer* 4 August 2014 <http://en.africatime.com/ouganda/articles/museveni-behind-gay-law-victory> (accessed 9 September 2017).

<sup>363</sup> *Lawrence v Texas* n 93 above, 578-79.

<sup>364</sup> See CM Glass & N Kubasek 'The evolution of same-sex marriage in Canada: Lessons the U.S. can learn from their northern neighbor regarding same-sex marriage rights' (2008) 15 *Michigan Journal of Gender and Law* 143, 197-204.

significance, how a country responds to developments at the international and regional bodies, as well as in other countries, become very important.

#### 5.3.4 Economic factors

Marxist theory asserts that the economy forms the base of society, while everything else - including the law - forms part of the superstructure.<sup>365</sup> In this regard, economic factors play an important role in how the law operates and by extension, how the courts of law influence social change in particular societies. The economic factors discussed below are the economic set up and the levels of development in the particular country.

##### *a) The economic set-up of the country*

The economic set up of the country contributes to how fast LGB SL can lead to social change. There are two main economic systems in the world: capitalism and communitarianism. Capitalism is where the ownership of the means of production is in the hands of private individuals or entities, while communitarianism is where means of production are owned on a community basis, either by the state on behalf the people or by smaller communities on their own behalf. The more capitalistic a country is, the more likely for LGB SL to lead to social change; the opposite is also true for communitarian societies. Capitalism comes with a free market economy, which is tied to individualism.<sup>366</sup> At the basic level, human rights are individualistic in nature.<sup>367</sup> According to Prof. Charles Ngwena, to be able to pursue and achieve human rights, the society must be attuned to liberal, individualistic thinking.<sup>368</sup> Individualism as well as communitarianism affect the society right from the basic structure, which is the family, and these are the values that people hold dear, and which determine their world views.<sup>369</sup> One of the reasons why capitalism is related to LGB social change is

<sup>365</sup> See generally K Marx *Capital: A critical appraisal of political economy* [trans] D McLellan (1977) *Karl Marx: Selected writings* (1867).

<sup>366</sup> A Snitow, C Stansell, & S Thompson (eds) *Capitalism and gay identity from powers of desire: The politics of sexuality* (1983) 100. It should be noted that capitalism has been responsible for many human rights violations including those of LGB persons. For a discussion of capitalism and its contribution to human rights violations, see for example J Dine and A Fagan (eds) *Human rights and capitalism: A multidisciplinary perspective on globalization* (2006). For the link between capitalism and gay oppression see for example S Wolf 'The roots of gay oppression' (2004) 37 *International Socialist Review* [http://www.isreview.org/issues/37/gay\\_oppression.shtml](http://www.isreview.org/issues/37/gay_oppression.shtml) (accessed 30 May 2018). This study however is about the dominant economic ideology in a country and how that ideology helps to ensure respect for individual rights, including LGB rights.

<sup>367</sup> See for example generally M Freeman 'Are there collective human rights?' (1999) 43 *Political Studies* 25-40.

<sup>368</sup> Interview with Prof. Charles Ngwena, Pretoria, 27 February 2018.

<sup>369</sup> Above.

because capitalism allows LGB persons to be much more involved in the economy, implying that they will make a substantive contribution to the economy.<sup>370</sup>

For the selected Common Law African countries, the proposition applies as follows:

All the countries studied are capitalistic, but the extent to which capitalism is practised in each differs. According to the Africa Competitive Report 2017 South Africa and Botswana were the 61<sup>st</sup> and the 63<sup>rd</sup> most competitive economies in Africa in the world in the year 2017-2018.<sup>371</sup> However, despite being generally capitalistic countries, they both have aspects of communitarianism still prevalent in different parts of the countries.<sup>372</sup> It is therefore not surprising that both South Africa and Botswana have made progress in the protection of LGB rights through SL. The pockets of communitarianism are also still reflected in the violations that continue in both countries.

Kenya is also largely a capitalistic economy, but with pockets of communitarianism. Kenya was the 91<sup>st</sup> most competitive economy in Africa for the year 2017-2018. The lower levels of capitalism partly explain why LGB SL has been successful in recent times but also why social change in favour of LGB persons is not happening at a much faster rate. Uganda is generally a more communitarian society and in terms of competitiveness it comes in at Number 114 in the world. This also explains the slow pace of social change despite successful LGB SL.

For the selected countries outside Common Law Africa, the Table flows as follows:

The USA and Canada are largely capitalistic societies with only a few pockets of communitarianism within the areas occupied by indigenous communities. The USA is the second most competitive economy for the year 2017-2018,<sup>373</sup> while Canada is the 14<sup>th</sup>. Belize is a capitalistic society but also has strong communitarian aspects among the general population. It is not ranked in the World Competitiveness Report. Finally Nepal is more of a communitarian than capitalistic state, with socialism officially the economic ideology of the

<sup>370</sup> MVL Badgett et al 'The relationship between LGBT inclusion and economic development: An analysis of emerging economies' (2014) <http://williamsinstitute.law.ucla.edu/research/international/lgbt-incl-econ-devel-nov-2014> (accessed 30 may 2018).

<sup>371</sup> World Economic Forum 'The world competitiveness report 2017-2018', ix.

<sup>372</sup> Above, ix.

<sup>373</sup> World Economic Forum, n 371 above, ix.



state as enshrined in its Constitution.<sup>374</sup> It is the 88<sup>th</sup> most competitive economy,<sup>375</sup> which is slightly above Kenya. It is therefore not surprising that in such conditions, social change in favour of LGB persons is slower in Belize and Nepal than in Canada and the USA.

All other factors constant, the level of capitalism or communitarianism in a country become important factors in influencing social change where there is LGB SL. It is trite to note that one of the conditions that are likely to influence LGB SL to stimulate social change is a more capitalistic society.

*b) The level of economic development of the country*

Scholars such as Inglehart have forwarded the post materialistic thesis, which is to the effect that more economic development leads to more respect and recognition for human rights.<sup>376</sup> In his view, the changes brought about by economic development - increased standards of living, more education, specialisation and industrial development - cause people to move away from focusing on material wants to focusing on realisation of immaterial things such as rights and freedoms.<sup>377</sup> Economic development comes with a more exclusive and independent way of living that does not require one to rely so much on other members of the community for basic survival and approval. In less affluent societies however, one has to rely on others, in a more or less communitarian way and in this way, one's sexuality becomes an issue of concern to all. Everyone is affected by what the others do. A good way to illustrate this is by considering how a right such as the right to privacy operates in a setting of poverty. If due to poverty, families of more than five people are sleeping in one room, one cannot claim the right to privacy in their bedroom, if their bedroom is also the bedroom of other people, or their living room for that matter. Such a right can only be meaningful where housing is adequate and where people do not have to share private spaces. In such situations, what one does in the privacy of the bedroom certainly affects other persons. The links between poverty and sexuality have been examined before and the discourse is largely that being LGB contributes to one's vulnerability, affects one's education and ability to get employed, thus exacerbating poverty.<sup>378</sup> Inglehart & Baker used acceptance

<sup>374</sup> Constitution of the Republic of Nepal, article 4(1).

<sup>375</sup> Above.

<sup>376</sup> This is the postmaterialist thesis forwarded by Inglehart. See generally R Inglehart *The silent revolution: Political change among Western publics* (1977); R Inglehart & WE Baker 'Modernization, cultural change, and the persistence of traditional values' (2000) *American Sociological Review* 19-51; and R Inglehart & C Welzel *Modernization, cultural change, and democracy: The human development sequence* (2005).

<sup>377</sup> Inglehart & Baker, above.

<sup>378</sup> See for example S Jolly 'Poverty and sexuality: What are the connections? Overview and literature review' *Swedish International Development Corporation* (2010); P Oosterhoff et al 'Literature review on sexuality and

of homosexuality as one of the indicators to show more acceptance with increased economic development, and they found a positive correlation.<sup>379</sup> Indeed the Pew Research Centre found more LGB acceptance in more affluent countries as opposed to less affluent ones.<sup>380</sup> Ormsby also established a correlation between homophobia in Africa and the low levels of economic development.<sup>381</sup>

Another aspect of economic development that must be put into consideration is that economic development must affect not just a few people but the majority of the population, and so should the levels of education, and the specialisation, industrialisation, and the movement from agricultural-based economies to service-based economies.<sup>382</sup> Mere GDP increment, which does not affect the lives of the majority, such as the situation usually is in resource rich countries like Gabon, does not lead to the desired changes.<sup>383</sup> Another aspect to note is the extent of inequality in a country. Where the society is unequal economically, then high GDP levels will not necessarily mean that society is economically developed. Therefore, in such unequal societies, acceptance of LGB rights is generally likely to remain low despite the high economic growth.

South Africa is the most economically advanced among the countries studied. It is however also the most unequal society in the world,<sup>384</sup> with its economic development occurring in pockets and not benefitting the whole society.<sup>385</sup> The more economically advanced parts of the country,<sup>386</sup> where the society is also more individualistic, enjoy access to all the human

poverty' *IDS Evidence Report 55* (2014). For the case of the LGB community specifically in Africa, see P Haste and TK Gatete 'Law, sexuality, poverty and politics in Rwanda' *IDS Evidence Report 131* (2015).

<sup>379</sup> Inglehart & Baker (n 376 above) 24.

<sup>380</sup> See Pew Research Centre 'The global divide on homosexuality: Greater acceptance in more secular and affluent countries' (2013) 1-2, available <http://www.pewglobal.org/files/2013/06/Pew-Global-Attitudes-Homosexuality-Report-FINAL-JUNE-4-2013.pdf> (accessed 28 March 2018).

<sup>381</sup> See generally, A Ormsby 'Institutional and personal homophobia in Sub-Saharan Africa: A post-materialist explanation' Honours thesis, University of Colorado, 2015.

<sup>382</sup> See RB Marthisen 'A Postmaterialist explanation for homophobia in Africa: Multilevel analysis of attitudes towards homosexuals in 33 African countries' Master's thesis, Department of Comparative Politics, University of Bergen, 2018, 17-13.

<sup>383</sup> Above, 15-16.

<sup>384</sup> See X Greenwood 'South Africa is the most unequal country in the world and its poverty is the enduring legacy of apartheid' says World Bank' *The Independent* 4 April 2018 <https://www.independent.co.uk/news/world/africa/south-africa-unequal-country-poverty-legacy-apartheid-world-bank-a8288986.html> (accessed 30 May 2018).

<sup>385</sup> For a more detailed discussion of the South African economy, capitalism and inequality, see K Hart & V Padayachee 'A history of South African capitalism in national and global perspective' (2013) 81/82 *Transformation: Critical Perspectives on Southern Africa* 55.

<sup>386</sup> World Bank Southern Africa economist Victor Sulla was quoted as saying that 'if you take the top 10%, they live like in Austria. So it's a very high level even by European standards or even by U.S. standards.' See 'SA most unequal country in world: Poverty shows Apartheid's enduring legacy' *Sunday Times* 4 April 2018 <https://www.timeslive.co.za/news/south-africa/2018-04-04-poverty-shows-how-apartheid-legacy-endures-in-south-africa/> (accessed 5 June 2018).

rights, and this includes LGB persons.<sup>387</sup> The poorer areas<sup>388</sup> are also more communitarian and there are a number of additional challenges that stop people from realising their rights, including LGB persons. In some areas, LGB SL has been able to lead to social change, while in others such change has been slow, which explains why South Africa as a country has not yet achieved significant social change in favour of LGB persons.

Botswana is among the middle-income countries.<sup>389</sup> It however also remains one of the most unequal countries in the world.<sup>390</sup> The level of economic growth in the country shows why LGB SL has been more successful in recent times, but the inequality also shows why the change is not happening uniformly across the country for all persons. Kenya is also among the fastest developing countries in Africa, being the largest economy in East Africa and one of the fastest growing economies on the continent.<sup>391</sup> However, the country also underwent recession caused partly by the global depression and partly by political instability. Today, the economy is in recovery mode,<sup>392</sup> however, inequality remains high, undermining economic development.<sup>393</sup> The level of economic development in a country therefore explains why LGB SL has been successful in recent times but also why social change in favour of LGB persons is not happening at a much faster rate. Uganda is generally less developed compared to all the others, and its economy is slowing down.<sup>394</sup> This also explains the slow pace of social change despite successful LGB SL.

For the selected countries outside Common Law Africa, the situation is as follows:

The USA and Canada are more economically developed than Belize and Nepal, with the former being the world's largest economy,<sup>395</sup> and Canada the tenth.<sup>396</sup> The USA is also a

<sup>387</sup> Human Rights Watch 'We'll show you you're a woman: Violence and discrimination against black lesbians and transgender men in South Africa' (2011) <http://www.hrw.org/sites/default/files/reports/southafrica1211.pdf> (accessed 4 May 2018).

<sup>388</sup> Victor Sulla also described the very poor as follows 'The people at the bottom in South Africa, they get wages comparable to the people who live in Bangladesh. It's very, very poor.' See n 386 above.

<sup>389</sup> Botswana has been seen as an economic miracle, with high and consistent economic development rates and continues to rank among the most developed countries in Africa. See 'Botswana's Economic Miracle' *World News* 26 July 2017 <https://intpolicydigest.org/2017/07/26/botswana-s-economic-miracle/> (accessed 30 May 2018).

<sup>390</sup> Greenwood, n 384 above.

<sup>391</sup> The World Bank 'The World Bank in Kenya' 19 April 2018 <http://www.worldbank.org/en/country/kenya/overview> (accessed 30 May 2018).

<sup>392</sup> Above.

<sup>393</sup> For details of the inequality, see Oxfam International 'Kenya: extreme inequality in numbers' <https://www.oxfam.org/en/even-it/kenya-extreme-inequality-numbers> (accessed 30 May 2018).

<sup>394</sup> The World Bank 'The World Bank in Uganda' 12 October 2017. <http://www.worldbank.org/en/country/uganda/overview> (accessed 30 May 2018).

<sup>395</sup> World Economic Forum 'The world's biggest economies in 2018' 18 April 2018 <https://www.weforum.org/agenda/2018/04/the-worlds-biggest-economies-in-2018/> (accessed 30 May 2018).

relatively unequal society<sup>397</sup> being ranked the 59<sup>th</sup> most unequal society in the world by the World Bank.<sup>398</sup> Canada on the other hand is a relatively more equal society, being ranked in the 106<sup>th</sup> position by the World Bank.<sup>399</sup> This also explains why the level of social change is higher in these two countries compared to the others.

Nepal is a developing country with about a quarter of its population living below the poverty line.<sup>400</sup> It is, however, a more egalitarian society than the other sampled countries outside Common Law Africa, being the 116<sup>th</sup> in the world. Belize is a developing country with a small economy, and a high rate of inequality,<sup>401</sup> ranking as the 8<sup>th</sup> most unequal country in the world.<sup>402</sup> It is therefore not surprising that in such conditions, social change in favour of LGB persons is slower in Belize and Nepal than in Canada and the USA.

If all other factors remain constant, the level of economic development is an important factor in influencing social change where there is LGB SL. It is trite that one of the conditions for LGB SL leading to social change is a more economically advanced society. LGB equality largely coincides with more economic development.

*c) The economic status of LGB persons relative to the general population*

Another important economic factor is the economic status of LGB persons in a particular country relative to the rest of the population. The more affluent LGB persons are in a particular country, the more likely is LGB SL to lead to social change. In most countries, LGB persons are poor and marginalised, but in several of them, openly LGB persons have also become economically successful and have thus been able to develop an infrastructure of support and the political capital necessary for social change in favour of LGB persons. The financial independence of LGB persons allows them to support other members of the community and to contribute to charity, something that greatly builds and boosts their profile, and which leads to them being seen in a more positive light, thus leading to

<sup>396</sup> Above.

<sup>397</sup> See World Inequality Lab 'World inequality report 2018' 78-92.

M Abadi 'Income inequality is growing across the U.S. — Here's how bad it is in every state' Business Insider 21 March 2018 <http://time.com/money/5207987/income-inequality-every-state/> (accessed 30 May 2018).

<sup>398</sup> See Index Mundi 'GINI index (World Bank estimate) - Country ranking' <https://www.indexmundi.com/facts/indicators/SI.POV.GINI/rankings> (accessed 5 June 2018)

<sup>399</sup> As above.

<sup>400</sup> United States Central Intelligence Agency 'The world factbook: South Asia, Nepal' <https://www.cia.gov/Library/publications/the-world-factbook/geos/np.html> (accessed 30 May 2018).

<sup>401</sup> United States Central Intelligence Agency 'The world factbook, Central America and Caribbean: Belize' <https://www.cia.gov/Library/publications/the-world-factbook/geos/bh.html> (accessed 30 May 2018).

<sup>402</sup> Index Mundi, n 398 above.

increased acceptance. High economic status of LGB persons makes it easier for LGB SL to translate into social change as the groundwork had already been laid.

For the selected Common Law African countries, South Africa has a large number of influential and economically successful LGB persons.<sup>403</sup> Despite these conditions, not all gay persons have openly come out, thus reducing the available information on LGB wealth in the country. Such individuals were able to support the SL efforts and also to act as positive examples enabling LGB persons to be portrayed in a more positive light, thus contributing to both legal change and social acceptance. Kenya also has a few successful out LGB individuals. Botswana and Uganda have barely any. This absence of public economically successful LGB persons is reflected in the relatively lower levels of social change in favour of LGB persons as compared to South Africa.<sup>404</sup>

For the selected countries outside Common Law Africa, the proposition applies as follows:

There are relatively more visible economically successful LGB persons in Canada and the USA than in the other two study countries.<sup>405</sup> Belize and Nepal have very few successful openly LGB persons who stand out in these countries. There has been more LGB social change in Canada and the USA than in Belize and Nepal.

The data therefore shows a positive correlation between the level of economic development of LGB persons and the level of social change. It is clear that the existence of a sizeable number of economically successful LGB persons contributes to successful LGB litigation leading to social change.

The economy remains an important aspect in every country. The level of economic development as well as the economic system that a country adheres to, are all reflected in how people relate to each other in society. This makes these factors significant in determining how LGB SL leads to social change.

<sup>403</sup> For a list of some of the outstanding openly LGB persons in South Africa see Chapter 4 section 4.2.3 above.

<sup>404</sup> As above.

<sup>405</sup> For the US, seven out of the 1645 American billionaires listed by Forbes in the USA identify as part of the LGB or transgender community. See N Robehmed 'Meet the world's LGBT billionaires' 3 March 2014. <https://www.forbes.com/sites/natalierobehmed/2014/03/03/meet-the-worlds-lgbt-billionaires/#23d3c77e7e6c> (accessed 2 July 2018).

### 5.3.5 Social factors

How people relate to each other socially is a major determinant of how fast social change happens in favour of LGB persons. This is because social relationships and interactions largely drive social change as they influence behaviour and conduct. This section of the chapter deals with how social factors influence the stimulation of social change by LGB SL. These factors are: the extent of religious extremism in a country; the extent to which ‘traditional’ culture plays an important role in public settings; and the extent of importation and adoption of cultures from elsewhere. They are discussed below:

#### *a) The extent of conservative religious disposition in a country*

The extent to which a majority of the population in a country adheres to conservative religious views appears to contribute to the rate at which LGB SL contributes to social change in favour of LGB persons. Religious grounds are often cited as the main basis for opposition to LGB rights.<sup>406</sup> Religious conservatives usually actively oppose homosexuality, contending that it is against the tenets of the religions. Such opposition is not limited to Christianity but can also be found in Islam and Hinduism for the case of Nepal, as well as African traditional religions. In Africa, both Christianity and Islam, which are the dominant religions, are tempered with African traditional beliefs and customs, which is the main way in which these hitherto foreign religions have managed to maintain a stronghold.<sup>407</sup> As Mbiti posits, the African is innately religious and many things are largely seen in religious perspectives.<sup>408</sup> This leads to the overwhelming opposition to LGB rights on religious grounds. Religion is generally supportive of equality and non-discrimination, and has been relied on in some contexts to promote LGB equality.<sup>409</sup> This implies that it is a particular brand of religion that actually opposes LGB rights. Coley posits that such expressions of religious opposition is more about how much a religion focuses on ‘individual orientations’ as opposed to ‘communal orientations’.<sup>410</sup> The Pew Research Centre found that there was less acceptance of homosexuality in more religious countries than in the more secular

<sup>406</sup> For the USA, for example the Pew Research Centre found in 2003 that 80% of those who hold strong religious views oppose homosexuality far ahead of the national average, which was 50%. See Pew Research Centre ‘Republicans unified, Democrats split on gay marriage: Religious beliefs underpin opposition to homosexuality’ 18 November 2003. <http://assets.pewresearch.org/wp-content/uploads/sites/5/legacy-pdf/197.pdf> (accessed 2 July 2018).

<sup>407</sup> See generally L Sanneh ‘Translatability in Islam and Christianity in Africa: Global religious movements in regional context’ in TD Blakely et al (eds) *Religion in Africa: Experience and expression* (1994) 22-45.

<sup>408</sup> JS Mbiti *African religions and philosophy* (1969) 142.

<sup>409</sup> JS Coley ‘Reconciling religion and LGBT rights Christian universities, theological orientations, and LGBT inclusion’ (2017) 4:1 *Social Currents* 87.

<sup>410</sup> Above.



ones.<sup>411</sup> This implies that in more religious societies, LGB SL cases are more likely to create little impact than in more secular countries, and thus lead to less social change.

For the selected Common Law African countries, this proposition applies as follows:

All the selected Common Law African countries have Christianity as a dominant religion, and there are marked brands of ultra-conservative Christianity. However for South Africa, which has so far made the most progress in protecting LGB rights, there has been a departure from conservative Christian teachings, which are strongly against LGB rights, to more moderate teachings, which favour non-discrimination.<sup>412</sup> This is one of the lasting legacies of the struggle against apartheid. For Botswana, the government does not tolerate extremism that would amount to hate speech even against LGB persons. This was seen when an American evangelical who insulted an LGB activist on radio was deported from Botswana.<sup>413</sup> Such attitudes also help to explain the greater social change in South Africa and the relative social change in Botswana.

Kenya and Uganda are both hotbeds of conservative religious extremism, with evangelicals mainly from the USA continuing to fuel and spread anti-gay hatred.<sup>414</sup> In Uganda religious extremists went ahead to support and have the AHA passed. This level of extremism helps to explain why LGB social change in Kenya and Uganda is still relatively slower compared to the other countries, despite the victories in the courts of law.

For the selected countries outside Common Law Africa, the trends are as follows:

Many people in these countries are religious, with Canada, USA and Belize being secular but essentially based on Christian values, while Nepal is a Hindu majority country. In the first three countries, Christian teachings, beliefs and practices underlie the set up of the society.<sup>415</sup> For Canada and the USA however, the role of religion in public has greatly

<sup>411</sup> See Pew Research Centre 'The global divide on homosexuality: Greater acceptance in more secular and affluent countries' (2013) 3-4 <http://www.pewglobal.org/files/2013/06/Pew-Global-Attitudes-Homosexuality-Report-FINAL-JUNE-4-2013.pdf> (accessed 28 March 2018).

<sup>412</sup> For more discussion, see Chapter 4 section 4.2.3.

<sup>413</sup> 'American anti-gay pastor deported from Botswana for hate speech' *Africanews.com* 20 September 2016 'http://www.africanews.com/2016/09/20/american-anti-gay-pastor-deported-from-botswana-for-hate-speech/' (accessed 31 March 2018).

<sup>414</sup> See generally, KJ Kaoma 'Globalising the culture wars: US conservatives, African churches and homophobia' Political Research Associates (2009).

<sup>415</sup> All three countries were essentially established by protestant Christians from Britain. Specifically on how Christian values underlie the founding of the US, see for example MD Hall 'Did America have a Christian

diminished making it easier to separate the religious issues from the legal and political ones,<sup>416</sup> and to explain why there is a change towards more inclusion and acceptance even of LGB persons. However, the USA has more fundamentalist groups, which even export hate beyond their borders. Christianity still holds sway in Belize, with the majority of people identifying as Christian, and the Catholic Church being dominant, with 40% of the population adhering to the religion.<sup>417</sup> The religious groups have come out openly and strongly against LGB rights. Such actions help to explain why change is slow in favour of LGB persons even in cases of successful SL.

Although Nepal is formally secular, Hinduism, which is the religion of about 81.3% of the population, is a way of life.<sup>418</sup> The Constitution itself views secularism as a way of protecting 'religion, ... handed down from the time immemorial.'<sup>419</sup> Although Hinduism does not set out a position against homosexuality, the conservative beliefs remain in favour of heterosexual relationships and individuals. However, the difference between Nepal and the other countries is that Hinduism allows for recognition of difference, and traditionally persons who do not align with the set gender roles have been known to exist and are largely accepted, making it easier to accept LGB persons.<sup>420</sup> Again, the type of Hinduism largely practised in Nepal is not the extremist type, making people in Nepal to be less fundamentalist in their thinking. This limited conservatism may explain why it was easier for the Supreme Court to make a sweeping ruling calling for equality of LGB as well transgender and intersex persons as well as *metis* in the *Sunil Babu Pant* case.<sup>421</sup> It also shows the increasing social change happening in the country.

As such, one of the key factors that can influence LGB SL leading to social change is the extent to which conservative religion, plays an important role in public life. Hence, one of

foundings?' Heritage Lectures, Lecture, No. 1186, delivered 13 May 2011 <https://www.heritage.org/political-process/report/did-america-have-christian-founding> (accessed 2 July 2018).

<sup>416</sup> For the USA, 77% of respondents in 2013 indicated that religion was losing its influence in the public sphere in the USA. See F Newport 'Most Americans say religion is losing influence in U.S' GALLUP, 29 May 2013 <https://news.gallup.com/poll/162803/americans-say-religion-losing-influence.aspx> (accessed 2 July 2018). For the state of religion in Canada, see R O'Toole 'Religion in Canada: Its development and contemporary situation' (1996) 43:1 *Social Compass* 119.

<sup>417</sup> See United States Department of State 'International religious freedoms report for 2017: Belize' <http://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm?year=2017&dclid=281050> (accessed 2 July 2018).

<sup>418</sup> United States Department of State 'International Religious freedoms report for 2017: Nepal' <http://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm?year=2017&dclid=281030> (accessed 2 July 2018).

<sup>419</sup> Constitution of the Republic of Nepal, 2015, article 4.

<sup>420</sup> UNDP & USAID (n 123 above) 22-23.

<sup>421</sup> n 69 above.

the conditions under which LGB SL can stimulate social change is having a more secular rather than conservative religious society.

*b) The extent to which 'traditional culture' plays an important role in the society*

Another important factor that influences LGB SL leading to social change is the extent to which 'traditional' culture plays an important role in public settings. The classic definition of 'culture' is that by Tylor which is that culture refers to the totality of things like 'knowledge, belief, art, morals, law, customs or any other capabilities and habits acquired by man as a member of society.'<sup>422</sup> However, this is not what is meant by 'traditional culture' as used by those who want to use culture to oppose LGB rights. 'Traditional culture' in this sense is used to mean an imaginary, reified, pure form of culture that is supposedly universal to a particular traditional society, such as Africa, and still subsists.<sup>423</sup> Of course such a culture never existed as cultures vary from place to place, and are always changing, and a whole continent is too big to have the same culture. 'Traditional culture' in most parts of Africa is presented as an important reason why many persons are against homosexuality.<sup>424</sup> It is usually referred to as 'African culture'.<sup>425</sup> Homosexuality is presented as being against African culture, and thus as 'unAfrican'.<sup>426</sup> Kaoma refers to this as cultural disposition:<sup>427</sup> the feeling that a culture that may be accepted elsewhere is not accepted here.<sup>428</sup> Thus, whereas homosexuality may be allowed in the west, it is not allowed in Africa, and as such African culture is against it. Many arguments have been put forward to counter this argument but it subsists and many believe in it. One of the main arguments against the claim of an essential 'African culture' is that it is not uniform to all African societies, and that a number of cultures accepted some forms of same-sex expressions, be it woman-to-woman marriage or having young boys apprenticed to older men with sex involved.<sup>429</sup> Others assert that

<sup>422</sup> EB Tylor *Primitive culture: Researches into the development of mythology, philosophy, religion, language, art and custom* (1871).

<sup>423</sup> For a discussion of this phenomenon, see S Nyanzi 'Dismantling reified African culture through localised homosexualities in Uganda' (2013) 15:8 *Culture, Health & Sexuality* 953-955.

<sup>424</sup> For a recent discussion on this topic see K Kaoma Christianity, globalization, and protective homophobia: Democratic contestation of sexuality in sub-Saharan Africa (2018) 1-12.

<sup>425</sup> See for example EO Ezedike *African culture and the African personality: From footmarks to landmarks on African Philosophy* (2009) 455 who sees African culture as 'the sum total of shared attitudinal inclinations and capabilities, art, beliefs, moral codes and practices that characterize Africans'. Also see generally GE Idang 'African culture and values' (2015) 162 *Phronimon* 97.

<sup>426</sup> See for example S Mokhobo 'AIDS and the mining industry', in Chamber of Mines Newsletter. August/October, 1989.

<sup>427</sup> Kaoma (n 424 above) 10.

<sup>428</sup> Above.

<sup>429</sup> See for example, OS Murray & W Roscoe *Boy-Wives and Female Husbands: Studies of African Homosexualities* (1998). For a recent discussion of these see M Epprecht *Heterosexual Africa? The history of an idea from the age of exploration to the age of AIDS* (2008) 34-64, and M Mutua 'Sexual orientation and human rights: Putting homophobia on trial' in S Tamale (ed) *African Sexualities: A reader* (2011).

‘traditional African culture’ was all about ‘Ubuntu’ – the concept that ‘I am because we are’.<sup>430</sup> As a result, one’s sexual orientation was not a primary issue in itself, but rather what mattered was respect for others, dignity and tolerance.<sup>431</sup> All this however does little to dissuade those who believe that African traditional culture is against same-sex relations and is immutable. Therefore, even if a court declares that LGB persons are equal to other persons, the people are likely to perceive such a finding to be influenced by foreign cultures and not African ones.

In the selected Common Law countries, the proposition can be noted as follows:

In all the countries studied, ‘traditional culture’ plays an important role in stirring homophobia and hostility. It is strongest in Uganda where ‘traditional culture’ is represented as being against LGB rights, and this has become a dominant discourse.<sup>432</sup> It is also prominent in Kenya with many using it to oppose LGB rights.<sup>433</sup> In Botswana, African culture is interwoven in the country’s fabric, but usually the more positive aspects such as ‘botho’ and seeking consensus are promoted more.<sup>434</sup> In South Africa, the right to culture is also included within the Constitution. Despite this, dignity of all persons, and non-discrimination are key values that are established and respected, thus watering down the ‘traditional culture’ argument. Nevertheless, protection of the right to culture and preservation of traditional rules has been opposed by particularly the House of Traditional Leaders, which has called for the removal of the protection on sexual orientation in the Constitution based on traditional culture.<sup>435</sup> However, the multiplicity of cultures in South Africa, some of which cannot be termed as ‘African tradition’ has helped to weaken this argument. This multiplicity can also explain why more progress towards social acceptance has been made. This factor may thus also help to explain the slower social change despite successful LGB SL cases.

<sup>430</sup> B Nussbaum ‘African culture and Ubuntu. Reflections of a South African in America’ (2003) 17 World Business Academy 1-12.

<sup>431</sup> See for example B Matolino ‘Being gay and African: A view from an African philosopher’ (2017) 18 Phronimon 59, 60-61.

<sup>432</sup> See generally, S Nyanzi, n 374 above. Also see A Jjuuko ‘Aren’t these emperors naked?’ Revealing the nexus between culture and human rights over the issue of homosexuality in Uganda LLB Dissertation, Makerere University, 2008, 52-68.

<sup>433</sup> CE Finerty ‘Being gay in Kenya: The implications of Kenya’s new Constitution for its anti-sodomy laws’ (2012) Cornell International Law Journal, 431, 436.

<sup>434</sup> SR Lewis Jr ‘Explaining Botswana’s success: The importance of culture’ [https://apps.carleton.edu/campus/president/slewis/speeches\\_writings/botswana\\_success/](https://apps.carleton.edu/campus/president/slewis/speeches_writings/botswana_success/) (accessed 2 July 2018).

<sup>435</sup> See ‘Stop protecting gays: Traditional leaders tell the ANC’ City Press 2012 <http://www.citypress.co.za/news/stop-protecting-gays-traditional-leaders-tell-anc-20120505/> (accessed 7 July 2018).

For the selected countries outside of Common Law Africa, the proposition plays out as follows:

In the USA, the dominant culture is European Judeo-Christian culture, which emphasises individualism/capitalism, fused with aspects of Asian, South American and African cultures.<sup>436</sup> This is largely similar to Canada, although Canada has also been influenced by distinctly British and French inspired cultures, tempered by indigenous cultures of the 'first nations' and by cultures from elsewhere as a result of continued immigration.<sup>437</sup> Culture is more or less fused with religion. This explains why the religious struggles between conservatives and liberals on such issues as LGB rights and abortion are referred to as 'culture wars'.<sup>438</sup> The USA is generally more attuned to religious extremism than Canada as it is bigger in terms of population, and also the melting pot of many more religious groupings than Canada. As such, this proposition explains why Canada has been able to have much faster social change in favour of LGB persons than USA.

For Belize, culture is an important consideration, with the concept of 'traditional culture' also playing a role as there are many ethnicities including cultures that go back many centuries, such as that of the Mayans, which are still largely conservative.<sup>439</sup> The same applies to Nepal, which is still largely dominated by Hindu and Buddhist traditions that go back millennia, and which is still largely a patriarchal and traditionalist society.<sup>440</sup> Many still look at LGB issues in a conservative way.<sup>441</sup> Therefore, despite positive LGB court decisions in both countries, change in attitudes towards LGB persons is much slower, and culture is one of the reasons for this.

The extent to which 'traditional culture' plays an important role in society is important, especially in Common Law Africa, as otherwise positive judgments will still not carry much weight in the wider society. It may thus be fairly concluded that one of the conditions for

<sup>436</sup> KA Zimmermann 'American culture: Traditions and customs of the United States' *Live Science* 13 July 2017 <https://www.livescience.com/28945-american-culture.html> (accessed 2 July 2018).

<sup>437</sup> 'Canada' <http://www.everyculture.com/Bo-Co/Canada.html> (accessed 2 July 2018).

<sup>438</sup> LR Kurtz 'Culture wars: The struggle to define America' (1994) 99:4 *American Journal of Sociology* 1125.

<sup>439</sup> United Belize Advocacy Movement (UNIBAM) & Sexual Rights Initiative (SRI) 'Stakeholder submission on Lesbian, Gay, Bisexual and Transgender (LGBT) rights in Belize for the 17th Session of the Universal Periodic Review - October 2013' <http://www.sexualrightsinitiative.com/wp-content/uploads/SRI-UNIBAM-Belize-UPR-Joint-Submission-March-2013.doc> (accessed 30 May 2018).

<sup>440</sup> See generally, S Greene 'Gender and sexuality in Nepal: The experiences of sexual and gender minorities in a rapidly changing social climate' Independent Study Project (ISP) Collection, Paper 2093, (2015).

<sup>441</sup> Above.

successful SL to lead to social change is traditional culture playing a less important role in public life.

*c) The extent of importation and adoption of culture wars from elsewhere*

The active spread of anti-gay rhetoric and pro-gay support particularly originating from the USA has played an active role in influencing how LGB SL can lead to social change. This struggle has been referred to as ‘culture wars’<sup>442</sup> and the argument goes that after the religious right losing their stronghold in the USA including through successful LGB SL, they turned their efforts to other countries particularly on the African continent.<sup>443</sup> At the same time, pro-gay groups that have recently seen much more success in the USA are riding on this wave of success to also protect and defend LGB rights elsewhere, again particularly in Africa.<sup>444</sup> Such groups work hard to oppose the efforts by the religious right. The result is a contestation between the two groups, with the law being used as a major weapon in the struggle.<sup>445</sup> Where the religious right gets a stronghold, this is also reflected in anti-gay rhetoric and anti-gay laws such as Uganda’s Anti-Homosexuality Act. The extent to which people in a country are amenable to such influences also affects the rate at which LGB SL will spur social change. This is because the anti-gay groups will frame the victories as dangerous to the existing social order and in need of being reversed, spurring a backlash.

The proposition plays out as follows in the selected African Common Law countries:

Among the selected countries in Common Law Africa, the cultural wars have largely been exported to Kenya and Uganda.<sup>446</sup> This high level of importation of cultural wars partly explains why there is much anti-gay rhetoric and why even successful LGB SL has led to limited social change. In Botswana and South Africa, the role of the US religious right is more limited,<sup>447</sup> as already discussed under the aspect of religion above. This low level of

<sup>442</sup> See Kurtz n 438, above.

<sup>443</sup> See C McCrudden ‘Transnational culture wars’ (2015) 13:2 *International Journal of Constitutional Law* 434–462

<sup>444</sup> For a critical discussion of such support, see ‘U.S. support of gay rights in Africa may have done more harm than good’ *New York Times* 20 December 2015 <https://www.nytimes.com/2015/12/21/world/africa/us-support-of-gay-rights-in-africa-may-have-done-more-harm-than-good.html> (accessed 2 July 2018)

<sup>445</sup> This struggle has been referred to as lawfare. For an analysis of the use of this term, see S Gloppen ‘Conceptualizing lawfare: A typology & theoretical framework’ Centre of Law and Social Transformation, University of Bergen [https://www.academia.edu/35608212/Conceptualizing\\_Lawfare\\_A\\_Typology\\_and\\_Theoretical\\_Framework](https://www.academia.edu/35608212/Conceptualizing_Lawfare_A_Typology_and_Theoretical_Framework) (accessed 30 May 2018).

<sup>446</sup> See generally, Kaoma, n 424 above. ‘

<sup>447</sup> For a more detailed discussion, see Chapter 4 section 4.2.3.



importation of cultural wars also explains the relatively higher levels of social acceptance in those countries.

For the selected Common Law countries outside of Africa, this factor plays out as follows: The culture wars have been exported to Belize,<sup>448</sup> and indeed there is slow social change and only one recent victory. The USA (and to a smaller extent Canada) is the source of the cultural wars, so they are excluded from such influences. Also, Nepal does not have the exportation of such wars as it is largely a Hindu and Buddhist rather than Christian nation. For Nepal, the reasons for slower social change lie elsewhere besides culture wars.

The extent to which a country is susceptible to the culture wars from the USA and elsewhere determines how fast social change will happen. As such, one of the conditions under which LGB SL can lead to social change is lessened influence of the religious right from USA and elsewhere influencing how LGB rights are perceived in Africa and other places.

### 5.3.6 Other factors

There are a number of other factors that cannot be classified under the political, legal, transnational, economic, and social factors above. The ones discussed here are: the number of cases of LGB SL brought before the courts in a particular period of time; the extent of victories among the cases brought; the time over which LGB SL has been done in a country; and the extent of backlash and counter mobilisation. These are discussed below:

#### *a) The number of cases and the breadth of issues LGB SL brought before the courts*

The number of LGB SL cases brought before the courts on different issues within a specified period of time determines the extent to which LGB SL spurs social change. This is because, with many cases, there are increased chances of victories, and also there is increased exposure of the public to LGB issues. It also implies that a wider range of issues will be brought to the court's attention and decided upon, thereby leading to the creation of more impact on different aspects of society. If Kretz's seven stages are to be progressively achieved,<sup>449</sup> in a country where there is no political goodwill to create change, there would

<sup>448</sup> McCrudden (n 443 above) cites the support to the Catholic Church and other religious interveners in the case in Belize, 454-455.

<sup>449</sup> These are: total marginalisation; criminalisation of status and behavior, decriminalisation, codification of Anti-Discrimination laws, establishment of positive rights, full legal equality, and then cultural integration. See A Kretz 'From "kill the gays" to "kill the gay rights movement": The future of homosexuality legislation in

need to be a case at almost every stage to achieve change that would be meaningful. Therefore, one case or two cases cannot be enough to lead to legal change, unless the court makes extensive orders in one case as was done in the *Sunil Babu Pant* case in Nepal, or the political processes take charge and make the changes without the court necessarily ordering so. However, this has rarely happened anywhere in the selected Common Law countries, showing that the need for cases to be filed can never be underestimated. The cases must be many and on different aspects. How this helps is that the cases keep referring to each other and creating a string of precedents, which make it clear what the position of the law is.<sup>450</sup> It also helps that judges who made the earlier decisions may still be part of the court and make similar decisions. Although unsuccessful cases and successful backlash/counter mobilisation usually discourage activists from filing more cases, it is only when activists persist and bring more cases that change can happen.<sup>451</sup> In the USA, the loss in *Bowers v Hardwick*<sup>452</sup> did not make activists to stop bringing cases, but rather made them to change tact and approach friendly state courts,<sup>453</sup> where they were eventually able to achieve court victories.

This proposition is supported by data from the selected African Common Law countries:

South African activists lead in the number of cases brought before the courts with 11 cases in the last 20 years. Uganda follows with eight cases. Activists in Kenya and Botswana have four and three cases respectively. In terms of social change, South Africa holds true to the proposition as it leads, and also covers nine different areas of the law.<sup>454</sup> All the other countries too support the proposition. Uganda has eight cases, but they cover four areas of law. Activists in Kenya have brought four cases covering three areas of law; while those in

Africa' (2013) 11 *Northwestern Journal of International Human Rights* 207, 211-216. The seven stages are discussed in detail in Chapter 4 above.

<sup>450</sup> This is the incremental approach to litigation, which is about chipping away at the different aspects of the law one at a time. For a description of this see for example HJ Hacker *The culture of conservative Christian litigation* (2005) 34-35. For LGB litigation specifically in Uganda see A Jjuuko 'The incremental approach: Uganda's struggle for the decriminalisation of homosexuality' in C Lennox & M Waites (eds) *Human rights, sexual orientation and gender identity in the Commonwealth: Struggles for decriminalisation and change* (2013) 381. It is based on the Common Law doctrine of precedent which ensures that judges in lower courts would be bound by the decisions of the higher courts, and this is important for LGB litigation. For a discussion of this, see also see Glass & Kubasek (n 364 above) 143, 148.

<sup>451</sup> See generally, TM Keck 'Beyond backlash: Assessing the impact of judicial decisions on LGBT rights' (2009) 43 *Law and Society Review* 151.

<sup>452</sup> 478 US 186.

<sup>453</sup> D NeJaime 'The legal mobilization dilemma' (2012) 61 *Emory Law Journal* 663, 714, 683-684.

<sup>454</sup> See discussion in Chapter 3 above.

Botswana also has three cases on three separate issues.<sup>455</sup> This shows that there is need for cases to be covering different aspects of the law.

For the selected Common Law countries outside of Africa, this factor plays out as follows:

The USA is the only country with more than five cases in the past twenty years, at eight cases, covering five different areas of law. All the others have fewer than five cases, with Canada at four, Nepal at three and Belize at one. At first glance it seems like the proposition is not supported by the statistics, however a deep analysis shows that it is. The USA and Canada are both federal states, and as such they had many more cases at the state/provincial level respectively within the 20 year period.<sup>456</sup> These covered different issues. Also, litigation in the USA started way back in 1951 and for Canada in 1979, and many different issues had been canvassed since then. Only a few issues had to be covered in the period 1997-2017, mainly decriminalisation of same-sex relations for the USA and same-sex marriages for both Canada and the USA. Therefore, in addition to the high number of cases, there was also a breadth of issues in both Canada and the US. Therefore, the number of cases is commensurate with the level of social change. In Nepal, the three cases covered a broad array of rights, including same-sex marriages. The cases thus had broader impact. However, the fact that the issue of same-sex marriages remained dependant on political forces, causes Nepal to score low in terms of social change. The number of cases and breadth of issues also supports the level of social change in Nepal. For Belize there was only one case, and it only covered one issue. The fact that Belize is yet to achieve social change is thus in line with the fact that only one case has so far been done.

Therefore, the number of cases and the breadth of the issues they cover is an important factor in determining the extent to which LGB SL would lead to social change. As such one of the conditions under which LGB SL can stimulate social change is if there are more cases done within a period of 20 years, covering a wide range of issues.

***b) The extent to which LGB SL cases have been successful in the past 20 years***

Success in LGB SL cases is very important. Activists take SL cases to court with the primary aim of obtaining victories. This is because courts usually issue orders in successful cases, which the executive, the legislature or any other persons against whom the orders are

<sup>455</sup> As above.

<sup>456</sup> See the discussion on number of cases in Chapter 3 above.

delivered are bound to implement. According to Gloppen, although cases may have indirect effects even when not successful, winning in court is still 'a core issue' as it helps to translate the claims into enforceable legal claims.<sup>457</sup> Handler shows that it was through court victories that various movements were able to obtain their stated aims.<sup>458</sup> Keck also recognises the power of victories when he argues that even if they may lead to backlash, the power of court victories cannot be underrated.<sup>459</sup> The secondary aims may be many, including drawing attention to an issue. Although losses must be expected, and in some cases, can also be regarded as wins,<sup>460</sup> they are best avoided. Losses may erode gains already achieved, such as was the case with the *Lokodo* case in Uganda, which watered down the positive judgment in the *Rollingstone* case, and more recently the *SMUG Registration* case which also criticised the decision in the *Rollingstone* case. They may also lead to allies abandoning the cause as being unworthy. Therefore, this study proposes that successes in LGB SL cases are very important if such SL is to stimulate social change.

This proposition works out as follows in the selected Common Law African countries:

South Africa has had the most victories - a 91% success rate. It is followed by Uganda with 50%,<sup>461</sup> and then by Botswana and Kenya<sup>462</sup> with 25% each. In terms of social change, South Africa leads, followed by Botswana, then Kenya and finally Uganda. Botswana and Kenya, have had fewer cases and one victory each but with more social change, which arises from a better political environment. They thus diverge from the proposition because other factors intervene. For Uganda, it should have had more social change, but again, the political factors such as the low levels of democracy, which have enabled a political witch-hunt of LGB persons, make it difficult to achieve significant social change for LGB persons.<sup>463</sup>

For the countries outside Common Law Africa, the trends are as follows:

All the countries have a success rate of more than two thirds as almost all the cases have been successful. Therefore, this factor does not fully explain why there are differences in the

<sup>457</sup> Gloppen (n 3 above) 345.

<sup>458</sup> See for example JF Handler *Social movements and the legal system: A theory of law reform and social change* (1978), 20.

<sup>459</sup> See generally, Keck, n 451 above,

<sup>460</sup> See generally, D NeJaime 'Winning through losing' (2011) 96 *Iowa Law Review* 941.

<sup>461</sup> Uganda has another loss in 2018, in the Frank Mugisha case (n 200 above) which had been categorised as 'pending' before.

<sup>462</sup> In 2018, Kenya had another victory, overturning the earlier loss. This was in the *COL* Appeal. This case has not been considered in the study as the period considered is 1997-2007.

<sup>463</sup> See discussion on the extent of democracy, above.

levels of social change in those countries. These go more to the number of cases, with countries that have more cases (Canada and the USA) having more social change than those having one (Belize and Nepal), as already seen under the number of cases factor above.

Therefore, the percentage of LGB SL cases that are successful is likely to increase the rate at which LGB SL stimulates social change. This however has to rely on the total number of cases, as it applies more when there are more cases. Therefore, one of the conditions under which LGB SL is likely to spur social change is multiple victories, which are more than the losses and pending cases.

*c) The length of the period over which LGB SL has been done*

The amount of time over which LGB SL has been done in a particular country, determines the extent to which LGB SL can stimulate social change. The longer the experience with LGB SL, the more likely success will be achieved in court, eventually leading to social change. It is quite obvious that countries where LGB SL has been going on for a longer period have a higher likelihood of achieving significant social change. Time allows the changes to be revealed for what they are and for the contribution of the cases to be seen and appreciated. Time also helps to overcome the initial backlash and allows the situation to normalise. Time allows the courts to be exposed to different matters concerning LGB issues, thus creating precedents and making it easier for the courts to deal with the different matters.<sup>464</sup>

For the Common Law African countries, this proposition plays out as follows:

Only South Africa has garnered 10 years of LGB SL, and the litigation has been able to lead to significant social change. As such South Africa has had more than 20 years of LGB SL. For the other countries, Botswana has had LGB litigation for 15 years (since 2003 when the *Kanane* case<sup>465</sup> was decided) while Uganda has been doing LGB SL for 11 years since the *Victor Mukasa* case was decided in 2007. Kenya has the least number of years of LGB SL, five years, since the *Eric Gitari v Attorney General* (the *Eric Gitari* case)<sup>466</sup> was only decided in 2013. There has been more legal and social change in Botswana, which thus supports the proposition that the longer the period within which LGB SL is done, the more the social change. However, Uganda has had less social change than Kenya. This points more to the

<sup>464</sup> For how this worked to help the US courts to get used to LGB issues in the aftermath of the loss in *Bowers v Hardwick* 478 US 186 (1986), see Nejaime (n 453 above) 684.

<sup>465</sup> n 84 above.

<sup>466</sup> *Eric Gitari* case, n 250 above.

different prevailing political conditions - the state of democracy - than the time factor. The longer period for litigation in Uganda has also corresponded to more state-sponsored persecution of LGB persons, making it difficult for positive social change to occur.

For the countries outside Common Law Africa, the proposition plays out as follows:

For the USA and Canada where LGB SL has been underway for much longer, there is much more social change. The USA had a case on LGB rights reach the Supreme Court in 1958, with the first case in the courts having come before the California Supreme Court in 1951. Canada had one reaching its Supreme Court in 1979.<sup>467</sup> For the case of Belize and Nepal, litigation is more recent, with cases being decided in 2007 in Nepal and 2016 in Belize.<sup>468</sup> Consequently, not much social change has been seen. It is only countries that have done LGB SL for more than 20 years that have achieved significant social change.

Time therefore plays a role in measuring the social change that has occurred as a result of a case. As such, for LGB SL to contribute sufficiently to social change in favour of LGB persons, LGB SL has to be done over a longer period of time, preferably for more than 20 years.

*d) The level of backlash and counter-mobilisation*

The level of backlash and counter-mobilisation that activists face in a country determines the rate at which LGB SL will spur on social change. Backlash refers to the reversal of gains made in litigation through counter-litigation, legislative reforms or executive actions.<sup>469</sup> Backlash occurs when anti-LGB groups threatened by the very action of LGB groups bringing a case before court, or by a victory, decide to counter-mobilise against LGB persons in order to reverse such steps. The effect of backlash is therefore to erode the gains made, and to reverse any social change that has been gained. Being a public strategy, SL attracts much backlash, and more so for LGB rights which are largely contested. A victory by LGB groups threatens anti-LGB groups as they fear losing what they cherish: their values or position in society. They thus do all they can to reverse the gains made. Because of the fear of backlash, and reversal of gains already made, many scholars and activists have argued

<sup>467</sup> For a discussion of these trends, see Chapter 3, above.

<sup>468</sup> As above.

<sup>469</sup> See Keck, n 451 above.



against LGB SL,<sup>470</sup> and have instead called for the use of alternatives such as lobbying the executive or the legislature.<sup>471</sup> So where there are high levels of backlash and counter-mobilisation, social change is more likely to be slower than where there is no backlash.

For the Common Law African countries, this proposition plays out as follows:

Uganda is the only country that has had high levels of backlash and counter-mobilisation, with two adverse court decisions on LGB rights in the past 10 years,<sup>472</sup> one incident of the legislature passing a new law,<sup>473</sup> and increased state crackdown on LGB rights.<sup>474</sup> As such, the high levels of backlash against LGB rights in Uganda are clearly linked to the low levels of social change on this issue.

Botswana and Kenya have not had any successful reversals of court decisions or passing of new laws but there have been attempts. In Botswana, the *LEGABIBO Registration* case was unsuccessfully appealed by the state, while in Kenya, the executive appealed the Eric Gitari decision and refused to register the National Coalition of Gay and Lesbian Equality. Again, the extent of social change in both countries is yet to reach the level of significant social change showing a correlation between the success of backlash and counter-mobilisation and low levels of social change.

South Africa as it has not had any successful backlash or any serious attempts at reversing court decisions by the executive or the legislature. Therefore, it is not surprising that South Africa still has the highest rates of social change among the selected countries.

For the selected countries outside Common Law Africa, the proposition plays out as follows:

Of all the countries, the USA has faced the most backlash, with the reversal of court decisions by state and federal legislatures, and the public in California voting to overturn the Supreme Court's decision, as well as having proposed constitutional amendments to

<sup>470</sup> See for example Rosenberg, n 1 above; See and MJ Klarman 'Brown and Lawrence (and Goodridge)' (2005) 104 *Michigan Law Review* 431-89, 482.

<sup>471</sup> See for example generally M Tushnet *Taking the Constitution away from the courts* (1999); T Stoddard 'Bleeding heart: Reflections on using law to make social change' (1997) 72 *New York University Law Review* 966, 977; and R West 'Progressive and conservative constitutionalism' (1990) *Georgetown Public Law and Legal Theory Research Paper* No. 11-46.

<sup>472</sup> *The Lokodo* case (n 197 above) and the *Frank Mugisha* case (n 200 above).

<sup>473</sup> The Anti-Homosexuality Act, 2014, which was later nullified.

<sup>474</sup> For example, the stopping of many LGB events since 2012. See discussion in chapter 4 section, 4.2.1 above.

prohibit same-sex marriages. In 2018, LGB rights activists lost the *Masterpiece Cakeshop, Ltd. v Colorado Civil Rights Commission*<sup>475</sup> case as the Supreme Court held that the Civil Rights Commission expressed open hostility against the owner of a cake shop's religious freedom (to refuse to make a cake for a gay wedding) and it had an obligation of religious neutrality under the Free Exercise Clause of the First Amendment to the Constitution. It is therefore not surprising that although there has been much LGB SL, the USA has not yet been able to achieve significant social change.

The other three countries have not faced any successful backlash, but nevertheless different steps have been taken. For Belize, there is still an appeal pending in the *Caleb Orozco* case. For Canada, anti-gay groups intervened actively in cases and spoke out against LGB rights. Finally, for Nepal, there was passive resistance with the Supreme Court's decision to have a panel review the suitability of same-sex marriages done but its recommendations not acted upon. It is not surprising that even with the low success of backlash and counter-mobilisation efforts, Canada was able to achieve significant social change. For Belize and Nepal, other factors besides backlash, such as the aspect of time, have more to do with the relatively lower levels of social change.

Therefore, the success of backlash and counter-mobilisation means the failure of LGB SL to stimulate social change. As such, one of the conditions for LGB SL to spur social change is absence or low levels of backlash and counter-mobilisation.

Exogenous factors therefore play an important role in ensuring that LGB SL stimulates social change. They form the base upon which litigation itself is even made possible, and also for success. Where litigation is successful, they also help to determine whether in the broader scheme of things, it can impact society in such a way that it creates social change. The political factors however, are more important than all the others. Once the political scheme is streamlined, it is easier for the other factors to align and lead to social change.

#### **5.4 Endogenous factors and how they contribute to LGB SL stimulating social change**

Endogenous factors go to how the cases are developed, how the movement is organised and communities mobilised as the cases are handled in court and afterwards, and also how the

<sup>475</sup> *Masterpiece Cakeshop Ltd. v Colorado Civil Rights Commission* 584 U.S. \_\_\_\_.

cases are enforced after judgment is delivered. Some cases are regarded as ground-breaking, while others, while important, are simply regarded as ordinary. Some cases end up unsuccessful but nonetheless create an impact. The difference lies in what impact the cases has in terms of causing actual legal change, and then going on to influence social attitudes towards LGB persons.<sup>476</sup> This impact can be controlled in a SL case that has been brought by LGB applicants (proactive litigation), and may be more difficult to control if the case is brought by other persons and LGB persons are forced to defensively react to the case - either as *amicus curiae*, as intervening parties or in defence (defensive litigation). Either way, there must be efforts to ensure that the case goes beyond the court's decision. This is where proper strategising and planning comes into the picture. According to Marcus et al, nothing replaces proper planning in a SL case.<sup>477</sup> A case must be developed in such a way that it is likely to succeed and establish the groundwork to build upon that success outside court. Dugard and Langford on the other hand are wary of judicial determinism and hold the view that litigation is too complex to predict the outcome.<sup>478</sup> However, both agree that planning litigation is essential.

For a successful case to make a difference, the decision must be framed in the language of legal rights, and must be enforced.<sup>479</sup> In the case of backlash against the LGB community, how this is handled is also part of what determines the impact of a case. For an unsuccessful case, care must be taken to ensure that the 'radiating effects' and 'special effects' that Galanter speaks of,<sup>480</sup> go beyond the parties in the case to everyone else - that they become 'general effects'.<sup>481</sup> It must also be ensured that the decision makes elites and opinion leaders, or people with special influence and authority as Balkin regards them,<sup>482</sup> to feel sympathy for the cause or angry enough that they demand change. While exogenous factors are important, they do not speak to individual cases. Endogenous factors determine what contribution each particular case makes. Marcus *et al* came up with a list of seven endogenous factors that in their view are key to litigation succeeding and eventually leading to social change. These are: proper organisation of clients; overall long-term strategy; co-

<sup>476</sup> Encarnación, n 13 above.

<sup>477</sup> G Marcus, S Budlender & N Ferreira *Public interest litigation and social change in South Africa: Strategies, tactics and lessons* (2014) 111.

<sup>478</sup> J Dugard & M Langford 'Art or science? Synthesising lessons from public interest litigation and the dangers of legal determinism' (2011) 27:1 *South African Journal on Human Rights* 39-64.

<sup>479</sup> Gloppen (n 3 above) 345.

<sup>480</sup> M Galanter 'The radiating effects of courts' in K Boyum & L Mather (eds) *Empirical theories about courts* (1983) 117, 121.

<sup>481</sup> Above.

<sup>482</sup> JM Balkin *Constitutional redemption: Political faith in an unjust world* (2011) 182

ordination and information sharing; timing; research; characterisation; and follow-up.<sup>483</sup> However this study goes into more detail and looks at the factors at the different levels of a strategic case: the overarching strategy level, the pre-litigation level, the litigation level and the post litigation level. The factors are as follows:

#### **5.4.1 Factors that go to the overarching litigation strategy**

The most important stage in the SL process is the overarching strategy stage.<sup>484</sup> At this stage, the success of the series of cases that are to be filed is ensured and set. At this stage therefore, a number of factors influence how LGB SL contributes to social change. These are:

##### *a) The framing of the strategic objective for the overall litigation*

When an overarching goal for the overall SL is set, it becomes easier for activists to pursue the different facets of the litigation to its end, and until it is able to create the desired legal change and social acceptance. This speaks to Marcus et al's second factor: overall longterm strategy. Where the litigation is intended to create ultimate social change, the objective is well understood by all and everyone concerned knows that it will take more than one case to achieve the desired change. The activists work towards this goal and despite losses and setbacks in individual cases, they continue on the path towards achieving the overarching objective. The overarching goal helps to direct efforts and to guide activists towards that set goal. Where the stated strategic objective is to achieve decriminalisation or defeat a particular law or pursue an individual case, once this is achieved the litigation usually falters, as people are not sure of the next direction to take.

For the countries in Common Law Africa, this is how the framing of a strategic objective relates to social change:

In all four countries, the activists ultimately aimed at changing laws and eventually achieving social change. However, for each country, a different overarching strategy was in place depending on the situation in their countries.<sup>485</sup> In South Africa, the activists aimed at going all the way until the achievement of same-sex marriages. They had a 'shopping list', which showed how these would be tackled through litigation. This strategy was indeed seen through, and it was able to lead to meaningful social change, even though it is

<sup>483</sup> Marcus et al (n 477 above) 110-126.

<sup>484</sup> See chapter 3, section 3.3 above.

<sup>485</sup> Chapter 3, section 3 above.

acknowledged that this is yet to reach the level of significant social change. Botswana and Kenya are aiming progressively at decriminalisation and legal change, although this is yet to be achieved. In Botswana, the decriminalisation effort was first shelved after the loss in the *Kanane* case, and the struggle to register LEGABIBO was later taken up. The registration was achieved and only then did decriminalisation pick up again when an individual went to court without the involvement of LEGABIBO. In Kenya, where two overarching strategies emerged, with one group aiming at decriminalisation, and another at broad social change, the result is that the struggle still continues with not much social acceptance gained in the process. For activists in Uganda, who aimed at defeating the Anti-Homosexuality Bill/Act, the Bill was indeed defeated, but the litigation faltered at this point. Uganda is not yet at the stage of seeking decriminalisation. Again, the required level of social acceptance is yet to be reached. These countries therefore confirm the proposition that LGB SL is likely to spur social change only where the overarching strategy aims at achieving full equality.

The countries outside Common Law Africa also provide a similar scenario as shown in the table below:

Activists in Canada and USA who had same-sex marriages as an ultimate target in their overarching strategy were able to achieve it. They have also been able to make much headway towards significant social change. Activists in Belize who had the initial target as decriminalisation achieved it. Nepal aimed at broader inclusion and indeed achieved protection in the Constitution. However, the question of same-sex marriages has not been taken back to the court to rule on it once more. Again, although the desired level of social acceptance is yet to be reached, it is also making headway. This set of countries also shows a connection between how clearly the overarching strategy is formulated, and the extent to which LGB SL stimulates social change.

Therefore, it is clear from both sets of countries that in order for LGB SL to achieve the desired change the strategic objective of the litigation must be clear from the beginning. As such, one of the conditions that contribute to LGB SL stimulating social change is the existence of a long-term clearly defined strategic objective for the litigation.

*b) The nature of strategy adopted in pursuing the cases*

As far as the strategy is concerned, the study makes the following proposition: Formal, well-known and countrywide strategic approaches are more effective in making LGB SL

contribute to social change than informal approaches, limited to individual organisations. This is because a more formal strategy makes it clear what the next steps would be in case of a win or a loss, and also helps to plan and schedule the litigation in a logical manner. Actions taken after the delivery of judgment usually determine the extent to which a particular case will stimulate social change in favour or against LGB persons.

Indeed, this proposition is supported by the events in the selected African Common Law countries as follows:

Activists in South Africa had an articulated formal strategy that ended with the recognition of same-sex marriage. They were also able to achieve legal change and to move towards significant social change, showing a clear correlation between the formal strategy and the level of social change. Uganda's written but flexible strategy allowed activists to opportunistically take advantage of new developments and bring cases, and this allowed for proper timing, which is key for cases to succeed in court. However, unlike South Africa, the cases were only able to encourage legal change or stop negative legal change but did not contribute much to social acceptance. This is explained more by the other factors, particularly the fact that the strategy was aimed at stopping the Anti-Homosexuality Bill/Act rather than decriminalisation or the recognition of same-sex marriage. Activists in Botswana and Kenya did not generally have a written formal strategy, but all took advantage of different developments to pursue litigation. Also, when compared with the level of social change, none of them score as highly as South Africa, which had a more formal strategy.

For the countries outside Common Law Africa, the proposition holds as follows:

Activists in Canada and the USA who had long-term formal litigation strategies, with many groups working together, were also able to achieve more in terms of social change than the other two countries. Nepal's longer-term strategy combined all aspects in one case. Activists in Nepal were also able to win their case and it is only its full implementation that is still pending. Belize's more informal strategy was aimed at decriminalisation. It is also not surprising that it is yet to lead to social change.

Therefore, the nature of the strategy followed during litigation is an important factor to ensure that LGB SL contributes to social change in favour of LGB persons. As such one of



the conditions to have in place to increase the chances of LGB SL contributing to social change is having a formal, flexible, and long-term strategy that the activists follow to lead to social change.

*c) The nature of organising and collaboration*

Where a formal coalition approach is adopted, LGB SL is more likely to be successful and lead to more social change. This is because of the ability of coalitions to mobilise elites and community members, and to portray the image of unity, which is crucial to convincing judges and other persons about the importance of the cause.

This proposition holds when tested on the selected Common Law African countries, as follows:

Among the African Common Law countries, South Africa was able to achieve success in terms of cases as well as significant social change through a more formal broad-based coalition. Even Uganda, where there is much political hostility, was able to pull off a number of successful cases with a broad-based coalition. However, social change remains very slow due to the limited scope of the overarching strategy and the influence of exogenous factors such as the state of governance as well as the limited time within which the SL has been done. Activists in Botswana and Kenya, who did not act in broader coalitions, and the rate of change is still slower than that in South Africa.

For the selected countries outside Common Law Africa, the proposition works out as follows:

In Canada and USA, there are more successful cases, more legal change and more social acceptance due to organisations closely working together. For Belize and Nepal, where organisations more or less work on their own, the level of social change in favour of LGB persons is also not as much as that in the earlier group.

Therefore, the nature of organising has an important role to play in LGB SL leading to social change. As such, one of the conditions that should be in place for LGB SL to play an important role in influencing social change in favour of LGB persons is the existence of a more coordinated coalition working together to achieve the desired change.

The overarching stage is an important stage in SL. If adequately planned, LGB SL can result into successful cases, and where adverse decisions are given, proper planning would also ensure that the case is discussed and eventually overturned on appeal.

#### 5.4.2 Factors at the pre-litigation phase

The pre-litigation phase determines the nature of the case that is to be filed, and this stage is also critical for the success of the individual cases and the preparation for the aftermath, regardless of whether the case is lost or succeeds. At this stage the factors that determine the possibility of LGB SL leading to social change are: the nature of the consultations that go into building the cases; and the nature of the sources of funding for the cases, as explained below:

##### *a) The extent of consultations that go into building the case*

Where there is more consultation of different stakeholders, the likelihood of social change happening is higher as groups then are able to work together towards the desired change. Marcus et al found that at any given time, there are multiple organisations and entities that are willing and interested in doing SL.<sup>486</sup> They therefore found that coordination and collaboration is very important in order for the part played by each entity to be clearly understood and to contribute to the overall aim.<sup>487</sup> They had this as their third factor.

For the selected Common Law African countries, the proposition works out as follows:

Among the selected Common Law African countries, there were more consultations in South Africa and Uganda than in Botswana and Kenya. At the legal victory level, South Africa and Uganda have more victories than Botswana and Kenya, and at the social change level, South Africa leads all the other countries. Botswana and Kenya follow and Uganda is so far seeing the least change. Uganda still stands in a special position due to the low levels of democracy in the country as well as judicial independence making it difficult for LGB SL to meaningfully spur social change. Nevertheless, there were important victories scored in Uganda with a high success rate, showing that LGB SL can indeed spur legal change if there are more consultations.

<sup>486</sup> Marcus et al (n 477 above) 118-119.

<sup>487</sup> Above.

For the selected countries outside Common Law Africa, the proposition holds as follows:

There were more consultations in Canada and the USA,<sup>488</sup> than in Nepal and Belize. Therefore, the more consultations are done between groups working on LGB litigation, the more likely it is that the LGB SL will lead to social change. Therefore, one of the conditions that need to be in place in order for LGB SL to lead to significant social change is when the groups doing the SL widely consult with each other and work together towards achieving the goals of the SL.

*b) The extent to which funds are available and the sources of these funds*

Availability of funds and the source where the funds are obtained are important in ensuring the success of cases, and play an equally important role in the SL being able to influence social change in favour of LGB persons. Availability of funds makes it possible to hire the best lawyers, do proper research and mobilise community members. Where funds are not readily available, most of these things cannot be done, and this affects the quality of the case, as well as the likelihood of success. Even when a case is successful, efforts to have it enforced would depend on the availability of funds. Another equally important aspect is where the funds are obtained from, whether locally generated or donated by international sources. Where funds are locally generated, there is more ownership of the cases by the members of the LGB community who are then more likely to support the cases and work towards ensuring the achievement of social change.

For the selected African Common Law countries, the proposition is demonstrated as follows:

For the selected Common Law African countries, funding is usually available for cases, but is sourced from foreign donors. For South Africa however, the level of local involvement in fundraising was higher than in most other countries, and this also accounts for the higher rates of success in terms of achieving social change. For Botswana, Kenya and Uganda, the fact that the funding for litigation is almost entirely foreign sourced makes local buy-in from the members of the LGB community and even well-wishers more difficult, and thus slows down the process of social change even if the cases are successful.

<sup>488</sup> See Chapter 3, section 3.3.2.

The same state of affairs is reflected for countries outside Common Law Africa, as shown below:

In Canada and the USA, resources for litigation were available and raised almost exclusively in-country, and indeed the levels of social change are higher, and for Belize and Nepal, where the funds were more or less raised from outside the levels of social change are considerably lower.

Therefore, there is a positive correlation between the availability and sources of funding and the extent of social change. Where funds are available and are raised locally, the extent of social change is higher, and where the funds are more limited and raised from outside the country, the extent of social change is slower. As such one of the conditions under which LGB SL can spur social change is if funds are available and raised locally.

The pre-litigation stage is an important stage for each individual case, and it determines its ability to create social change. Success alone is not the aim at this stage, but how it goes beyond the courtroom to affect everyone else, thus spurring social change.

#### **5.4.3 Factors at the litigation stage**

The litigation stage is where all the planning for the individual case comes to fruition in terms of whether the case will be successful and thus vindicate the rights of LGB persons or if it will be unsuccessful and thus lead to backtracking on the rights or stagnation. It is also the stage that lays the ground for the next stage (the post litigation stage) as the outcome at this stage determines how the next stage is implemented. The factors at this stage that influence whether LGB SL will lead to social change are: The choice of forum; timing of the filing of the case; the choice of petitioners; the extent of elite and community mobilisation; the nature of the respondents; the involvement and the nature of interveners; the number and nature of amici; the nature of lawyers handling the case in court; the nature of the legal and factual arguments raised during the hearing of the case; the nature of the prayers made; the extent of judge mapping; the incidence of costs; and the extent to which the cases are backed up by advocacy efforts. These are discussed below:

*a) The choice of forum*

Cases that come before the highest courts are more easily enforced than those that are brought at lower courts, and are thus more likely to lead to legal change and inspire social change. This is because of the binding nature of the decisions of the highest courts, as well as their norm-setting power. Also, cases brought before international bodies may have more impact than those brought before domestic courts, as they affect more than one country, and as they help to clarify on the position of international law concerning a particular matter. There is also the aspect of bringing cases before international bodies and before courts of other jurisdictions that have control over the persons who instigate LGB hate. This is also effective in that it limits the power and influence of such persons in the countries where they spread their hate.

For the selected countries outside Common Law Africa, the proposition holds as follows:

Among the selected countries, only South Africa had almost all LGB cases reach the highest court in the land, the Constitutional Court, with the exception of one, which did not have to be confirmed by that Court and was not appealed. What remained was for the norms set to become more socially acceptable, and this has been going on over time. Although significant social change is yet to be achieved, much progress has been made. Botswana is the other country that has had two of its four cases coming before the Court of Appeal, which is the highest court, but it also must be noted that there is just one tier of appeals from the High Court to the Court of Appeal. It also follows South Africa in terms of social acceptance. Uganda has not had a case reaching the highest court, but has taken cases before regional courts and before courts in other countries, therefore creating precedents that bind at regional level, and exploiting the exogenous factors prevalent in the other countries to create positive change back home. Kenya has not had a single case reaching the highest courts and so the norms set in the earlier cases have not fully crystallised and can be changed. This also partly explains why social change is yet to be realised in Kenya. Therefore, whether cases have reached the highest courts or not matters in order for LGB SL to spur social change.

All the cases considered in this study made it to the highest courts in the land in all the four countries – with the exception of Belize where the case is now at the highest court. Therefore, the differences in social change can largely be explained by the exogenous factors, without necessarily reducing the impact of the cases coming to the highest courts.

As such one of the factors that contribute to LGB SL stimulating social change is the forum to which the cases come. Therefore, one of the conditions that will ensure that LGB SL leads to social change in favour of LGB persons is the cases making it to the highest court in the land or an international court which ensures that the decisions create norms that have to be respected as they are binding on all other courts. The radiating effects of such court decisions then see to it that the cases lead to social change.

*b) Timing of the filing of the case*

An important factor that goes to ensuring that a case eventually leads to social change is timing. This is Marcus et al's fourth factor. A case must be filed at the 'right' time in order to be successful or even if unsuccessful, have the most impact aimed at social change. The right time goes to the political opportunity structure and the legal opportunity structure. These are to the effect that strategies employed are always in line with the access that those employing them have to the political system and the legal system respectively.<sup>489</sup> Therefore, if an opportunity to mobilise through the political channels or the courts exists, then this should be done as such opportunities keep on shifting. It thus goes to the prevailing political-socio-economic factors as well as to the availability of evidence, proper preparation as well as exhaustion of the other available remedies.<sup>490</sup> It is about taking advantage of the exogenous factors and proper planning. For LGB cases, timing is even more critical due to public sentiments.<sup>491</sup>

Among the selected Common Law African countries, again all South African cases were brought at the 'right time', as they followed earlier successes and a period of political transformation. It is thus not surprising that the cases were able to spur legal change and are helping to move the country towards social change. In Botswana, where there was poor timing in the *Kanane* case,<sup>492</sup> the case was lost, although this was later corrected in the latter cases. It is also making more headway towards social change than Kenya and Uganda. For Kenya, where proper timing faced issues of disagreement, the cases failed and some succeeded. Also, the extent of social change has not been significant. Finally, for Uganda,

<sup>489</sup> G Fuchs 'Strategic litigation for gender equality in the workplace and legal opportunity structures in four European countries' (2013) 28 *Canadian Journal of Law and Society* 189, 192.

<sup>490</sup> Marcus et al (n 477 above) 119-120.

<sup>491</sup> For a discussion of the importance of timing in case of the USA see E Bazelon 'Why advancing gay rights is all about good timing: Lessons for same-sex marriage from the Supreme Court's terrible decision in *Bowers v. Hardwick*' 19 October 2012

[http://www.slate.com/articles/news\\_and\\_politics/supreme\\_court\\_dispatches/2012/10/the\\_supreme\\_court\\_s\\_terrible\\_decision\\_in\\_bowers\\_v\\_hardwick\\_was\\_a\\_product.html](http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2012/10/the_supreme_court_s_terrible_decision_in_bowers_v_hardwick_was_a_product.html) (accessed 16 June 2018).

<sup>492</sup> n 84 above.



most of the cases were timed well, but again, Uganda's exceptional circumstances marked with low democracy and active state persecution of LGB persons as well as a lack of judicial independence led to low social change.

For the countries outside Common Law Africa, still timing played a very important role as discussed below:

For Canada, where cases were well timed after the decriminalisation of same-sex relations, and after the Canadian Charter came into effect, the level of social change can be described as significant social change. For the USA, cases were also built on earlier successes, although some of the earlier cases were wrongly timed and failed. It has also almost achieved significant social change, as the country has seen rapid changes. For Belize and Nepal, the cases were brought before even achieving moderate social change, but with legal and political opportunities in sight and it worked.

As such, proper timing is crucial to the success of cases and for riding on public opinion to create social change. Therefore, one of the conditions that need to be in place for LGB SL to lead to social change is proper timing that applies to the legal and political opportunity structures.

### *c) The choice of petitioners*

One of the factors that contributes to the success of a SL case is the nature of the persons used as petitioners in the case. Marcus et al refer to this as 'proper organisation of clients' and it is their first factor. The choice of which petitioners to use depends on a variety of considerations. SL in countries that rely on multiple petitioners in the same case, as well as those that have different petitioners with different interests for different cases, usually are more successful, and usually in such cases, social change is deepened. This is because multiple petitioners also mean more buy-in from different interested persons and groups, and thus creates wider general appeal. Marcus et al, relying on the broader South African experience, suggest that using collective entities - organisations or movements - as petitioners is more likely to lead to success since these interested parties are well-grounded and have a direct interest in the matters being litigated.<sup>493</sup> However, this study adopts the view that specifically for LGB SL, the choice of petitioners depends on the nature of the case and, in certain cases, having individuals directly affected may be more strategic than having

<sup>493</sup> Marcus et al (n 477 above) 111-114.

institutions. Often, there may be a need to have faces, since invisibility of openly LGB persons in public spaces is one of the challenges with which the LGB movement has to grapple.

For Common Law Africa, in South Africa and Botswana where there were rarely repeat petitioners, there is more social change compared to Uganda and Kenya, where activists are routinely repeat petitioners. Again, SL in these two countries also tends to use more petitioners with different capacities and interests than SL in Kenya and Uganda. Comparing these two countries, SL in Uganda does tend to use multiple petitioners more often than Kenya, which reveals the importance of using multiple petitioners with different interests to ensure the success of LGB SL and eventually to achieve more than superficial social change.

For countries outside Common Law Africa, the proposition can be observed as follows:

For countries outside Common Law Africa, activists in Canada and USA have used different and multiple applicants, there has been much progress towards social change. For Nepal, where the petitioners were also diverse, legal victory was achieved and the country is making progress towards social acceptance. In Belize, where the prevailing legal rules prevented multiple petitioners, it remains to be seen how much social change the legal success in the single case will lead to.

Therefore, the nature of petitioners used in a case as well as the avoidance of repeat petitioners makes it easier for cases to be won and for different interests to be represented and presented out there which also helps to spur social change. Therefore, one of the conditions under which LGB SL can lead to faster social change is to have multiple petitioners with different interests and characters in the same case and to avoid repeat petitioners.

*d) The extent of elite and community mobilisation*

The community plays an important role in ensuring that LGB SL cases succeed and that social change happens faster. This is because the case is seen as representing interests of persons beyond the petitioners. Community mobilisation is about both constituents and elite members of the community, all of whom have impact as regards social change.<sup>494</sup> Community members ensure that the courts and the general public see that the cases have

<sup>494</sup> NeJaime (n 453 above) 663, 666.

not been brought by mere busybodies but by persons who have the LGB community firmly behind them. Elites, on the other hand, are crucial in changing mindsets and driving social change, and it is thus important that they join the cause.<sup>495</sup> For the general public, the fact that many persons identify with the cause will attract many others to do so too, as they then do not have to stand alone.<sup>496</sup> Therefore cases, which have had the LGB community behind them as well as elites, have generally been successful and have eventually contributed to the occurrence of social change.

The proposition plays out as below in the selected Common Law African countries:

South African activists mobilised LGB persons as well as elites to support the cases, which increased the chances of success and eventually made it easier for society to accept the court decisions as there were real persons behind the cases. However, there is also the failure to bring everyone on board and the racial-economic divide in the country to consider. Uganda follows next as it managed to mobilise elites and LGB community members to oppose the AHB/A. The fact that this was a campaign limited to the AHB/A however makes the mobilisation to fall short of spurring social change to significant levels. Activists in Botswana and Kenya also mobilised to a certain measure but not to the extent of the other two and therefore the resultant social change is commensurate with these efforts. Therefore, the difference in the extent of such mobilisation explains the difference in terms of social change.

For the selected countries outside Common Law Africa, the relationship is as follows:

Activists in the USA and Canada where there was much determined mobilisation of elites and the LGB community also saw more social change as compared to those in Belize and Nepal who did not mobilise as much perhaps due to the prevailing political and social conditions.

Therefore, the extent of mobilisation of elites and the LGB community is an important factor in determining the success of a SL case and how these contribute to social change. As such,

<sup>495</sup> See JM Balkin *Constitutional redemption: Political faith in an unjust world* (2011) 182. Also see D NeJaime 'Constitutional change, courts and social movements' (2012) 111 *Michigan Law Review* 897. Also see generally D NeJaime 'Convincing elites, controlling elites' (2011) 54 *Studies in Law, Politics and Society* 175.

<sup>496</sup> Interview with Prof. Charles Ngwena, n 368 above.

one of the conditions under which LGB SL can lead to social change is adequate mobilisation of members of the LGB community, as well as civil society actors and elites.

*e) The nature of the respondents*

Where the state and private individuals are targeted as respondents, the likelihood of the resultant decision prompting social change is high. Whereas usually states are the right entities to target, as they are the primary duty bearers, sometimes it pays dividends to target individuals outside the state who are responsible for human rights violations. This helps to isolate them, but also to act as a cautionary tale to others that it is not acceptable to violate the rights of LGB persons. Even if such a case was not successful, the fact that someone can be taken to court to account for violations against LGB persons sends a clear message to others in the same position. Its only downside is that it also gives a platform to the violators to adopt the posture of victim and claim that they are being persecuted, and this may lead to backlash as happened in Uganda when Pastor Sempa claimed that he had been sued in the USA by 'gays' when in reality he had been subpoenaed to appear and testify in a US court in the *Scott Lively* case.<sup>497</sup>

In the selected Common Law African countries, the proposition plays itself out as follows:

All the countries have had the state and its organs as the respondents in the majority of cases, but also included other respondents in their official and private capacities. This implies that the differences in social change are largely attributable to factors other than this one.

The experience in the Common Law countries outside of Africa also confirms this proposition as follows:

In Canada and USA where the state, its officials and private persons have been targeted as respondents, the result is significant social change for Canada, and increasing social change for the USA. For Belize and Nepal where it is largely the state that has been targeted, but then other private individuals joined the cases, and the level of social change has not yet reached the level where it can be said to be significant.

<sup>497</sup> Interview with Frank Mugisha, Executive Director, Sexual Minorities Uganda, Kampala, 20 July 2017.

Therefore, the choice of respondents is important in determining success of the case and eventually influencing the extent of social change. As such, one of the conditions necessary for LGB SL to influence the direction and magnitude of social change is the inclusion of state actors, state officials in their official and personal capacities as well as private individuals where applicable.

*f) The involvement and the nature of third parties in the case*

Another factor in successful litigation is the involvement and nature of third parties in the cases, including interveners, amicus curiae or interested persons, depending on the jurisdiction concerned. Third parties are usually allies or opponents that join the case to argue for one side. These therefore indicate to the court the importance of the matter at hand and therefore give more weight to the case,<sup>498</sup> but some also come with reputations which help to bolster the parties, and yet some can easily bring down a party's case. When drawn from allies, third parties come in to support the LGB groups and this shows that many more persons beyond members of the LGB community are concerned and affected by the violations. Therefore, how interveners are involved and keeping them to one's side is an important factor in ensuring the success of the litigation and eventually ensuring that the case achieves the desired social change.

This proposition stands as follows regarding the selected Common Law African countries:

In South Africa, where eight third party interventions occurred in three cases, they were mostly on the side of LGB groups, there is more positive and increased social change. For Kenya and Uganda where there was at least one intervener in favour of LGB rights. Again, the level of social change in each of these countries is not as high as that in South Africa. Kenya in particular had interveners who opposed the case, and the fact that social change is limited points to interveners who are against LGB groups derailing the case and delaying social change. Botswana, has not had any third party intervention. However, Botswana is ahead of Kenya and Uganda as regards social change, showing that overarching factors, like the state of democracy, override endogenous factors such as the nature of interveners in terms of determining the ability of LGB SL to stimulate social change.

For countries outside of Common Law Africa, the proposition holds as follows:

<sup>498</sup> JJ Karastelev 'On the outside seeking in: must interveners demonstrate standing to join a lawsuit?' (2002) 52 *Duke Law Journal* 455-456.

For Canada and the USA where there were many more than ten interveners on the side of LGB groups in the past 20 years and all of them almost entirely based in those countries, the levels of success are higher as well as the rate and magnitude of social change. In Belize, on the other hand, there were many interveners on both sides and then what came into play is the nature of interveners. The interveners on the side of the respondents were mainly churches while those on the side of the LGB groups were mainly international human rights organisations. This showed that few organisations within Belize wanted to be identified with the case, but nevertheless the case was successful. For Nepal, there were no interveners in the main cases, but the fact that an individual brought a case to challenge the recognition of an LGB organisation is telling, and shows the level of opposition to LGB progress within the country.

Therefore, the extent and nature of third party interventions in a case is an important factor contributing to the case's success but also its significance beyond the court verdict. As such, one of the conditions that need to be in place if LGB SL is to lead to social change is the presence of interveners that are based within the country and are supportive of LGB rights.

*g) The nature of lawyers handling the case*

Lawyers make legal arguments before the judges, and they bring more than legal arguments and pleadings, they also bring their personal relationships with the judges, their reputations and their honour and beliefs. The nature of lawyers speaks to Marcus et al's fifth factor: research. Therefore, the choice of lawyers who argue cases before the judges is an important factor not only in ensuring the success of the case, but also in convincing the general public that the cause for which the lawyer stands is right and thus contributing to social change. As such lawyers who have specialised in human rights or who otherwise have experience handling a multiplicity of cases, may come in handier as lead lawyers in such cases. Cause lawyers or lawyers who identify as LGB or who specialise in handling LGB cases are more suited to handle such cases, but there is also the added advantage of using lawyers in private practice who have had years of experience. International lawyers tend to have much to offer where a comparative perspective is needed. The lawyer should be able to work well with the clients and to follow instructions as usually lawyers largely see matters through 'rights claims' lenses.<sup>499</sup> As Marcus et al note:

<sup>499</sup> SA Scheingold *The politics of rights: Lawyers, public policy, and political change* (1974) 3-10.



Where litigation is led primarily by lawyers, it runs a substantially greater risk of producing a case and a judgment that is removed from the reality on the ground and that does not achieve tangible social change. Even with the best intentions in the world, lawyers generally see things from a legal perspective first, in contrast with clients who want to see an impact on their lives or those of their constituencies.<sup>500</sup>

The choice of the lawyer/s to use therefore depends on the circumstances surrounding the case and the jurisdiction. In most cases, a multiplicity of lawyers bringing in different skillsets is what is needed.

For the selected Common Law countries, those who use a combination of experienced lawyers in private practice, community lawyers and international lawyers have had more successes in litigation. South Africa falls in this category, and so does Uganda, and Botswana. South Africa leads in terms of social change, followed by Botswana and then Kenya. Uganda is last. Since almost all countries use multiple lawyers from the different backgrounds, it comes to the fore that while the choice of lawyer is an important factor, it cannot determine the outcome of the case by itself.

Canada and the USA used different lawyers, including those specialised in public law as well as in international law, as well as those who were part of the community. Belize and Nepal on the other hand relied more on private lawyers. Canada and the USA has more success in terms of social change than did Belize and Nepal. It can therefore be concluded that one of the factors that contributes to LGB SL resulting into social change in favour of LGB persons is use of lawyers who are experienced in human rights and knowledgeable about LGB rights. As such, one of the conditions under which LGB SL can spur social change is to have different lawyers who are experienced and knowledgeable on LGB issues, and who can do proper and quality research, relate well to the community and the judge and make effective arguments.

*h) The nature of the legal and factual arguments raised during the hearing of the case*

Preparation of the arguments to make before court is of paramount importance if a case is to be won. The arguments help to 'characterise' the case and determine how the case is viewed by the court and the public; an issue that Marcus et al regard as their sixth factor crucial for

<sup>500</sup> Marcus et al (n 477 above) 114.

the success of SL.<sup>501</sup> As regards LGB litigation, currently the best arguments to make before court are human rights arguments as the likelihood of success is high but it also directly characterises the case as a human rights case. The rights to privacy, dignity, and non-discrimination are very important and have been used successfully in many different cases. Also discussing the limitation clause is very important as this is usually relied on to limit rights. Procedural aspects are also other grounds that should be well considered and addressed. Indeed, an analysis of the different LGB decisions in the US courts found that they were all grounded in proper legal analysis rather than simply being a result of judicial activism as many had attempted to brand such cases.<sup>502</sup> Therefore legal arguments are critical to how a case is perceived and how the judges come to decide it.

For the selected countries outside Common Law Africa, the proposition works out as follows:

Among the selected Common Law countries, lawyers have primarily based their arguments in human rights. The facts also follow the same line as they are about instances of violation of human rights. For countries like South Africa, Botswana and Uganda, where more arguments than simply human rights ones have been relied on by the parties. There have also been more court victories based on these grounds, and indeed there is more social change than in Kenya. The success of LGB SL in Uganda, as has been shown before, has been affected by overriding exogenous factors concerning the state of democracy and the level of judicial independence.

For the selected countries outside Common Law Africa, the proposition works out as follows:

For the selected Common Law countries outside Africa, all the cases in all countries were based almost entirely on human rights arguments too. Also, the social change so far seen differs among the countries. The fact that no other arguments have been relied on to achieve victory shows the paramount importance of human rights arguments in such cases.

Therefore, the nature of arguments made is an important factor, and one of the conditions that need to be in place in order to ensure that LGB SL leads to social change is reliance on human rights arguments, which are anchored in the Constitution.

<sup>501</sup> Above, 121-122.

<sup>502</sup> See generally, SJ Becker 'The evolution toward judicial independence in the continuing quest for LGBT equality' (2014) 64 *Case Western Reserve Law Review* 863.

*i) The nature of the prayers made*

The nature of the prayers made before court also influence the success of the case and eventually social change. Prayers guide the judges on what to do in case they find in favour of a party. Usually, the judges will not grant prayers that have not been asked for. Remedies such as 'reading in' and nullification of laws are usually criticised for violating the principle of separation of powers, and for being counter majoritarian, and as such judges may not be eager to issue them unless specifically asked by the parties. Where the courts do issue remedies such as reading in, or ordering parliament to make changes within a particular period of time, it becomes incumbent upon parliament to enforce those remedies.

For the selected Common Law African countries, only in South Africa were wide and specific prayers for remedies made. These were largely granted, with the court ordering parliament in some respects or directly reading into provisions of the law. For other countries, usually declarations were sought as well as non-specific prayers. Due to the nature of these prayers, even the laws that were nullified remain on the law books, as in the case of Uganda. In Kenya, what the court ordered in the *Eric Gitari* case was not done.

For the selected Common Law countries outside Africa, the proposition works out as follows:

For the selected countries outside Common Law Africa, the parties go all out asking the court to issue the remedies within its powers and this has been so in all four countries. The differences in terms of social change among the countries can therefore be attributed to other factors, both exogenous and endogenous beside this one.

Therefore, how remedies are couched and what is asked for is important in determining the success of LGB SL and eventually social change. As such, one of the conditions that is crucial for LGB SL is requesting for remedies that are specific, and thus can be issued by the court.

*j) The extent of judge mapping*

Whereas lawyers make arguments, judges take the decisions. Therefore, knowing the backgrounds, dispositions and whether the judges are generally liberal or conservative is important in determining the success of cases and anticipating how the cases will eventually change public perceptions and opinions. According to Dugard and Langford, the outcome

of a case depends ultimately on the judge, and this is what makes judicial mapping important.<sup>503</sup>

LGB issues are usually met with very conservative societal views. As members of society themselves, judges are biased by their own belief systems and values, and therefore it becomes critical that judges who are more open to LGB issues should be identified. It should be noted that it is not always guaranteed that a particular judge will rule in a particular way, but nevertheless general trends can be studied and mapped. If the judges are mapped well, then the parties can more easily strategise on how to approach the judges and which arguments to raise, and also, where possible, to do forum shopping in order to find the best court in which to file the case. It must be noted however that parties will not always be in a position to know which judge out of a large pool of judges will be assigned to hear a case. In Kenya, for instance, this is done more easily as the various High Courts have a specific Human Rights Division to which only one or two particular judges are assigned. The judges who will hear a human rights case filed in the Kenyan High Court are therefore narrowed down. Apex courts, such as the Supreme Court of Kenya and the Constitutional Court of South Africa, will require a large coram of judges to sit on a particular case and the parties will not be able to know ahead of time which particular judge will be assigned to write the judgment. Precise mapping for a specific judge would not be possible and parties could only work with the dispositions of the various judges that occupy the bench of the particular court at the time the case is instituted. Precise judge mapping is perhaps of lesser importance when it comes to apex courts since individual judges, who were part of the bench hearing the case but who had not been assigned to write the judgment, may nevertheless pen dissenting judgments with which the majority of the bench could concur. The disposition of all the judges on a large bench should thus be taken into account.

For the selected Common Law African countries, the proposition works out as follows:

In South Africa, where cases were filed in the euphoria of the move from apartheid to democracy, and after activist judges had been appointed to the new Constitutional Court, the litigation was successful, and clear headway is still being made towards social change. It was more about the general spirit of the times rather than specifically about judge mapping. Botswana and Kenyan activists also only took cases when the timing was good. Kenyan activists deliberately filed cases targeting more progressive judges, in a more favourable

<sup>503</sup> n 478 above, 63.

context brought about by the introduction of the new Constitution characterised by an altered judicial system and more independent judges. Botswana activists took the disposition of the judges into account when developing the *LEGABIBO Registration* case and allowed the bench to rule on clear constitutional issues without having to make declarations about LGB rights.<sup>504</sup> Ugandan activists were largely reactive to developing situations and filed cases without deliberately aiming at any particular judges. The rate of victory in Uganda is reducing, and the level of social change is still low. As such, judge mapping is important for court victories.

For the selected countries outside Common Law Africa, the proposition plays out as follows:

Even for countries outside of Common Law Africa, activists in all the countries only filed cases when they felt that there were enough judges on the courts who could rule in a way that favoured the LGB agenda. Therefore, the difference in terms of social change can be better explained by exogenous and endogenous factors other than this one. However, the overall indication is that judicial mapping is an important factor determining the success of LGB SL. As such, one of the conditions necessary for LGB SL to lead to social change is mapping of judges who can make LGB friendly judgments and filing cases at the time when they are on the courts.

*k) The incidence of costs*

Awarding costs against public interest petitioners inhibits litigation,<sup>505</sup> and thus dims the prospect of successful SL. Therefore, avoiding being ordered to pay costs is important if litigation is both to continue and to lead to social change.

This proposition plays out as follows for Common Law Africa:

For the selected Common Law countries in Africa, where the rules on costs favour LGB SL, such as the case is in South Africa, Botswana and Kenya, LGB SL is thriving. Despite the difference in the extent to which social change is being achieved, all countries are making headway. For Uganda however, where the strategic cases are largely treated as any other case, not much progress has been made in terms of social change.

<sup>504</sup> See n 86 above.

<sup>505</sup> See C Tollefson, 'When the "public interest" loses: The liability of public interest litigants for adverse costs awards' (1995) 29 *University of British Columbia Law Review* 303.

For the selected countries outside Common Law Africa, the proposition plays out as follows:

For Canada and the USA where costs have generally not been awarded against LGB applicants in countries, there is more progress towards significant social change. For Belize and Nepal, costs are yet to be awarded against LGB activists since there are no lost cases, yet. Both countries are making progress towards social change. Therefore, other factors, such as the number of cases brought before the courts, have a bigger role to play in this regard than the incidence of costs.

Therefore, where costs are not awarded against LGB petitioners, LGB SL is more likely to thrive and this therefore is one of the factors that determine LGB SL leading to social change. As such, one of the conditions for LGB SL leading to social change is the avoidance of being condemned in costs.

*l) The extent to which the cases are supported by advocacy efforts*

Litigation in isolation from advocacy, media exposure and broader social mobilisation is unlikely to lead to social change. The nature of advocacy and other strategies employed to support the court cases are critical to how a case leads to social change. Media coverage is key and important in this regard as it ensures that the cases are more widely known and the outcomes widely disseminated.<sup>506</sup> This is important as the actual import of the case, as well as the challenge itself and what it means, are publically discussed and debated and LGB issues start receiving the level of attention required to initiate social change.

For the selected Common Law African countries, this proposition comes to the fore as follows:

In those countries where advocacy was extensively used such as in South Africa, LGB SL was successful and has largely contributed to increased social change. In Botswana, Kenya and Uganda where advocacy was limited due to strategic reasons or practical challenges the level of both legal change and social acceptance is still low, although it is growing in both Botswana and Kenya and stagnating in Uganda. The other factors such as the level of democracy better explain the differences in the rates.

<sup>506</sup> Interview with Nicholas Opiyo, human rights lawyer, Executive Director, Chapter 4 Uganda, Kampala, 19 March 2018.



For the countries outside Common Law Africa, the proposition can be perceived as follows:

Canada and the USA which have witnessed extensive advocacy have had more social change than Belize and Nepal which had limitations on how much advocacy they could do. Nepal did take advocacy a notch higher than Belize with political engagements.

Therefore, the level and extent of advocacy is crucial in enabling LGB SL to stimulate social change. As such, one of the conditions necessary for LGB SL to lead to social change is having extensive advocacy efforts targeting the general public and elites in particular.

In general, the litigation stage is also key to the success of a case both in court and outside court. The court in which a case is filed, the parties to the case, preparations of the case, the orders given and the extent of advocacy are all key determinants of how a case fares in court, and its impact after a decision is made.

#### **5.4.4 Factors at the post-litigation stage**

The post-litigation stage is a critical stage that determines if LGB SL will spur social change. It would be a great mistake to assume that once a court victory is achieved, social change has also been achieved. At the same time, losses do not mean that a case will not have any positive impact that can create social change. What happens at this stage determines the real value of SL. This stage is largely not limited in terms of timeframes, but nevertheless certain things must happen immediately and others later if legal change and social acceptance are both to be realised. The factors that contribute to LGB SL leading to social change at this stage are: the extent to which the court decision is enforced; the extent to which adverse decisions are appealed; and the extent to which authorities are held to account to ensure implementation of the decisions:

##### *a) The extent to which successful decisions are actively enforced*

Enforcement is the process through which the decision turns into tangible rights for LGB persons. It is when a judicial pronouncement is translated into a change in law or policy. Decisions which do not require further action and enforcement on the part of the state or another losing party, are infrequent. Even simple declarations have to be given meaning: people have to test them out. The executive or the legislature needs to change their conduct

in response to the court decision.<sup>507</sup> This therefore makes this stage very important if LGB SL is to meaningfully contribute to social change. It is what Marcus et al identify as the last and seventh factor: follow up.

For the selected Common Law countries outside Africa, the proposition can be discerned as follows:

For the selected Common Law African countries, in South Africa where implementation of all the victorious cases was achieved, the level of social change is higher. For Botswana, the successful *LEGABIBO Registration* case was actively enforced, and even the lost *Kanane* case<sup>508</sup> did not lead to further arrests. There is also a relatively higher level of legal change and social acceptance than in Kenya and Uganda. For Kenya, and Uganda, enforcement is largely non-existent except where declarations have been given. The level of social change is slightly higher in Kenya than in Uganda.

The same is true for the selected countries outside Common Law Africa, where Canada and USA lead in terms of enforcement of successful decisions as all are actively enforced. The level of social change in Canada and the USA is also higher than the other two countries. For Belize and Nepal where enforcement is still dragging on, still less social change has been seen but with Nepal doing far better than Belize.

Therefore, the extent to which successful decisions are enforced is an important factor in ensuring that LGB SL leads to social change. As such, one of the conditions that must be in place for LGB SL to lead to social change is the ability of the court decisions to be turned into tangible benefits through actual enforcement.

***b) The extent to which adverse decisions are appealed***

Appeals help to determine the final position of the law on an issue, and for issues as controversial as LGB rights, there is need for such a definitive position to be reached. Where a system of precedent is followed, final judicial decisions significantly reduce the possibility of the decisions being reversed, at least in the foreseeable future. Finality in decisions facilitates implementation and can serve as a basis for clear communication about the position to the general public.

<sup>507</sup> Marcus et al (n 477 above) 122-126.

<sup>508</sup> *Kanane* case, n 84 above.

For the selected countries in Common law Africa, the proposition can be discerned as follows:

South African activists appealed all adverse decisions all the way to the Constitutional Court, which of course was easier as it was generally automatic within their legal system, and indeed the level of social change is also high. For Botswana, too, the position on registration of organisations and consensual same-sex relations is now certain through the appeals to the Court of Appeal. Its level of social change is also comparable with that in South Africa. For both Kenya and Uganda, the fact that no case has ever come before the highest courts and the fact that appeals are going on in the relevant cases relates to the fact that the level of social change is also not so high, even though there are differences between the two countries. This shows that the proposition that the extent of appeals has a link to the ability of LGB SL to spur social change is valid.

For the selected Common Law countries outside Africa, the proposition works out as follows:

The fact that the Supreme Courts in all the countries have finally had a say on all the cases except for the pending appeal in Belize shows that there is certainty on the legal position in three of the four countries. For Canada and USA, which have had a large number of cases, the legal change is almost complete with the exception of a few issues, while in those countries that have had just a few cases (Nepal and Belize) the extent of social change is still limited. This shows that this fact combines with the number of cases filed also to contribute to enabling LGB SL to stimulate social change.

Therefore, one factor that contributes to whether LGB SL may lead to social change is whether the decisions are appealed to the highest courts.

Generally, the post-litigation phase determines how the case will go down in history: either as a case to be forgotten, or a case that prompts deep-rooted change. How appeals are handled, and how the decision is interpreted and communicated are all key components of ensuring this form of change.

## 5.5 Conclusion

From the discussion above, the fact that LGB SL has largely failed to meaningfully stimulate social change in Common Law Africa is not necessarily due to African exceptionalism, as the same situation exists elsewhere where the conditions are more or less similar to those in Common Law Africa. Belize and Nepal are not much different from most African countries in terms of levels of political stability, the level of economic development, the role of religion and dependence on other countries, and therefore the similarities to Common Law Africa. The countries that are politically, economically and socially distinct from countries in Common Law Africa, that is Canada and USA, show a real difference in terms of social change. Also, the African exceptionalism theory is further discarded in that South Africa compares rather favourably in terms of social change with countries like the USA with whom they share some attributes such as economic inequalities and social diversity. Indeed, South Africa's legal regime is ahead of both Canada and USA as regards protection of LGB persons.

Considering the factors in detail, it is quite clear that all factors do not play the same role in ensuring that LGB SL spurs social change. Some are more relevant than others. An unquestionable and important conclusion is that the exogenous factors, overall, are more important than the endogenous factors in predicting whether LGB SL would lead to social change in any particular context. The experience of activists in Uganda - the country with the lowest 'social change' ranking - shows that it does not matter much what kind of strategy is being followed, or who is actively mobilised or the nature of legal arguments raised, when there is declining rule of law, undermined judicial independence, a legal culture that does not respect formal conflict resolution mechanisms, a proliferation of conservative religions and general economic underdevelopment. In such circumstances judges will not be independent enough to make decisions that vindicate rights of such an unpopular minority group as LGB persons. But even if they did so, the executive and the legislature frequently simply ignore them at best or physically raid the courts at worst. This goes to Gloppen's four broad factors: Opportunities must exist for marginalised persons to turn their concerns into legal claims. Courts must hear these claims and decide them favourably. The court's decision will address the claims raised. Other organs should be able to comply with the court decisions. In contrast to the experience in Uganda, activists in countries like Botswana and Kenya, where judicial independence is more established, have had impressive victories, with little mobilisation of elites and the LGB community, with in-

fighting within the LGB community, and with lawyers who are not necessary very experienced. However, South Africa stands out for both having had a very well-organised litigation strategy and also prevailing circumstances that favoured LGB SL.

South Africa therefore compares favourably with Canada, which is so far the only country examined that achieved significant social change, and the USA, which follows next. The similarities between the political system, the state of judicial independence, and the levels of economic development among others cannot be ignored. On the other hand, Nepal and Belize, which have conditions almost similar to Botswana, Kenya and Uganda, have also not been able to make as much progress as the USA or Canada or even South Africa. Therefore, it is clear that the exogenous factors play the biggest role in ensuring that LGB SL spurs social change. It can even be said that with the right conditions, even a poorly prepared and argued case would succeed in the courts and will go ahead to stimulate social change.

The data reveals a close association between the extent of social change favouring LGB persons in the study countries and exogenous factors potentially impacting and facilitating that change through SL. Of the 22 exogenous factors that have been examined for the four selected Common Law African countries, South Africa leads in 21; Botswana is second in 14; Kenya is third in 13 categories, while Uganda is fourth in 17 categories, which rhymes perfectly with the positions that each of the countries take respectively - first, second third and fourth. Legal culture stands out as a significant factor predictive of change-inducing SL, as its score on the social change scale for the respective countries as those that respect the law also have had higher levels of social change. Also, the level of democratic governance emerges as a firm predictor of significant change through SL. Other factors that show a strong positive correlation through close alignment between social change scores and scores for the particular factor are: those that deal with the judiciary: the extent of judicial independence and the legitimacy of the judiciary; then those that deal with the economy: the nature of the economy; and the level of economic development; and those that deal with social-religious factors: the extent of religious conservatism, the role of traditional culture, and the extent of importation of culture wars. The last category shows an inverse relationship with those that score high being the lowest in terms of social change. This shows again a positive relationship between these factors and the extent of social change.

As for the endogenous factors, the extent to which favourable decisions are enforced appears as the most significant factor potentially inducing social change through SL. A

favourable decision that is not enforced stands little chance of leaving its mark. Even where the conditions are good but cases have not been brought before courts, no social change will happen as a result of litigation. For example, it is quite obvious that fewer cases have been brought in Botswana yet the conditions there favour social change more. Inversely, more cases have been brought in Uganda in circumstances that are very hostile to LGB litigation. This would imply that activists in Uganda may need to study the environment and decide how to proceed with LGB SL, and so should those in Botswana. Even those in South Africa seem to have stalled in terms of bringing cases before the courts yet the broader factors still favour LGB SL.

Therefore, the interplay between the exogenous factors and the endogenous factors is important in ensuring social change. They must all be in place if litigation is to lead to the desired change. The existence of the right political climate but with only a few cases being brought to courts as the case is in Botswana means that social change will not be driven by SL, and at the same time, the existence of the best planned case in an unfriendly political environment as the case is in Uganda would not lead to much social change either. This would remain true whether in Africa or any other place. These factors are therefore more or less universally applicable to all Common Law countries. This therefore implies that those designing LGB SL initiatives have to be alive to the broader context and pay more attention to enforcement of decisions and changing hearts and minds.

Having all these factors in one's favour will certainly ensure that social change happens. However, it does not imply that each and every factor must be in place for LGB SL to stimulate social change. Their importance is contextual and they play different roles in different countries. Nevertheless, the parties should be able to make effective use of the endogenous factors as they are fully in control of these and then strive to take advantage of the exogenous factors. Better still, LGB activists also ought to be alive to other social justice struggles and be part of them. LGB SL cannot be undertaken in isolation of struggles for democracy, social justice, and human rights more generally.



## CHAPTER 6

### TAKING THE BULL BY ITS HORNS: MAKING LGB STRATEGIC LITIGATION MORE EFFECTIVE IN STIMULATING SOCIAL CHANGE

#### 6.1 Introduction

None of the Common Law African countries studied – including South Africa – has achieved significant social change. This implies that these countries do not meet most of the conditions identified in Chapter 5 as being important for LGB strategic litigation (SL) to stimulate social change and to advance the rights of persons in Africa. South Africa nevertheless stands out from the rest of the African countries in that it has undergone significant legal changes, and has made at least some distinct headway towards social acceptance. LGBT SL in the country has been characterised by many of the conditions identified in Chapter 5. For the selected countries outside Common Law Africa, Canada has been able to achieve significant social change while the USA is on course to the same achievement. Nepal and Belize are largely lagging behind but with clear progress being witnessed. This implies that from both the selected Common Law African countries and those outside Common Law Africa, there is much to learn which would help activists in the selected Common Law countries to move towards the desired significant social change.

This chapter makes recommendations to activists in the case study Common Law African countries on how to strategically use their political, legal, economic, social and movement realities in order to make LGB SL contribute more meaningfully towards the creation of social change. The chapter begins with a discussion of how the factors exogenous to court cases can be used and influenced and then goes on to consider how the factors endogenous to cases can be managed. Approaches to use towards the exogenous factors include: linking the LGB struggle to the broader quest for democracy; supporting institutional capacity building for the judiciary; being part of the struggle for economic reforms; and the LGB community taking part in broader social-political initiatives. Some of the approaches considered in managing the endogenous factors include: clearly defining the strategic objective in litigation; drawing formal litigation and long-term litigation strategies; adequate mobilisation of elites and allies; using the different

types of lawyers in appropriate ways; engaging in judge-mapping ahead of every case; encouraging supportive interveners and amici curiae; and ensuring that successful court decisions are implemented.

The discussion generally puts the realities of Common Law Africa into consideration and thus makes suggestions that are in line with these realities. As such, more 'African' ways of doing SL such as tempering the adversarial nature of litigation generally by maintaining dialogue and being open to alternative dispute resolution mechanisms drawn from African traditions are also discussed. The chapter then focuses on other strategies that can complement SL, particularly: engagement in law-making and policy-making processes; training judges and police officers on LGB issues; engagement with the media; relations with international allies; and using spaces such as the African Commission on Human and Peoples' Rights, other African Union bodies and the United Nations in order to influence change; and seizing on critical moments and events to draw public attention to the issues at hand. It then discusses the question of whether there are any typically 'African' ways of doing SL, which can then replace the need for using SL. The chapter concludes with a summary of the main suggestions and recommendations.

## **6.2 Strategic engagement with the exogenous factors**

The exogenous factors cover those issues over which LGB activists largely have no direct control. Even though LGB activists cannot directly control these factors, they can nevertheless take advantage of them in order to stimulate social change in favour of LGB persons, and can contribute to the positive effects of LGB SL. The following are the recommendations in respect of each of these factors:

### **6.2.1 Managing the political factors**

The political opportunity structure theory requires that activists use available political conditions and opportunities to advance their causes.<sup>1</sup> LGB activists need to make use of what they have even in unfavourable circumstances. They need to be alive to the political dynamics around them and plan their cases with these dynamics in mind. Winning a case in which the judgment will never be implemented is largely a hollow victory, and yet politics

<sup>1</sup> G Fuchs 'Strategic litigation for gender equality in the workplace and legal opportunity structures in four European countries' (2013) 28 *Canadian Journal of Law and Society* 189, 192. See also discussion in Chapter 5 above, section 5.2.2.

determines who enforces the judgments. The LGB activists need to be aware of other struggles, take part in them and avoid being exclusive and only caring when their own rights are on the line. The political factors need to be managed in different ways such that they do not negatively affect how LGB SL leads to social change. Some of these ways include: joining the wider struggle for democracy, human rights and good governance in the country; strategically engaging with different groups during periods of political and social transformation and strategically supporting LGB friendly leaders to occupy important positions in the government, the judiciary and the legislature.

*a) Joining the wider struggle for democracy and human rights*

In situations of autocratic and poor governance, those seeking to stimulate social change in favour of LGB persons must also engage in seeking to effect changes to the political leadership and set-up of the country. LGB activists and persons therefore need to actively join the pro-democracy struggles and demand for political change. One way to do this is to ally themselves with the different political parties seeking political change. Activists in South Africa were able to look forward and strategically align themselves with the African National Congress even before it won the 1994 elections in South Africa.<sup>2</sup> This was also done in Nepal, where LGB persons aligned themselves with one of the strongest political parties, the Communist Party of Nepal (United), which ensured a seat for them in the Constituent Assembly that was to define the nation's political future.<sup>3</sup>

Furthermore, LGB persons and activists can strive to be part of the struggles that go beyond LGB rights, by encompassing related issues such as women's rights and racial equality. In Uganda, strategic alliances with primarily the women's movement ensured that the AHA was defeated. This was through the Civil Society Coalition on Human Rights and Constitutional Law (CSCHRCL), which saw established women's rights organisations such as Akina Mama Wa Afrika (AMWA) taking the lead to oppose the bill that led to the Act.<sup>4</sup> Swartz argues that, within the context of the USA, African American rights activists should embrace LGB rights activists since the causes are one and the same.<sup>5</sup> This advice can be applied to all other causes, and even to LGB persons themselves, to embrace other

<sup>2</sup> See EC Christiansen 'Ending the apartheid of the closet: Sexual orientation in the South African constitutional process' (2000) 32 *New York University Journal of International Law and Politics* 997, 1029-1032.

<sup>3</sup> UNDP & USAID 'Being LGBT in Asia: Nepal Country Report' (2014) 25.

<sup>4</sup> See generally A Jjuuko & F Mutesi 'The multifaceted struggle against the Anti-Homosexuality Act in Uganda in N Nicol et al *Envisioning global LGBT human rights: (Neo) colonialism, neoliberalism, resistance and hope* (2018) 342.

<sup>5</sup> See generally, O Swartz 'Gay rights/ African American rights: A common struggle for social justice' (2015) 29:2 *Socialism and Democracy* 1.

movements in order to make their own movement stronger, thereby creating a situation of unity in diversity. Such a broadened focus would not only help to win over allies but also provide the basis for others to recognise LGB persons as people legitimately interested in wider democratic struggles rather than as a selfish group only interested in achieving their own goals. Supporting other activists/ causes in seeking change would put other people in the debt of the LGB persons who supported their own cause, thus building a wide support base for LGB activists. The approach serves another role in countries where LGB rights are restricted, as it helps to keep LGB persons safe seeing that they are engaged in the broader social struggles, which are the legitimate demands of every group.<sup>6</sup> It is thus important that LGB persons play an active role within the broader democracy struggles in order for LGB SL to stimulate social change.

*b) Strategically engaging during periods of political and social transformation*

LGB activists and persons should strategically engage other persons and groups during periods of social and political transformation. One of the ways to do this is by joining active and partisan politics in countries that are undergoing constitutional building processes or major changes in leadership. This is because the politicians would need the support of large groups of persons, and a united LGB group, even if they are generally a minority, would make a significant difference to an election outcome. This would enable the activists to place their agendas on the table, and be strategically placed to take on key positions in case the group that they supported wins.

The above strategy worked well in South Africa at the end of apartheid and was the basis for the major constitutional changes, which included the inclusion of sexual orientation as a protected ground against discrimination within the new Constitution.<sup>7</sup> It also worked in Nepal, when Sunil Pant joined the Communist party and later was part of those who drafted a new constitution for Nepal.<sup>8</sup> It worked in the USA as key Obama campaigners included active LGB activists,<sup>9</sup> many of whom were later appointed to significant positions in the Obama administration.<sup>10</sup> These appointments help as they create allies in the courts, the

<sup>6</sup> See for example, H El Menyawi 'Activism from the closet: Gay rights strategising in Egypt' (2006) 7 *Melbourne Journal of International Law* 27, 49-51

<sup>7</sup> See Christiansen, n 2 above.

<sup>8</sup> UNDP & USAID, n 3 above.

<sup>9</sup> See 'Behind the scenes of the Obama campaign' *The Blade* 8 September 2011 <http://www.washingtonblade.com/2011/09/08/behind-the-scenes-of-the-obama-campaign/> (accessed 15 July 2018).

<sup>10</sup> Over 250 people appointed to the Obama administration identified as LGB - a number higher than in all the previous administrations combined. For details of these persons, see Victory Institute 'LGBTQ appointments

legislature and the executive who will not only be able to convince others, but may also be able to effect the necessary changes depending on the positions they occupy. It also helps to show other persons that LGB persons can serve as well as anyone else and thus increase public understanding and appreciation of them.

Another way to do this is through active lobbying during constitution making processes, to ensure that sexual orientation is included as a protected ground in the resultant constitution. In South Africa, the express protection of sexual orientation as a ground upon which someone cannot be discriminated against has been the main gateway for the recognition of LGB rights. So far, it has been difficult to make similar headway in all the other countries that have no express protection in their constitutions. The best time to achieve such a goal is during political transition and the drafting of new constitutions as was done in both South Africa and Nepal. Such a strategy was attempted but did not succeed during the making of the new Constitution for Kenya in 2010.<sup>11</sup> In Uganda, the reverse is true as the anti-gay groups managed to secure the insertion of the prohibition of same-sex marriages into the Constitution during the 2005 constitutional amendment.<sup>12</sup> In Belize, Canada, and the USA, the courts have managed to rule in favour of protection even without such a clause. It has nevertheless been an uphill struggle.

An alternative approach is for activists to make use of other key transformative events beyond political changes. Such events include transformative judicial decisions. Following the case of *M v H*,<sup>13</sup> Canadian activists immediately ensured that most laws that discriminated against partners in same-sex relationships were changed.<sup>14</sup> In the USA, the victory in the *Baehr v Lewin*<sup>15</sup> case was actively followed up with many other cases, eventually leading to the legalisation of same-sex marriages,<sup>16</sup> in *Obergefell et al v Hodges*,

in the Obama-Biden administration' <https://victoryinstitute.org/programs/presidential-appointments-initiative/lgbt-appointments-obama-biden-administration/> (accessed 11 June 2018).

<sup>11</sup> CE Finerty 'Being gay in Kenya: The implications of Kenya's new Constitution for its anti-sodomy laws' (2012) 45 *Cornell International Law Journal* 448. See also joint interview with Lorna Dias, Jackson Otieno, Kelvin N. Washiko, Yvonne Oduor, and Brian Macharia, all of Gay and Lesbian Coalition of Kenya (GALCK), Nairobi, 26 July 2017.

<sup>12</sup> See generally, JD Mujuzi 'The absolute prohibition of same-sex marriages in Uganda' (2009) 23 *International Journal of Law, Policy and the Family* 278.

<sup>13</sup> (1996), 142 DLR (4th) 1 (Ont CA), aff'd [1999] 2 SCR 3 (20 May 1999).

<sup>14</sup> Skype interview with Douglas Elliott, Canadian LGB activist and human rights lawyer, 29 July 2018.

<sup>15</sup> 74 Haw. 530, 597, 852 P 2d 44, 74 (1993).

<sup>16</sup> See generally EA Andersen 'Transformative events in the LGBTQ rights movement' (2017) 5 *Indiana Journal of Law and Social Equality* 451-455. Also see E Wolfson 'Crossing the threshold: Equal marriage rights for lesbians and gay men and the intra-community critique' (1993) 21 *New York University Review of Law and Social Change* 567, 572.

*Director, Ohio Department of Health, et al.*<sup>17</sup>

Therefore, transformative events must be taken advantage of, as during such periods, change is most likely to occur. Such periods are when most of the usual justifications for restricting LGB rights would not make sense as other groups are also claiming change, and the general atmosphere in the country favours human rights and equality in breaking away from the oppression of the past.

*c) Strategically using LGB friendly leaders*

Since strong and visionary leaders do much to help in changing people's minds in favour of LGB equality, it is important that LGB activists and leaders support visionary LGB friendly leaders' ascent to key positions where they can effect change. In South Africa, LGB groups actively supported the African National Congress (ANC) and its transformative leader, Nelson Mandela. The alliance greatly helped them when it came to ensuring changes were effected in favour of LGB persons. Mandela reciprocated through the appointment of outstanding LGB persons to important positions, most notably Justice Edwin Cameron,<sup>18</sup> who was first, appointed to the High Court, and then rose through the ranks to the Supreme Court of Appeal and eventually to the Constitutional Court. Justice Cameron has been involved in key LGB decisions, including *Fourie and Another v Minister of Home Affairs and Another*<sup>19</sup> that legalised same-sex marriages. A number of openly LGB politicians have also been elected and appointed to key positions, including Lynne Brown, the Minister of Public Enterprises under the Zuma presidency, and the sixth Premier of the Western Cape.<sup>20</sup>

Although he does not identify as gay, former Chief Justice Willy Mutunga was openly supportive of LGB rights during his time working with the Ford Foundation and, despite admitting to this, he was appointed the Chief Justice of the Supreme Court of Kenya.<sup>21</sup> Another prominent LGB rights activist, Monica Mbaru, was appointed as a Justice of the High Court of Kenya. In her view, her being on the court has helped to demystify the court –

<sup>17</sup> *Obergefell et al. v Hodges, Director, Ohio Department of Health, et al* 576 US (2015).

<sup>18</sup> Justice Edwin Cameron was appointed to the High Court by President Nelson Mandela shortly after the political transition in 1994. There was a significant delay in his appointment to the Constitutional Court due to the fact that he had openly criticised then President Thabo Mbeki about his stance on HIV/AIDS. He was only appointed to the highest court in the country during the brief presidency of Kgalema Motlanthe in 2009, after his third application to the Court. See 'In South Africa, a Justice delayed is no longer denied' *New York Times* 23 January 2009.

<sup>19</sup> (232/2003) [2004] ZASCA 132; [2005] 1 All SA 273 (SCA) (30 November 2004).

<sup>20</sup> See People's Assembly 'Ms. Lynne Brown' <https://www.pa.org.za/person/lynette-brown/> (accessed 16 August 2018).

<sup>21</sup> See T Maliti 'For all to see and hear: Part I' *International Justice Monitor* 9 June 2011 <https://www.ijmonitor.org/2011/06/for-all-to-see-and-hear-part-i/> (accessed 20 August 2018).



since even LGB activists can be High Court judges. She is of the view that activists should support allies to get to such positions, and that people should always make an effort regardless of who they are, because 'such positions do not come on a silver platter.'<sup>22</sup> Only Botswana and Uganda have no openly LGB persons or LGB activists serving in key State positions.

Among the selected Common Law countries outside Africa, there are also important examples of persons who have been supported by the LGB community and then went on to occupy important positions. In the USA, many LGB groups supported Barack Obama, which paid off when Obama supported LGB equality and over-saw many positive changes happening during his tenure in office. LGB persons were identified by LGB lobbyists and these were appointed to key positions in the Obama administration.<sup>23</sup> Indeed, LGB groups such as the Presidential Appointments Initiative of the Victory Institute do specific advocacy to ensure that professionals they identify are appointed to administrations that are supportive of LGB rights.<sup>24</sup>

In Canada, many individuals have been supported by the LGB community and gone on to occupy important positions. Openly gay Svend Robinson was supported by the LGB community and became a Member of Parliament from 1988 to 2004, a first time achievement, which has since been replicated many times over.<sup>25</sup> Randy Boissonnault was appointed by Prime Minister Justin Trudeau as the his Special Adviser on LGB and Transgender, Queer and Two Faced (LGBTQ2) issues, after being elected Member of Parliament.<sup>26</sup> Kathryn Wynne was elected as a Member of Parliament and later became leader of the Liberal Party and Prime Minister in Ontario.<sup>27</sup> In Nepal, Sunil Babu Pant became a Member of Parliament.<sup>28</sup>

There are many examples of openly LGB persons or persons who strongly support LGB equality who have been appointed to important positions where key decisions on LGB rights are made. More of this needs to happen in Common Law Africa, as it not only renders

<sup>22</sup> Interview with Justice Monica Mbaru, Nairobi, 26<sup>th</sup> July 2017.

<sup>23</sup> See Victory Institute, n 10 above.

<sup>24</sup> Above.

<sup>25</sup> See '30 years after Canada's first MP came out, LGBT politicians still face challenges' *CBC News* 24 February 2018 (accessed 12 June 2018).

<sup>26</sup> 'Apology part of mandate for LGBTQ adviser Randy Boissonnault' *CBC News* (accessed 12 June 2018).

<sup>27</sup> For more discussion on how LGB politicians fare as well as the support from the LGB community see, J Everett & M Camp 'In versus out: LGBT politicians in Canada' (2014) 48:1 *Journal of Canadian Studies* 226, 234.

<sup>28</sup> USAID & UNDP, n 3 above.

respect to LGB persons but also puts them directly in positions of influence, something that helps to ensure that LGB SL stimulates social change.

## 6.2.2 Leveraging the legal factors

The legal opportunity structure<sup>29</sup> for LGB persons lies in the fact that in all the different countries studied, there is equal access to the courts by all persons, including LGB persons. LGB persons should therefore make the legal factors work for rather than against them through the following ways: playing a role in ensuring judicial independence; testing the non-discrimination clauses in the constitutions for their applicability to LGB persons; ensuring the enforcement of and adherence to international and regional human rights standards through the different mechanisms; popularising the Constitution and demystifying human rights; encouraging the use of the judiciary by LGB persons; encouraging the use of traditional justice mechanisms for LGB issues; and taking advantage of the legal culture in the different countries.

### *a) Playing a role in ensuring judicial independence*

All the selected countries protect judicial independence in their constitutions. Such protections provide an opportunity to demand that judicial independence be upheld in practice. To maintain its independence, the judiciary needs popular support. In Canada, it has been noted that it would be difficult for the executive or the legislature to trample on the judiciary as the levels of popular support for this institution would not easily allow that.<sup>30</sup> In the Common Law African countries, LGB persons need to join other groups and vehemently oppose the violation of judicial independence, demand better conditions for judges and other judicial officers and support reforms that would help further judicial independence. The country where judicial independence is being eroded most is Uganda,<sup>31</sup> and therefore LGB activists there need to join the voices demanding improved respect for the courts. If the courts are not independent, they cannot make decisions independent from what the legislature or the executive wants them to do. In particular, LGB persons should continue using the courts by bringing cases of violations against them before the judiciary, thus

<sup>29</sup> See discussion of the legal opportunity structure theory in Chapter 5.3.3 above.

<sup>30</sup> See I Binnie 'Judicial independence in Canada' Paper submitted to the World Conference on Constitutional Justice on behalf of the Supreme Court of Canada in anticipation of its Second Congress to be held in Rio de Janeiro January 16-18, 2011. [http://www.venice.coe.int/WCCJ/Rio/Papers/CAN\\_Binnie\\_E.pdf](http://www.venice.coe.int/WCCJ/Rio/Papers/CAN_Binnie_E.pdf) (accessed 26 May 2018).

<sup>31</sup> See discussion in Chapter 5, section 5.2.1.

bolstering the courts' exposure to LGB cases, and their increased legitimacy when they make decisions on such cases. LGB persons should also be involved in lobbying for fair and transparent judicial selection processes and criteria, including proposing persons to be appointed as judges or magistrates to the relevant bodies, and lobbying support for them. It is also important to advocate for a diverse and representative bench, which reflects the demographics of the entire populace, including representation of LGB persons. LGB activists should also make it one of their aims to provide support to magistrates and judges wherever possible in the area of human rights and international law. For example in Uganda, the Uganda Human Rights Commission has been supporting trainings of magistrates on LGB issues, and engaging LGB activists and organisations as facilitators.<sup>32</sup> In order to protect the legitimacy of the judiciary, it is also important to ensure that cases of corruption within the judiciary are exposed and prosecuted.

*b) Testing the non-discrimination clauses in the constitutions*

Activists in countries whose constitutions protect against discrimination on the grounds of sexual orientation have been able to move courts to make positive judgments in favour of LGB persons. These are Nepal and South Africa. In other countries, activists have been able to achieve the same result by testing the non-discrimination clauses in the constitutions for their applicability to LGB persons. Usually, the right to equality and freedom from discrimination is for 'all persons', and thus it would be difficult for a court to specifically exclude LGB persons. This is why it is important for these provisions to be interpreted by the courts. The usual limitation to the use of the non-discrimination clause in countries without express protection of sexual orientation as a ground upon which someone cannot be discriminated is the list of grounds, which is sometimes a closed list. However, it has already been established in international law that protection from discrimination on the grounds of sex, includes sexual orientation.<sup>33</sup> The framing is also usually in such a way that the list is open-ended, and thus protection based on analogous grounds can be allowed. This implies that even without a constitutional amendment, the constitution can be interpreted positively to include sexual orientation either as an analogous ground or as part of the category of 'sex'. In Kenya, the High Court in the case of *Eric Gitari v Attorney General & Another*<sup>34</sup> expressly included LGB persons among persons protected from discrimination in the Constitution.<sup>35</sup> In Uganda, the Constitutional Court has clearly spoken out against

<sup>32</sup> Interview with Frank Mugisha, Kampala, 20 July 2017.

<sup>33</sup> No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

<sup>34</sup> Petition 440 of 2013 [2015] eKLR 24 April 2015 (The *Eric Gitari* case).

<sup>35</sup> Above, paras 126-138.

discrimination of marginalised persons in *Adrian Jjuuko v Attorney General* (*Adrian Jjuuko case*).<sup>36</sup>

Outside Common Law Africa, most recently in 2016, sexual orientation was declared to be a protected ground under the Belize Constitution.<sup>37</sup> The judge drew this conclusion from the fact that 'sex' was a protected ground in article 16(3) of the Constitution while Belize had at the same time also acceded to the International Covenant on Civil and Political Rights (ICCPR). The judge relied on the UN Human Rights Committee's decision in the *Toonen v Australia* Communication<sup>38</sup> (*Toonen case*). In Canada, the majority in the Supreme Court declared 'sexual orientation' to be a protected ground under the Canadian Charter of Rights and Freedoms in *Egan v Canada*<sup>39</sup> (*Egan case*) even if it was not expressly protected therein. After this, the Charter became an effective weapon for LGB litigation as it forced governments to act on the issue of LGB equality even when they did not want to.<sup>40</sup> This therefore shows that cases seeking such an interpretation of the constitution need to be encouraged in order to bridge the gap where there is no express constitutional protection. All that is needed is to bring a case supported with sound legal arguments and persuasive precedents. This 'low hanging fruit' can easily be harvested. Once sexual orientation is clearly protected, then the other cases become easier to win as was the case in South Africa following the inclusion of sexual orientation in the new Constitution, and Canada after the *Egan case*.<sup>41</sup>

*c) Seeking interpretation of the different rights in the Bill of Rights*

Incremental LGB SL should target the judicial interpretation of the various rights in the Constitution, with a particular emphasis on the rights to dignity, privacy and due process. This is because these rights have been crucial for the vindication of LGB rights in other jurisdictions. The right to dignity has been the basis of key decisions on LGB rights in the selected countries. In South Africa, sodomy was decriminalised based not only on the protection against discrimination but also on the right to dignity.<sup>42</sup> The *Du Toit* case was

<sup>36</sup> Constitutional Petition No. 1 of 2009.

<sup>37</sup> *Caleb Orozco v The Attorney General of Belize*, Supreme Court Claim No. 668 of 2010. (10 August 2016) paras 90-96 (*Caleb Orozco case*).

<sup>38</sup> Communication No.488/1992

<sup>39</sup> [1995] 2 SCR 513.

<sup>40</sup> M Smith 'Identity and opportunity: Lesbian and gay rights movement' in M Smith (ed) *Group politics and social movements in Canada* (2008) 135.

<sup>41</sup> Above.

<sup>42</sup> *National Coalition for Gay and Lesbian Equality v the Minister of Justice* 1999 1 SA 6 (CC) (*Sodomy case*).

decided partly on the grounds of dignity; and marriage equality was also won (through the *Fourie* case<sup>43</sup>) partly relying on the right to dignity.

In Kenya, the right to dignity was one of the grounds upon which anal examinations were declared unconstitutional.<sup>44</sup> It also remains a main ground in the two petitions challenging the criminalisation of same-sex marriages.<sup>45</sup> The right to dignity has also been successfully relied on in Uganda, where it is expressed as the right to dignity and freedom from torture, cruel, inhuman and degrading treatment or punishment,<sup>46</sup> in *Victor Mukasa & Yvonne Oyoo v Attorney General (Victor Mukasa case)*<sup>47</sup> and *Kasha Jacqueline Nabagesera, David Kato Kisuule & Pepe Julian Onziema v The Rollingstone Newspaper & Giles Muhame (Rolling Stone case)*.<sup>48</sup> For the selected countries outside Common Law Africa, the right to dignity was relied on and properly defined in the *Caleb Orozco* case<sup>49</sup> in Belize.

The right to privacy was relied on in South Africa as an equally important ground in the nullification of the sodomy laws, and was adequately discussed and analysed in this study for what it meant for the LGB community.<sup>50</sup> The right was also an important ground in the *Rolling Stone* case<sup>51</sup> in Uganda, although it was not discussed in a detailed way as to its content, more so in light of the fact that the right seems more restricted in the Ugandan Constitution.<sup>52</sup> It is yet to be interpreted for LGB rights in Botswana and Kenya. Outside Common Law Africa, Belize once again had a good articulation of the right, and what it means for LGB persons, in the *Caleb Orozco* case.<sup>53</sup> In Nepal, the Supreme Court also relied partly on the right to privacy to order for broad protections for LGB persons in the case of *Sunil Babu Pant and Others v Government of Nepal and Others*.<sup>54</sup> The US Supreme Court relied on the right to privacy to nullify the Texas sodomy statute in the case of *Lawrence v Texas*.<sup>55</sup>

<sup>43</sup> *Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* 2005 ZACC 19.

<sup>44</sup> *COL & GMN v Resident Magistrate Kwale Court & 4 Others* Civil Appeal 56 of 2016 (the COL case).

<sup>45</sup> *Eric Gitari Decriminalisation petition* (n 34 above) and *John Mathenge, Maureen Ochieng, Mary Akoth Ochieng, Yvonne Powers, Mark Odhiambo, Gay and Lesbian Coalition of Kenya, Nyanza Western and Right Valley Network, and Kenya Human Rights Commission v Attorney General*, Petition No. 234 of 2016, High Court of Kenya.

<sup>46</sup> Article 24 of the Constitution of the Republic of Uganda.

<sup>47</sup> (2008) AHRLR 248 (High Court of Uganda) 22 November 2008.

<sup>48</sup> Miscellaneous Cause No. 163 of 2010 (High Court of Uganda) 30 December 2010.

<sup>49</sup> n 37 above, paras 63-67.

<sup>50</sup> The *Sodomy* case (n 42 above) para 29-32.

<sup>51</sup> n 49 above.

<sup>52</sup> Article 27 of the Constitution of the Republic of Uganda, 1995 (the Uganda Constitution) provides for the right to privacy in respect of searches of the person, home or property and in respect of home, correspondence, communication or 'other property'. So it sounds more like a property right than a personal right.

<sup>53</sup> n 37 above, paras 68-86.

<sup>54</sup> (2008) 1 Writ No 917.

<sup>55</sup> 539 US 558.

Therefore, this is a formula that works and which needs to be tested more in the jurisdictions in Common Law Africa.

Due process rights have been largely relied on by the Supreme Court of the USA to vindicate LGB rights. This ground arises from the Fifth and Fourteenth amendments to the Constitution of the USA, which provide for protection against abuse of due process when taking away the rights to life, liberty and property. On this ground, the Supreme Court has decided many major LGB cases including *United States v Windsor*,<sup>56</sup> which nullified the Defence of Marriage Act,<sup>57</sup> and *Obergefell et al. v Hodges, Director, Ohio Department of Health, et al*<sup>58</sup> which legalised same-sex marriages across the country. The equivalent of this in the Common Law African countries would be a combination of due process rights including the right to liberty, the right to a fair trial and the right to life, and the right to property. Indeed the rights to liberty and property have been relied on in the Ugandan *Victor Mukasa* case,<sup>59</sup> and the right to a fair hearing has been relied on in the *Adrian Jjuuko* case.<sup>60</sup> These due process rights provide an effective avenue for vindicating the fundamental rights of LGB persons without stepping into the more controversial aspects of their social recognition and acceptance, and can thus be relied on in countries where there is a lot of hostility to LGB rights.

If activists bring various rights of LGB persons to the table and convince the courts to interpret them in favour of LGB persons, this would translate into greater protection for LGB persons. All the different constitutions have these rights, and all that is required is linking them to the situation of LGB persons. Once declared applicable to LGB persons, then numerous demands can be made in different circles, including from the police for protection of LGB persons, and the health sector for inclusion of LGB persons among persons to whom services are provided.

***d) Ensuring adherence to international and regional human rights standards***

Civil society organisations working on LGB issues should constantly put their governments to task on how far they are living up to their human rights obligations at the international level. Beyond political commitments, states have binding legal obligations at the

<sup>56</sup> 570 US (2013).

<sup>57</sup> Defense of Marriage Act (*DOMA*) (Pub.L. 104-199, 110 Stat. 2419, enacted September 21, 1996, 1 USC § 7 and 28 USC.

<sup>58</sup> *Obergefell* case, n 17 above.

<sup>59</sup> n 48 above.

<sup>60</sup> n 36 above.



international level, which arise out of ratifying treaties as well as from customary international law. No human rights treaty or rule of international customary law excludes LGB persons from protection, and all treaties use inclusive language that shows that 'every person', including LGB persons, are protected.<sup>61</sup> This implies that the mechanisms available for enforcement of these legal obligations can be used by LGB activists to ensure adherence.

One available international mechanism is bringing a communication before the relevant treaty body challenging a violation of the state's obligations as set out in the particular treaty. It should be noted that these international remedies only become available after domestic remedies have been exhausted.<sup>62</sup> Nevertheless, most of the treaties have provisions allowing for individual complaints. For example, individual complaints are allowed under the First Optional Protocol to the International Convention on Civil and Political Rights,<sup>63</sup> under article 22 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),<sup>64</sup> provided a state party makes a declaration to that effect, and under the Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).<sup>65</sup> However, although all the African Common Law countries forming part of this study have ratified the ICCPR, only South Africa and Uganda have ratified the First Optional Protocol.<sup>66</sup> This implies that this avenue is not open to activists in Botswana and Kenya, but open to those in South Africa and Uganda. Indeed, two communications have so far been submitted to the Committee against South Africa, but they were not on LGB rights.<sup>67</sup> This implies that for now, this avenue has not been used by activists in any of these countries. For article 22 of the CAT, only South Africa among the selected African Common Law countries has made the declaration allowing individuals to

<sup>61</sup> For these protections, see discussion on the extent of adherence to international and regional human rights standards in Chapter 5, section 5.2.2 above.

<sup>62</sup> For example, article 41(1)(c) of the ICCPR provides that the Human Rights Committee shall deal with a matter that had been referred to it only after it has been determined that all domestic remedies were employed and exhausted.

<sup>63</sup> Optional Protocol to the International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and acceded to by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976.

<sup>64</sup> 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85.

<sup>65</sup> Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women, adopted by General Assembly Resolution A/54/4 on 6 October 1999 and opened for signature on 10 December 1999 (Human Rights Day); entered into force on the 22 December 2000.

<sup>66</sup> Kenya and Botswana have neither signed nor ratified the Optional Protocol to the ICCPR; see UN Office of the High Commissioner of Human Rights website, 'Status of ratification interactive dashboard: Optional Protocol to the International Covenant on Civil and Political Rights' <http://indicators.ohchr.org/> (accessed 18 August 2018).

<sup>67</sup> *Prince v South Africa*, Comm. 1474/2006, U.N. Doc. A/63/40, Vol. II, at 261 (HRC 2007) and *McCallum v South Africa*, Communication No. 1818/2008.

bring complaints before the Committee.<sup>68</sup> However, no complaint from South Africa has been filed on LGB rights or any other issue. For the Optional Protocol to the CEDAW, it has only been ratified by Botswana and South Africa.<sup>69</sup> This implies that activists in these two countries can bring individual complaints to the CEDAW Committee but those in Kenya and Uganda cannot. Nevertheless, no such complaint has been filed, including on LGB issues. Therefore, even where the avenues are open, they have not been effectively utilised by activists from these countries, including LGB activists.

At the African regional level, individual communications can be brought under article 55 of the African Charter on Human and Peoples' Rights (African Charter).<sup>70</sup> Ratification of the African Charter automatically gives the African Commission the jurisdiction to hear communications brought by individuals and entities other than State Parties.<sup>71</sup> For individuals and NGOs to lodge petitions with the African Court on Human and Peoples' Rights (African Court) however, an additional step is required from the State Parties beyond ratification of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court. In terms of Article 34(6) of the Protocol, States Parties have the option to make a declaration accepting the jurisdiction of the Court to receive cases from individuals and NGOs with observer status against the State. In the absence of such a declaration, the Court is not to receive any petition involving the State Party from an individual or an NGO.<sup>72</sup> To date, only 9 States Parties have made such a declaration, and they do not include any of the four African Common Law countries covered in this study.<sup>73</sup> This implies that this avenue is also not open for LGB persons for now. However, individuals in these countries can still go to the African Court through the African

<sup>68</sup> United Nations Treaty Collection 'Chapter IV: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984'

[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-9&chapter=4&clang=en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=en#EndDec) (accessed 21 August 2018)

<sup>69</sup> See UN Entity for Gender Equality and the Empowerment of Women website

[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8-b&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&lang=en) (accessed 18 August 2018).

<sup>70</sup> African Charter on Human and Peoples' Rights (ACHPR) OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982) (African Charter)

<sup>71</sup> See Arts 55 and 56 of the African Charter, above.

<sup>72</sup> *Femi Falana v African Union*, Appl. No. 001/2011 (African Court on Human and Peoples' Rights)

<sup>73</sup> These countries are: Benin, Burkina Faso, Côte D'Ivoire, Ghana, Malawi, Mali, Rwanda, Tanzania and Tunisia. Coalition for an effective African Court on Human and Peoples' Rights 'Benin deposits article 34(6) declaration' 2 March 2016

[http://www.africancourtcoalition.org/index.php?option=com\\_content&view=article&id=330%3Ablank-template&catid=34%3Ain-the-news&Itemid=4&lang=en](http://www.africancourtcoalition.org/index.php?option=com_content&view=article&id=330%3Ablank-template&catid=34%3Ain-the-news&Itemid=4&lang=en) (accessed 18 August 2018); African Court on Human and Peoples' Rights 'Republic of Tunisia signs African Court declaration to allow NGOs and individuals to access the human and peoples' rights court directly' 18 April 2017 <http://en.african-court.org/index.php/news/press-releases/item/145-republic-of-tunisia-signs-african-court-declaration-to-allow-ngos-and-individuals-to-access-the-human-and-peoples-rights-court-directly> (accessed 18 August 2018).

Commission, which has jurisdiction to refer cases to the court. However, so far the Court has not yet handled any case brought by LGB activists either directly or through the African Commission. Only one request for an advisory opinion has been brought on LGB rights.<sup>74</sup> This was the request for an advisory opinion in respect to the powers of the Executive Council of the African Union when ‘considering’ the report of the African Commission. It arose out of the Executive Council’s directive to the African Commission to ‘take into account the fundamental African values, identity and good traditions’ and therefore to withdraw the observer status granted to the Coalition of African Lesbians (CAL). The African Court declined to give the opinion on the grounds that the entities bringing the case were not organisations ‘recognised by the African Union’.<sup>75</sup> The organisations bringing the case had observer status with the African Commission, but standing before the African Court is restricted to NGOs with observer status with the African Union Commission, or which had entered into a Memorandum of understanding with the African Union Commission.<sup>76</sup> This decision however makes it much more complicated for NGOs to access the court since it is now apparently unclear how this can be done.<sup>77</sup>

At the sub-regional level, the only case on LGB rights is *Human Rights Awareness and Promotion Forum v Attorney General of Uganda* (the HRAPF case)<sup>78</sup> that was brought before the East African Court of Justice (EACJ). The case challenged the passing of the Ugandan Anti-Homosexuality Act (AHA) into law contrary to the principles of the Treaty for the Establishment of the East African Community. However, it was dismissed on ground that it was moot, as the AHA had already been nullified in Uganda by the time the case came up for hearing in the EACJ.<sup>79</sup> This means that the sub-regional African bodies have not yet heard and decided an LGB case, and it has not yet been proven that this can be undertaken

<sup>74</sup> See *Request for advisory opinion by the Centre for Human Rights of the University of Pretoria and the Coalition of African Lesbians*, Request No. 002 of 2015 (African Court on Human and Peoples’ Rights).

<sup>75</sup> Centre for Human Rights ‘African Court rejects Centre for Human Rights and CAL request, leaving political tension in AU unresolved’ 6 October 2017 <http://www.chr.up.ac.za/index.php/centre-news-a-events-2017/1930-press-statement-african-court-rejects-centre-for-human-rights-and-cal-request-leaving-political-tension-within-au-unresolved-.html> (accessed 2 July 2018).

<sup>76</sup> See *Request for advisory opinion by the Socio-Economic Rights and Accountability Project (SERAP)* No. 001/2013 (26 May 2017), Para 64.

<sup>77</sup> For a detailed discussion of this issue see O Windridge ‘More questions than answers? Advisory opinions before the African Court’ 13 December 2017 <http://www.acthprmonitor.org/more-questions-than-answers-advisory-opinions-before-the-african-court/> (accessed 20 August 2018).

<sup>78</sup> *Human Rights Awareness and Promotion Forum (HRAPF) v Attorney General of Uganda and the Secretariat of the Joint United Nations Programme on HIV/AIDS (UNAIDS)* Reference 6 of 2014 (the HRAPF case).

<sup>79</sup> Above.

successfully. There is therefore a need for this avenue to be explored more as regards LGB rights.<sup>80</sup>

With all these mechanisms available to activists to engage the state on their international commitments, it would be useful to use them, as then the state would remain alive to court decisions and implement them, fearing international condemnation.<sup>81</sup>

*e) Popularising the Constitution and demystifying human rights*

The status of the Constitution as the supreme law of the land needs to be emphasised such that a culture of constitutionalism is adequately nurtured. In a situation of legal pluralism, constitutional supremacy may be declared on paper but is constantly under challenge. That is why Okoth Ogendo famously described African countries as having ‘constitutions without constitutionalism’.<sup>82</sup> Needless to say, whatever the manner in which the constitution was adopted, it is the supreme law of the country and needs to be respected and defended. The legitimacy of a constitution is not derived from the text itself, but rather from the level of confidence that the general public has in its effect and enforcement, which is cultivated over time.

Protecting the constitution and its bill of rights is an assured way of putting in place one of the essential building blocks for ensuring that LGB SL may lead to meaningful social change. LGB activists can participate in this process through awareness campaigns about the constitution and the bill of rights. They also need to demystify human rights and portray them for what they are: inherent and inalienable claims that accrue to everyone because they are human beings. This is opposed to the view that human rights are aimed at eroding ‘African’ cultures and traditions in favour of western values, which is the sentiment expressed by a large section of Africans for the case of Uganda. Boyd suggests that there is a general feeling that rights and freedoms related to sexuality are focused on the autonomous and independent individual, in direct contravention of the celebrated Ganda norm of ‘ekitiibwa’, translated to mean honour. This norm delineates a system of conduct based on reciprocal obligations among the members of the society, thereby advancing the communal

<sup>80</sup> AM Ibrahim ‘LGBT rights in Africa and the discursive role of international human rights law’ (2015) 15 *African Human Rights Law Journal* 263, 278.

<sup>81</sup> See generally D Cassell ‘Does international human rights law make a difference?’ (2001) 2:1 *Chicago Journal of International Law* 129; Also see S Gopalan & R Fuller ‘Enforcing international law: States, IOs, and courts as shaming reference groups’ (2014) 39:1 *Brooklyn Journal of International Law* 74.

<sup>82</sup> HWO Okoth-Ogendo ‘Paradox of constitution without constitutionalism’ in IG Shivji (ed) *State and constitutionalism: An African debate on democracy* (1991) 1 Southern Africa political economy series.

right over the individual right, unlike the more western individual focus of human rights.<sup>83</sup> One of the ways this can be dealt with is by raising awareness of the bill of rights in the constitutions and popularising the concept of individual rights and freedoms.

As the bill of rights is interpreted in court, people should be able to understand why this is important. There is a need for public sensitisation about the bill of rights generally and about equality and non-discrimination in general. The importance of the human rights-based approach (HRBA) to development needs to be communicated to ordinary citizens. This kind of sensitisation and popularisation does not have to be about LGB rights. Understanding the concept of human rights and its key aspects such as equality and non-discrimination, and the inherent nature of human rights, is enough to start the process of shifting mindsets. The HRBA to development is particularly important in this regard as it focuses on ensuring that everyone is meaningfully included in developmental processes,<sup>84</sup> and this would certainly include LGB persons.

*f) Encouraging the continued use of the judiciary by LGB persons*

For the judiciary to be regarded as legitimate, it has to be effectively used by the population. As Chopra shows, avoiding or ignoring courts in favour of other mechanisms of dispute resolutions is an indication that the courts are not seen as relevant or useful,<sup>85</sup> thus contributing to their being illegitimate. One way of making sure that courts are seen as useful and legitimate is their increased usage as a way of resolving conflicts. This is because increased usage shows increased trust in the institution by the people. Although the extent of trust depends largely on how the judiciary conducts itself, the judiciary alone cannot determine its own legitimacy, and as such it needs the support of activists. They are the ones to bring cases before the courts in order to test how the judges will react to them. Another important reason as to why more cases on LGB rights should be taken to court is to help the courts to get over the novelty of such cases, and see them as normal. According to Justice Isaac Lenaola of the Supreme Court of Kenya, it is like

<sup>83</sup> L Boyd 'The problem with freedom: Homosexuality and human rights in Uganda' *Anthropological Quarterly* (2013) 86:3 697.

<sup>84</sup> The human rights-based approach to development is an approach to development that puts human rights at the centre of everything. For details on what it entails, see UNICEF 'The human rights-based approach: Statement of common understanding' <https://www.unicef.org/sowc04/files/AnnexB.pdf> (accessed 16 June 2018).

<sup>85</sup> T Chopra 'Peace vs justice in Northern Kenya: Dialectics of state and community laws' in JC Ghai & Y Ghai (eds) *Marginalised communities and access to Justice* (2010) 185, 190 -193.

‘... chipping on a rock. Every time you do a case, something gives, some judge learns. You will lose some cases, but every case is a gain. SL is always a win. Even by losing, you are winning. Winning over minds, and may be things may be better the next time.’<sup>86</sup>

He advises that there should be continuous and protracted litigation on LGB issues, as that is how the momentum will be maintained. After a time, court decisions on LGB rights will no longer be surprising to the courts or the general public. For example according to Prof. Paul Smith, the attorney who argued the *Lawrence* case<sup>87</sup> at the Supreme Court of the US in the USA, after sodomy was decriminalised in that case, it became obvious that other gains too would be made including same-sex marriages.<sup>88</sup> Indeed, if the LGB community in South Africa did not bring many cases on LGB rights, the courts would never have made the many decisions that they did. Therefore, even losses in the courts should not discourage more cases being brought to court since this is part of the process of gaining legitimacy for the courts.

*g) Encouraging the use of traditional justice mechanisms for LGB issues*

LGB activists should also increasingly use traditional justice mechanisms on LGB rights. This approach is usually seen as negative since traditional culture has constantly been portrayed as being against LGB rights.<sup>89</sup> However, there is a need to embrace these mechanisms and use them to engage on LGB rights. Many LGB activists are of the view that recourse to ‘customary law’ in a traditional court would undermine protection for LGB persons, since opposition to LGB rights has largely been based on the view that such rights are un-African, and against African culture.<sup>90</sup> While these fears are certainly not unfounded, it would be wrong to simply assume that such mechanisms would by default be hostile to LGB rights. The constitutions already ensure supremacy of the Constitution, and remnants of the colonial repugnancy clause<sup>91</sup> still exist to ensure that cultural practices that do not

<sup>86</sup> Interview with Justice Isaac Lenaola, Justice of the Nairobi Supreme Court of Kenya, 17 July 2017.

<sup>87</sup> n 55 above.

<sup>88</sup> Interview with Prof Paul Smith, Washington DC, 2 August 2018.

<sup>89</sup> See discussion in Chapter 5, section 5.2.1.

<sup>90</sup> See for example ‘The traditional courts bill threatens LGBT South Africans’ *The Guardian* 26 May 2012 <https://www.theguardian.com/commentisfree/2012/may/26/south-africa-gay-lgbt-traditional> (accessed 16 June 2018).

<sup>91</sup> The repugnancy clause was a common feature of British received law. It subjected customary law to ‘natural justice, equity and good conscience.’ These were deliberately vague concepts, which thus helped to make British inspired laws superior to African traditions, and to legitimise foreign values and traditions as any of the African values and traditions could be found to be ‘repugnant’. It has been modified in the different countries, and largely replaced with the principle of constitutional supremacy. See EA Taiwo ‘The repugnancy clause and its impact on customary law: Comparing the South African and Nigerian positions – Some lessons for Nigeria’ (2009) 34:1 *Journal for Juridical Science* 89.



align with the constitution could be found to be unconstitutional.<sup>92</sup> A traditional court's decision that is unconstitutional would be struck down.<sup>93</sup> Again, customary law evolves with time and it is not set in stone, and that is why sometimes it is referred to as 'living customary law'.<sup>94</sup> Such a system is therefore capable of incorporating the constitutional principles of equality and non-discrimination on the basis of sexual orientation and putting it in language that the common people understand very well. Many people respect and understand their traditions and customs as well as the traditional institutions, and prefer them to the more formal justice systems.<sup>95</sup> Indeed, even international human rights law recognises such justice systems, provided that they meet certain criteria such as handling minor criminal or civil matters, following principles of a fair trial and providing for appeals against their decisions to the civil courts.<sup>96</sup> A decision of a customary court emphasising 'ubuntu'<sup>97</sup> 'botho'<sup>98</sup> or 'obuntu-bulamu'<sup>99</sup> in South Africa, Botswana or Uganda respectively in respect to LGB rights would go a long way in making people realise the importance of everyone, including LGB persons. This would make it easier for decisions made based on the constitution on LGB rights to also be appreciated more, leading to much desired social change.

In the different case study countries, customary traditional institutions play different roles, and these can be tapped into. In Botswana, traditional courts are an important component of the justice system, handling many disputes including criminal matters,<sup>100</sup> and indeed they

<sup>92</sup> For example the South African Constitution in section 211(3) requires the courts to apply customary law if it is in line with the Constitution. For how it is used see generally, TW Bennett *Human rights and African customary law under the South African Constitution* 1999.

<sup>93</sup> This is the positive aspect of the repugnancy clause in most of the received laws in former British colonies which ensured that the more 'problematic aspects of customary law' were left out.

<sup>94</sup> See for example C Himonga 'The living customary law in African legal systems: Where to now?' in J Fenrich, et al (eds) *The future of African customary law* (2011).

<sup>95</sup> See for example United Nations Office of the High Commissioner for Human Rights 'Human rights and traditional justice systems in Africa' (2016) 17-20.

<sup>96</sup> For example see UN Human Rights Committee (HRC), *General Comment No. 32, Article 14, Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, para 24 <http://www.refworld.org/docid/478b2b2f2.html> (accessed 16 June 2018). See also United Nations Development Programme 'Informal justice systems: Charting a course for human rights-based engagement' 38-40, <http://www.undp.org/content/dam/undp/library/Democratic%20Governance/Access%20to%20Justice%20and%20Rule%20of%20Law/Informal-Justice-Systems-Charting-a-Course-for-Human-Rights-Based-Engagement.pdf> (accessed 2 July 2018).

<sup>97</sup> This term is mainly used in Southern Africa and now largely across the world to denote the African conception of an individual being part of the community as a whole, and therefore having to behave in a compassionate way towards the others. See JK Khomba 'Redesigning the balanced scorecard model: An African perspective' PhD Dissertation, University of Pretoria, May 2011, 126-164.

<sup>98</sup> This is the Tswana word used for Ubuntu. See Republic of Botswana 'Presidential task group on a long-term vision for Botswana, 1997' 47.

<sup>99</sup> This is the Luganda term for 'Ubuntu'. See for example ES Kirunda *The fourth republic: A possible future for the Uganda nation* (2011) 81-82.

<sup>100</sup> DG Boko 'Fair trial and the customary courts in Botswana: Questions on legal representation' (2000) 11 *Criminal Law Forum* 445, 455-456.

handle more cases than magistrates courts.<sup>101</sup> During British colonisation, traditional courts were given additional importance by the British as they were recognised as the legitimate institutions to dispense 'native' justice.<sup>102</sup> The courts' powers are laid out in the Customary Courts Act, 1969.<sup>103</sup> Their jurisdiction is as provided for in their mandate documents- but they handle both civil and criminal matters.<sup>104</sup> The definition of customary law as the customary law of any tribe provided it is 'not incompatible with the provisions of any written law or contrary to morality, humanity or natural justice'<sup>105</sup> actually puts matters of homosexuality within their purview. Generally, although chiefs have expressed their hostility to homosexuality,<sup>106</sup> there are no reported indications that they have decided such matters. On the contrary, LEGABIBO reports having had meetings with chiefs and working with traditional courts- *kgotlas*, and they are slowly getting to appreciate LGB issues better.<sup>107</sup> This is indeed an avenue that can be used more.

Kenya, South Africa and Uganda, unlike Botswana, do not formally recognise traditional courts, but have unified court systems that apply both statute law and customary law. For Kenya, this integration of the courts was done under the Magistrates Court Act, 1967.<sup>108</sup> For South Africa, section 211(1) of the Constitution, 1997 recognises traditional institutions, but the traditional courts have not yet been recognised, although there is a firm proposal to do so in the Traditional Courts Bill<sup>109</sup> which is still pending before Parliament. In Uganda, the constitution recognises traditional institutions in article 246. Part of the traditional institutions recognised are traditional conflict resolutions mechanisms, which may not necessarily be through courts. In Kenya, traditional justice mechanisms are still used to resolve conflicts within the communities in Northern Kenya without recourse to the courts.<sup>110</sup> In South Africa, such mechanisms too have been documented<sup>111</sup> as well as in

<sup>101</sup> CM Fombad 'Customary courts and traditional justice in Botswana: Present challenges and future perspectives' (2004) 15 *Stellenbosch Law Review* 166, 181.

<sup>102</sup> S Roberts 'The survival of the traditional Tswana courts in the national legal system of Botswana' (1972) *Journal of African Law* 103.

<sup>103</sup> Cap 04:04.

<sup>104</sup> Above, sections 11, 12, and 13.

<sup>105</sup> Above, section 2(1).

<sup>106</sup> For reports of such hostility, see DITSHWANELO Botswana – The Centre for Human Rights 'Customary law and its impact on women's rights, children's rights and LGBTI- people in Southern Africa – the Botswana example' Nr. 14 / 2013, Friedrich-Naumann-Stiftung für die Freiheit (FNF), April 2013, 4(c).

<sup>107</sup> Interview with Bradley Fortuin and Botho Namatona of Lesbians, Gays and Bisexuals of Botswana (LEGABIBO), Gaborone, 10 October 2017.

<sup>108</sup> Act 17 of 1967. For the significance of this and its effect on the application of African customary law, see E Cotran 'Integration of courts and application of customary law in Kenya' (1968) 4 *East African Law Journal* 14.

<sup>109</sup> B1-2017.

<sup>110</sup> Chopra, n 85 above.

Uganda.<sup>112</sup> Many of these mechanisms are both respected and understood by the people, and they are more geared towards reconciliation rather than punishment – mainly centering around mediation, reconciliation and diplomacy.<sup>113</sup>

As such, in areas that still respect traditional mechanisms, there have always been ways of dealing with controversial issues, and as such LGB issues too can be dealt with through these mechanisms. They should thus be exploited and utilised.

#### *h) Taking advantage of the legal culture of the different countries*

Understanding and appreciating a country's legal culture is important in adequately planning for litigation. Knowing how a country generally respects the law and treats its conflict resolution and norm producing institutions<sup>114</sup> helps to determine how to approach the litigation. For Botswana, Kenya and South Africa, there is quite a high level of respect for the law, accountability of the judiciary to the people, and lawyers respecting their professions and being perceived as persons contributing to justice in the country.<sup>115</sup> This therefore marks these countries out as those where litigation would make more sense. Outside Common Law Africa, LGB SL in the USA benefitted from the fact that the USA is a much more litigious society and courts play an important role in people's lives.<sup>116</sup> This is the same as for Canada, where the courts are also more respected, and the law plays an important role in the day to day life of people.<sup>117</sup> In Uganda, the legal culture is largely one of avoidance of the courts,<sup>118</sup> disrespect for the courts and their judgments, judges being perceived as corrupt and unable to stand up to the executive, and lawyers being seen largely as an exploitative group that cannot generally be trusted.<sup>119</sup> According to Mureinik, all the different aspects of legal culture are interconnected such that when one fails, all the others

<sup>111</sup> For a detailed discussion of the use of these traditional mechanisms in South Africa, see for example R Choudree 'Traditions of conflict resolution in South Africa' 24 April 1999 <http://www.accord.org.za/ajcr-issues/traditions-of-conflict-resolution-in-south-africa/> (accessed 20 August 2018).

<sup>112</sup> Perhaps the most famous of the Ugandan conflict resolution mechanisms is 'mato oput' among the Acholi of Northern Uganda, which focuses on cleansing. See for example J Wasonga 'Rediscovering mato oput: The Acholi justice system and the conflict in Northern Uganda' (2009) 2 (1) *Africa Peace and Conflict Journal*, 17.

<sup>113</sup> See F Ben-Mensah 'Indigenous approaches to conflict resolution in Africa' in World Bank (ed.) *Indigenous Knowledge: Local Pathways to Global Development*. (2004) 39-44.

<sup>114</sup> These are the main types of institutions that Sunde identifies on which legal culture is based. See JØ Sunde 'Champagne at the funeral- An introduction to legal culture' in JØ Sunde, KE Skodvin (eds) *Rendezvous of European legal cultures* (2010) 11-28.

<sup>115</sup> See discussion in section 5.2.1 above.

<sup>116</sup> See discussion in Chapter 5, section 5.2.1.

<sup>117</sup> See generally, J Gundel 'Effects of judicial review on Canadian judicial culture' (2000) 7 *South Western Journal of Law and Trade in the Americas* 157.

<sup>118</sup> Zartner, D 'The Culture of law: Understanding the influence of legal tradition on transitional justice in post-conflict societies' (2012) 22 *Indiana International & Comparative Law Review* 297.

<sup>119</sup> Above.

follow. He gave the example of judges who need to be conscientious, since then lawyers will be able to make conscientious arguments before them, lecturers to research and pose new questions, and for students to study, or for the public to trust the legal system with cases for that matter.<sup>120</sup> The whole system is interlinked, and so where the norm making institutions are disrespected, the whole system is disrespected and not credible. In such circumstances, litigation may not yield the necessary results. Therefore, to make SL work in situations where the legal culture does not favour litigation, SL must be buttressed by strong advocacy efforts aimed at changing peoples' mindsets.

### 6.2.3 Engaging with the transnational factors

International actors—both international organisations and other countries—have some leverage with which to influence developments at the domestic level. LGB activists need to be able to leverage these factors if LGB SL is to lead to social change. The suggested ways in which this can be done is through engaging with different organs at the international level and influencing the foreign policy of LGB rights friendly countries, as described below:

#### *a) Engaging with different organs at the international level*

Besides treaty bodies and other channels at the international level, there are many more opportunities that can be used by LGB activists to engage states at the international level. These are especially about engaging the different political mechanisms at the different levels, and in the different human rights systems.

One of the important ways of engagement is through alternative reporting to the treaty bodies. Civil Society Organisations can submit alternative reports to the different treaty bodies showing how the state is living up to its obligations. This is again something that is allowed by the different treaty bodies. At the United Nations level for example, article 40 of the ICCPR requires states to submit reports to the Human Rights Committee within one year of ratification of the treaty on the steps they have taken to implement their obligations under the treaty. Thereafter, they report as the Committee determines, which is usually after four or five years.<sup>121</sup> Article 18 of the CEDAW requires reports one year after ratification and then every four years thereafter. At the African Commission level, article 62 of the African

<sup>120</sup> Mureinik E 'Dworkin and Apartheid' in Corder H (ed) *Essays on law and social practice in South Africa* (1988) 181, 182.

<sup>121</sup> Centre for Civil and Political Rights (CCPR) 'Periodic reports' <http://ccprcentre.org/ccpr-state-reporting> (accessed 15 July 2018).

Charter requires states parties to report after every two years. Although not expressly stated within the treaties, individuals and civil society organisations can submit alternative reports to the treaty bodies confirming or disproving facts and situations as reported or supplementing information in the state report. The Human Rights Committee and the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee), which interprets the CEDAW, have consistently made decisions to the effect that LGB persons are protected under their respective treaties.<sup>122</sup> The African Commission has on various occasions made recommendations on sexual orientation, for example during the concluding remarks on Cameroon's report in 2005,<sup>123</sup> and commending Mauritius for, including in the list of grounds, sexual orientation as a protected ground against discrimination in its Equal Opportunities Act of 2008.<sup>124</sup>

Other avenues are through the Universal Periodic Review (UPR) process, which is a mechanism by which states periodically (every four years) review the progress made by other states towards fulfilling their human rights obligations.<sup>125</sup> LGB activists should take part in their domestic processes to ensure that the LGB rights situation is clearly reflected in the UPR report. Indeed, this is done and is reflected by LGB issues making it to the final UPR reports of all the four selected Common Law African countries.<sup>126</sup> At the African Union level, the African Peer Review Mechanism (APRM) is the near equivalent of the UPR

<sup>122</sup> For the Human Rights Committee, see for example the *Toonen* case (n 38 above) on sexual orientation being protected as part of 'sex' in articles 2(1) and 26 of the ICCPR; *Young v Australia* (No. 941/2000, ICCPR) and HRC, *X v Colombia*, Communication No. 1361/2005, 6 August 2003 where the HRC found sexual orientation was covered by the 'other status' ground of article 26 of the ICCPR. The CEDAW Committee has adopted General recommendation No. 28 on 'The core obligations of states parties under article 2 of the CEDAW.' See UN Committee on the Elimination of Discrimination against Women 'General recommendation No. 28 on The core obligations of states parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women' 16 December 2010, CEDAW/C/GC/28 <http://www.refworld.org/docid/4d467ea72.html> (accessed 23 August 2018), in which it noted the link between sex discrimination and other factors such as sexual orientation, and as such called upon states to prohibit such discrimination. It has also made concluding recommendations asking states to protect against discrimination based on sexual orientation. See for example Committee on the Elimination of Discrimination against Women *Concluding observations of the Committee on the Elimination of Discrimination against Women: Panama* Forty-fifth session 18 January – 5 February 2010, CEDAW/C/PAN/CO/7.

<sup>123</sup> African Commission on Human and Peoples' Rights 'Concluding observations on the first periodic report of Cameroon' adopted at the Commission's 39th ordinary session (11-25 May 2005) para 14.

<sup>124</sup> African Commission on Human and Peoples' Rights 'Concluding Observations and Recommendations on the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> fourth periodic reports of the Republic of Mauritius,' adopted at the Commission's 45th ordinary session (13-17 May 2009), para 15.

<sup>125</sup> See UN Office of the High Commissioner for Human Rights 'UN Human Rights Council: Universal Periodic Review' <https://www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx> (accessed 15 July 2018).

<sup>126</sup> LGB issues were raised during all the reviews of all countries. For Botswana's latest review see UN Human Rights Council 'Report of the working group on the Universal Periodic Review: Botswana' 11 April 2018 A/HRC/10/69; for Kenya, see Human Rights Council 'Report of the working group on the Universal Periodic Review: Kenya' 26 March 2015 A/HRC/29/10; for South Africa, see Human Rights Council 'Report of the working group on the Universal Periodic Review: South Africa' 18 July 2017 A/HRC/36/16; and for Uganda, see Human Rights Council 'Report of the working group on the Universal Periodic Review: Uganda' 27 December 2016 A/HRC/34/10.



process,<sup>127</sup> and although it does not specifically address human rights, it is an important complement to the human rights mechanisms of the African regional human rights system.<sup>128</sup>

All four of the selected countries have signed up to the APRM and have undergone review and human rights issues have indeed been raised in their reports. This process gives activists space to raise LGB issues and ensure that they make it to the report. For Uganda's last review, the need to investigate cases of violence against LGB persons was noted,<sup>129</sup> as well as the fact that the Anti-Homosexuality Act had been challenged in court because of its human rights deficiencies.<sup>130</sup> Kenya's APRM reports make no mention of LGB rights at all,<sup>131</sup> and that of South Africa also largely omits LGB issues.<sup>132</sup> Botswana has not signed on to NEPAD and the APRM. There clearly is more space to engage states on LGB issues through the political peer review processes.

Finally, activists can also utilise the special procedures that are available under the UN system and within the African regional system. These are different experts who are mandated with reporting and advising on specific human rights themes or on country situations.<sup>133</sup> Under the UN system, the most relevant one for LGB persons is the independent expert on protection against violence and discrimination based on sexual orientation and gender identity.<sup>134</sup> This mechanism is mandated to 'assess the implementation of existing international human rights instruments with regard to ways to overcome violence and discrimination against persons on the basis of their sexual orientation or gender identity, while identifying both best practices and gaps.'<sup>135</sup> Other

<sup>127</sup> For a discussion of the APRM, see Chapter 5 above, section 5.2.2.

<sup>128</sup> M Killander 'The African Peer Review Mechanism and human rights: The first reviews and the way forward' (2008) 30 *Human Rights Quarterly* 41.

<sup>129</sup> African Peer Review Mechanism 'Uganda country self-assessment report 2017' May 2017 53.

<sup>130</sup> Above, 87.

<sup>131</sup> See African Peer Review Mechanism, 'Country review report of the Republic of Kenya 29 (2006), <http://www.nepad.org/2005/files/aprm/APRMKenya-report.pdf> (hereinafter

Kenya Report). See also the African Peer Review Mechanism 'Second country review report of the Republic of Kenya' APRM Country review report No. 20 (2017) <https://www.aprm-au.org/publications/country-review-report-no-20-kenya-2nd-version/> (accessed 16 June 2018).

<sup>132</sup> South Africa's Country Self-Assessment Report recognises gay, lesbian and transgender people as a vulnerable group and categorises them along with migrant workers and refugees. There is no other mention made of LGB persons and no detailed attention is paid to their rights and protection. African Peer Review Mechanism 'Country review report and plan of action of the Republic of South Africa' (2007) 117.

<sup>133</sup> United Nations Office of the High Commissioner for Human Rights 'Special procedures of the Human Rights Council' <https://www.ohchr.org/en/hrbodies/sp/pages/welcomepage.aspx> (accessed 15 July 2018).

<sup>134</sup> United Nations Human Rights Council Resolution adopted by the Human Rights Council on 30 June 2016: Protection against violence and discrimination based on sexual orientation and gender identity A/HRC/RES/3/2/2, 15 July 2016, Para 3.

<sup>135</sup> Above.



mechanisms are also important and have largely been utilised before the independent expert was specifically created.<sup>136</sup> Under the African Commission, there are a number of rapporteurs and working groups whose mandates are relevant to LGB rights. These include the Special Rapporteur on Human Rights Defenders in Africa, which has indeed taken steps to protect LGB rights;<sup>137</sup> and the African Commission's Committee on HIV, which has also addressed the situation of LGB persons in its reports.<sup>138</sup>

There is much room within these mechanisms to ultimately help to stimulate social change. LGB activists in the case study African Common Law countries are in a position to consistently report on the state's adherence to these promises at the different levels and to engage these bodies. By taking these steps, LGB cases that have not been heard or implemented can be brought to the attention of international actors, which also 'embarrasses' the nation<sup>139</sup> and encourages the state to do what needs to be done.

***b) Engaging LGB friendly countries for diplomatic pressure on the state***

States influence each other in different ways, and many have leverage over others in different forums. For LGB rights, this is done through socialisation, policy diffusion and global queering.<sup>140</sup> Therefore, it is sometimes necessary that LGB activists tap into these processes in order to cause change at home. The ways through which foreign governments can be engaged in extreme situations is through meetings with staff of the embassies of the said countries and where possible the foreign ministries. Another way is to work with organisations based in other countries to engage with the foreign ministers and other key personnel. For the USA, groups such as the Council for Global Equality<sup>141</sup> are well known in this regard, and can thus be of great help to activists wanting to access the White House or the State Department. Indeed, this approach was used in Uganda to delay the passing of the

<sup>136</sup> For a discussion on how these were used see G MacArthur 'Securing sexual orientation and gender identity rights within the United Nations framework and system: Past, present and future' (2015) 15 *The Equal Rights Review* 40-43.

<sup>137</sup> See for example African Commission on Human and Peoples' Rights 'Press release on the implications of the Anti-Homosexuality Act on the work of Human Rights Defenders in the Republic of Uganda' <http://www.achpr.org/press/2014/03/d196/> (accessed 16 June 2018) as well as one condemning Nigeria's Same-sex Marriage [Prohibition] Act. See 'Press release on the implication of the Same -sex Marriage [Prohibition] Act 2013 on Human Rights Defenders in Nigeria' <http://www.achpr.org/press/2014/02/d190/> (accessed 25 April 2014).

<sup>138</sup> For example, it raised concerns regarding violence against LGB persons in Cameroon Namibia.

<sup>139</sup> Naming and shaming is one of the ways through which international human rights law is enforced, and it usually works, although not all the time. For a discussion of its effectiveness see EM Hafner-Burton 'Sticks and stones: Naming and shaming the human rights enforcement problem' (2008) 62:4 *International Organization* 689.

<sup>140</sup> See the discussion on multiple commitments at the international level in Chapter 5 above (5.2.3).

<sup>141</sup> For details about the Council, see The Council for Global Equality 'About us' <http://www.globalequality.org/about-us> (accessed 15 July 2018).

Anti-Homosexuality Bill, and also its being signed into law.<sup>142</sup> This did not fully work as the President went ahead and signed the Bill into law anyway, but the fact that the Act was hurriedly annulled by the Constitutional Court after many donors had cut aid,<sup>143</sup> and the USA had reviewed its aid support to Uganda and barred unnamed Ugandan officials from entering USA territory<sup>144</sup> at a time when the President was due to travel to Washington DC for the US-Africa Summit<sup>145</sup> points strongly to the view that in fact foreign pressure must have had a hand in having the Act nullified– or at least in its hurried nullification.<sup>146</sup>

This approach however should only be resorted to in extreme circumstances when foreign pressure remains almost the only alternative available to ensure that change happens. The Ugandan case was perhaps such a situation, as this was an extreme law which had massive support from the legislature and the general population.<sup>147</sup> The reason for extreme caution in using this approach is because it supports the argument that LGB rights are a western imposition (since countries in the global north are usually the ones that openly speak out in favour of LGB protection), and that this is a new form of colonialism and imperialism. This argument is valid as some of the ways in which promotion of LGB rights is done is utterly disrespectful of the values and views of African countries.<sup>148</sup> Perhaps what would be more acceptable and safer for LGB persons is to use other African countries such as South Africa to bring the ‘African perspective’ to the issue, since they have been able to achieve legal change on LGB rights. This is however also no guarantee due to the South African exceptionalism as regards LGB rights in Africa, being the only country on the African continent so far to have recognised same-sex marriages, and its own peculiar racial situation, which makes the country’s stand on LGB rights appear to many as largely influenced by its white minority. This may however be more palatable than using the USA, although of

<sup>142</sup> ‘Obama condemns Uganda anti-gay bill as “odious”’ *Reuters* 4 February 2010 <https://www.reuters.com/article/us-uganda-gays-obama-idUSTRE6134EZ20100204> (18 August 2018).

<sup>143</sup> ‘Uganda donors cut aid after president passes anti-gay law’ *The Guardian*, 25 February 2015, <https://www.theguardian.com/global-development/2014/feb/25/uganda-donors-cut-aid-anti-gay-law> (accessed 22 August 2018).

<sup>144</sup> ‘U.S. cuts aid to Uganda, cancels military exercise over anti-gay law’ *Reuters*, 19 June 2014 <https://www.reuters.com/article/us-usa-uganda-gay-announcement/u-s-cuts-aid-to-uganda-cancels-military-exercise-over-anti-gay-law-idUSKBN0EU26N20140619> (accessed 20 August 2018).

<sup>145</sup> ‘Museveni behind gay law victory?’ *The Observer*, 4 August 2014 <https://www.observer.ug/news-headlines/33127--museveni-behind-gay-law-victory> (accessed 17 June 2018)

<sup>146</sup> Above.

<sup>147</sup> Interview with Frank Mugisha, n 32 above. See also A Jjuuko ‘International solidarity and its role in the fight against Uganda’s Anti-Homosexuality Bill’ in K Lalor, E Mills, AS Garcia & P Haste *Gender, sexuality and social justice: What is the law got to do with it?* (2016)126, 133.

<sup>148</sup> Ssebagala for example considers forcing Ugandans to discuss same-sex issues as ‘morally unconscionable’ since they largely do not openly discuss sex at all. R Ssebagala ‘Straight talk on the gay question in Kampala’ (2011) 106 *Transition* 50. See also J Oloka Onyango ‘We are more than just our bodies: HIV and AIDS and the human rights complexities affecting young women who have sex with women in Uganda’ HURIPeC Working Paper No. 36 (2012) 70.

course South Africa does not have the same influence on Uganda's government that the USA and some western European countries have due to their bilateral support to Uganda.

Another danger lies in the fact that successfully lobbying another state may not necessarily lead to that state doing what the activists want in the exact manner desired. States usually have their own citizens and interests to consider, and are thus more likely to act in self-interest. Dr. Chris Dolan of the Civil Society Coalition on Human Rights and Constitutional Law in Uganda notes instances where the states would ignore the Coalition's advisories on when to speak out.<sup>149</sup> Indeed, in Uganda where activists lobbied the Canadian government to speak out against Uganda's Anti-Homosexuality Act, the manner in which Foreign Minister John Baird accosted Uganda Speaker of Parliament Rebecca Kadaga at a public meeting in Canada had largely negative results for the campaign against the AHB.<sup>150</sup> The public accosting led to the Speaker angrily lashing out at the Canadian Foreign Minister. She was subsequently received as a hero by the anti-gay groups in Uganda, promising to pass the Bill as a Christmas gift.<sup>151</sup> Although as the Speaker she was supposed to be neutral, Kadaga made it a personal agenda to have the Bill passed into law.<sup>152</sup>

Another dangerous offshoot of such lobbying is the issue of aid conditions. Many states—particularly those in the global north which give aid to African countries—usually find cutting aid or imposing aid-conditions the best way to sanction a country that violates LGB rights. Unfortunately, this tactic puts LGB persons at risk as they are used as scapegoats for any budgetary constraints and are seen as being against the interests of the country, and may be targeted.<sup>153</sup> They are also resented by other advocacy groups for being somehow 'more important' than others and thus isolated.<sup>154</sup> A far more serious danger is that aid cuts will affect development and support to key sectors such as health and education, which are crucial for developing countries.<sup>155</sup> And finally, they may also affect LGB persons, as they

<sup>149</sup> Interview with Dr Chris Dolan, Director, Refugee Law Project, School of Law, Makerere University and former chairperson of the Steering Committee of the Civil Society Coalition on Human Rights and Constitutional Law (CSCHRCL), Kampala, July 2017. Also see A Jjuuko, n 147 above.

<sup>150</sup> 'Kadaga, Canadian minister in gay row' *Daily Monitor*, 25 October 2012. <http://www.monitor.co.ug/News/National/Kadaga--Canadian-minister-in-gay-row/688334-1594430-t0reff/index.html> (accessed 24 July 2017).

<sup>151</sup> As above.

<sup>152</sup> 'Kadaga wants anti-gay bill tabled' *Daily Monitor*, 16 November 2012. <http://www.monitor.co.ug/News/National/Kadaga-wants-anti-gay-Bill-tabled/688334-1621218-8qyfc/index.html> (accessed 9 September 2017).

<sup>153</sup> Jjuuko for example links the restrictive NGO Act 2016 to the need to stop LGB groups. See Jjuuko (n 147 above) 126, 134.

<sup>154</sup> P Dunne 'LGBTI rights and the wrong way to give aid' (2012) 12 *Harvard Kennedy School Review* 67.

<sup>155</sup> For example, the US cutting off support to the Inter-Religious Council of Uganda (IRCU) over its anti-gay stance was said to affect over 165,000 people on ARVs. See 'US cuts aid to religious council over anti-gay

are part of the same population that misses out when aid is cut, thus further undermining the rights of everyone including LGB persons.<sup>156</sup> It may also promote violence against LGB persons as they are blamed for the aid cuts and seen as ‘foreign agents’ or as selfish people who want to seek their own rights at the cost of everyone else’s rights.<sup>157</sup> Therefore, this strategy has to be used with extreme caution. For example, Ugandan activists have always defended their actions in lobbying other governments to speak out against the AHA as a necessary and last step since there was such strong determination by the legislature and the public to have the bill passed into law<sup>158</sup>. Certainly when the Bill became law, there was little else left besides a court challenge.

Therefore, there is no doubt that some countries can have leverage over others regarding LGB rights, and activists can therefore take advantage of this. However, this should be done carefully after weighing all the advantages and disadvantages of such an approach. There should be a process of advising on when certain steps could be taken by the lobbied states in order not to jeopardise the security and rights of LGB persons.

#### 6.2.4 Taking advantage of the economic factors

Since the economy influences the way the law operates, economic factors need to be taken advantage of if LGB SL is to stimulate the creation of the necessary social change. It is therefore suggested that LGB activists do the following to take advantage of the prevailing economic factors: file more LGB SL cases in countries that are rapidly developing economically, and prioritise economic empowerment of LGB persons.

##### *a) Filing more cases in more capitalistic countries*

For the more capitalistic Common Law African countries such as South Africa and Botswana,<sup>159</sup> there is need to bring more cases before the courts of law on LGB rights. This is because capitalism puts in place the conditions necessary for progressive judgments and the

law’ *Saturday Monitor* 4 July 2014 <http://www.monitor.co.ug/News/National/US-cuts-aid-to-religious-council-over-anti-gay-law/688334-2371374-n4cs03/index.html> (accessed 9 September, 2017).

<sup>156</sup> See for example African Men for Sexual Health and Rights (2011) ‘Statement of African social justice activists on the threats of the British government to “cut aid” to African countries that violate the rights of LGBTI people in Africa’ <http://www.amsher.net/news/ViewArticle.aspx?id=1200> (accessed 15 July 2018).

<sup>157</sup> See also ‘U.S. Support of Gay Rights in Africa May Have Done More Harm Than Good’ *The New York Times*, 20 December 2015 <https://www.nytimes.com/2015/12/21/world/africa/us-support-of-gay-rights-in-africa-may-have-done-more-harm-than-good.html> (accessed 22 August 2018).

<sup>158</sup> A Jjuuko n 147 above

<sup>159</sup> See discussion in chapter 5.2.1.

need to attract more investors and private actors through open and progressive court decisions and policies. One of the pillars that the World Competitiveness Report bases on is the capacity of institutions, including judicial independence and reliability.<sup>160</sup> These countries are therefore very much interested in the image of progress that they portray to the outside world, and this is a good incentive to protect LGB rights. It is therefore no surprise that again it is South Africa and Botswana that have protected LGB rights more through the judiciary.

***b) Filing more cases in rapidly developing countries***

As discussed in chapter 5.2.1 above, LGB SL is more likely to be effective in situations of capitalism and increased economic development. Activists need to file more cases in court to take advantage of this development. Almost all the selected Common Law African countries are developing<sup>161</sup> and so this gives fertile ground for LGB SL to be more effective and meaningful. Botswana and Kenya stand out as countries whose economic development levels are going higher. As such, more opportunities exist that would ensure the success of LGB SL, implying the need to have more LGB SL cases filed before the courts of law. Donors that support LGB work could also look at supporting economic development for the different countries as a whole as this would surely create a more accepting and less homophobic society.

***c) Prioritising economic empowerment of LGB persons***

Since it has been proposed in Chapter 5 above that the more affluent LGB persons there are in a country, the faster LGB SL will lead to social change, there is a need to create more economic opportunities for LGB persons. Organisations that support LGB persons should thus look into this aspect and be able to provide seed capital, training opportunities, supporting the education of LGB persons, and starting small-scale businesses for them. One of the reasons why the marginalisation of LGB persons continues is their failure to economically support themselves, thus remaining economically disempowered and unable to effectively demand their rights.<sup>162</sup> Without economic empowerment, even if all LGB cases were won, people would not be empowered enough to take advantage of the resulting

<sup>160</sup> Above, 29.

<sup>161</sup> The World Bank foresees continued development for African economies. See The World Bank 'Global economic prospects: Sub-Saharan Africa' The World Bank, 9 January 2018 <https://www.worldbank.org/en/region/afr/brief/global-economic-prospects-sub-saharan-africa-2018> (accessed 22 August 2018).

<sup>162</sup> 'Why economic justice is central to LGBT rights' *Huffington Post* 5 July 2012 [https://www.huffingtonpost.com/chi-mgbako/why-economic-justice-is-central-to-lgbt-rights\\_b\\_1479601.html](https://www.huffingtonpost.com/chi-mgbako/why-economic-justice-is-central-to-lgbt-rights_b_1479601.html) (accessed 17 July 2018).

benefits, and the victories and legal changes would largely be in vain. According to Funeka Soldaat of Free Gender in South Africa, 'Even if you know how the constitution works, you don't know how to use it to protect yourself. If you don't have money, you don't have access to the justice system.'<sup>163</sup>

In the selected Common Law African countries, there are barely any groups that support the economic empowerment of LGB persons,<sup>164</sup> with more assistance being focused on legal and health services. Economic empowerment is however equally important, along with education, since education empowers people, enables access to employment and increases social status. When LGB persons remain poor, they are easily susceptible to involvement in petty crime, and thus contribute to the common myth that LGB persons are naturally miscreants and drug addicts.<sup>165</sup> They also do not make good role models whom young members of the community can look up to and follow in order to build a better life. In the USA and Canada as well as South Africa, many prominent persons have come out as gay, which has helped to change minds and demonstrate that LGB persons too can be like everyone else and can become important members of the community and good role models.<sup>166</sup> Economic disempowerment of LGB persons slows down social changes in favour of LGB equality.

### 6.2.5 Engineering the social factors

Social factors are critical to how LGB SL creates social change. This is because they determine how people perceive each other, communicate with each other and generally relate to one another. These factors therefore need to be influenced by activists if LGB SL is to lead to social change. The following factors are discussed below: joining and supporting liberal religious groups and figures; holding 'foreign'/non-national supporters of anti-LGB groups accountable in their own countries; publicising the positive aspects of 'traditional' culture that support equality and inclusion; continuing to do LGB litigation despite the hardships and backlash; continuing to do LGB SL in order to build a basis for future cases to

<sup>163</sup> 'Crisis in South Africa: The shocking practice of "corrective rape" - aimed at "curing" lesbians' *Independent UK* 4 January 2014 <http://www.independent.co.uk/news/world/africa/crisis-in-south-africa-the-shocking-practice-ofcorrective-rape-aimed-at-curing-lesbians-9033224.html> (accessed 12 February 2015).

<sup>164</sup> An example of such group is the Coalition for Advancement of Lesbian Business in Africa (CALBiA), which provides start-up capital for small and medium businesses for lesbians. See n 161 above.

<sup>165</sup> See Southern Poverty Law Centre '10 anti-gay myths debunked' 27 February 2011, <https://www.splcenter.org/fighting-hate/intelligence-report/2011/10-anti-gay-myths-debunked> (accessed 16 July 2018).

<sup>166</sup> See discussion on economic changes in Chapter 3, section 4.2.4.



be decided; increasing the prospect of favourable judicial decisions; and engaging in counter-mobilisation of elites, neutrals and allies.

*a) Supporting liberal religious groups and figures*

Extremist religious groups need to be countered with a more moderate and inclusive message. LGB groups need to join and support religious groups that are more welcoming to LGB persons and develop religious discourse around inclusion and love, which are indeed hallmarks of every religion. Such groups include: the World Council of Churches,<sup>167</sup> and the Metropolitan Community Churches.<sup>168</sup> This support should go beyond Christian groups to other religions including Muslims. An example of an inclusive mosque is the People's Mosque in Cape Town, which welcomes LGB persons.<sup>169</sup>

Leading liberal figures in the more established religious groupings should also be lobbied to speak out against discrimination. For example, the Pope's message about not judging<sup>170</sup> and his comment to a gay man that 'God made you like this,'<sup>171</sup> were important as it showed that the Catholic Church did not outrightly condemn LGB persons and could actively welcome them. Another way of engaging religious leaders can be through lobbying liberal leaders such as Archbishop Desmond Tutu of South Africa,<sup>172</sup> Bishop Christopher Ssenyonjo of Uganda,<sup>173</sup> and Reverend Thabo Otukile Mampane of Botswana of the World Council of Churches in Botswana to speak out against hate and discrimination in the name of religion.

<sup>167</sup> The World Council of Churches is a worldwide fellowship bringing together over 350 churches. See World Council of Churches 'About us' <https://www.oikoumene.org/en/about-us> (accessed 17 June 2018). They are also more open to LGB inclusion. See for example World Council of Churches 'Churches' response to human sexuality' 14 February 2006 <https://www.oikoumene.org/en/resources/documents/assembly/2006-porto-alegre/3-preparatory-and-background-documents/churches-response-to-human-sexuality> (accessed 17 June 2018).

<sup>168</sup> The Metropolitan Community Churches (MCC) were established in 1968 and specifically reach out to LGB persons among other groups. See <https://www.mcccchurch.org/> (accessed 17 June 2018).

<sup>169</sup> A Bruce-Lockhart 'Meet the imam of Africa's first gay-friendly mosque' *World Economic Forum* 4 May 2017 <https://www.weforum.org/agenda/2017/05/gay-lgbt-mosque-imam-muhsin-hendricks/> (accessed 14 April 2018).

<sup>170</sup> For the details and a discussion of this comment, see MJ O'Loughlin 'One key to understanding Pope Francis? His approach to judgment' *The Jesuit Review* 27 February 2018, <https://www.americamagazine.org/faith/2018/02/27/one-key-understanding-pope-francis-his-approach-judgment> (accessed 15 July 2018).

<sup>171</sup> 'LGBT community cheers pope's 'God made you like this' remark' *Chicago Tribune* 21 May 2018 <http://www.chicagotribune.com/news/nationworld/ct-pope-gay-comment-20180521-story.html> (accessed 15 July 2018).

<sup>172</sup> Archbishop Emeritus of Cape Town, South Africa. He has spoken out openly in support of LGB rights. See for example D Tutu Foreword to P Germond & S de Gruchy *Aliens in the household of God: Homosexuality and christian faith in South Africa* (1997).

<sup>173</sup> Bishop Christopher Ssenyonjo is the former Anglican Bishop of West Buganda Province who was defrocked because of his inclusion of LGB persons. He went ahead to continue his support for LGB persons through Integrity Uganda and the Saint Paul's Reconciliation and Equality Centre in Kampala. See generally, C Ssenyonjo *In defense of all God's children* 2016.

There is a need for more study on how the religious right channels its support to anti-gay groups in Africa, and how this bolsters domestic anti-gay campaigns. This would build further on the research and documentation done by Reverend Kapya Kaoma.<sup>174</sup> His exposure of such ties was important in bringing cases such as *SMUG v Lively* (the *Scott Lively* case)<sup>175</sup> which brought attention to the role of US pastor Scott Lively in spreading anti-gay hate in Uganda and elsewhere. Working with progressive church leaders helps to send clear signals that not all churches or faiths condemn people who are LGB, and also brings to light the activities of anti-gay groups aimed at spreading hate. The collaboration of progressive churches helps to change minds and thus helps to enable LGB SL to spur social change.

***b) Holding 'foreign' anti-gay supporters accountable***

The support of radical evangelicals from the USA and elsewhere makes a significant contribution to the anti-gay rhetoric in many African countries. Their contribution has been widely documented and discussed in this volume.<sup>176</sup> The example from the *Scott Lively* case in Uganda<sup>177</sup> has shown that where these activities cross the line into the international crime of persecution of LGB persons, then activists based in Africa can successfully file a lawsuit in a US court under the Alien Torts Statute challenging such actions.<sup>178</sup> The lesson learnt from the *Scott Lively* case<sup>179</sup> is that more effort should be made to point out the actions done on US soil that constitute persecution, in order to satisfy the test laid down earlier by the US Supreme Court in *Kiobel v Royal Dutch Petroleum Co.*<sup>180</sup>

Despite the judgment ultimately failing to hold Scott Lively liable, it made it clear that conspiring with others and actively supporting legislation that is aimed at curtailing the rights of LGB persons would constitute persecution under international law. It also pointed out that the US courts are willing to enforce the jurisdiction under the Alien Torts Statute, provided the right conditions are met. Indeed, Scott Lively's appeal against the language used in the judgment was thrown out by the appellate court on the basis that he had no right of appeal as the winning party, and that the words were merely dicta, and not the gist

<sup>174</sup> Rev Kaoma is a Zambian priest who has extensively researched these connections. See Political Research Associates 'Author archives: Kapya Kaoma' <http://www.politicalresearch.org/author/kkaoma/#sthash.F81nvkOB.dO2kgiUR.dpbs> (accessed 17 June 2018)

<sup>175</sup> C.A. No. 12-cv-30051-MAP (Scott Lively case).

<sup>176</sup> See discussion on the extent of religious extremism in Chapter 5, section 5.2.3.

<sup>177</sup> *SMUG v Lively* (n 175 above).

<sup>178</sup> As above.

<sup>179</sup> As above.

<sup>180</sup> 133 S. Ct. 1659 (2013).

of the decision.<sup>181</sup> This leaves the decision intact and puts such evangelicals on notice that their actions, which demonise, intimidate and injure LGB persons, would attract sanctioning under international law. Indeed in Uganda, there has been a marked reduction of the number of evangelicals who come into the country and hold large rallies against homosexuality.<sup>182</sup> Even Scott Lively himself is in the process of closing his Abiding Truth Ministries,<sup>183</sup> which is regarded by the Southern Poverty Law Centre as a hate group.<sup>184</sup> The bad publicity from this case is arguably one of the reasons this happened. Therefore, the Ugandan example of challenging the actions of Lively in a US court shows that if supporters of hate groups are brought to book in their own countries where stronger legislation combatting hate crimes exists, this helps to stem the tide of anti-gay hate. It also helps to weaken their local supporters in-country. For example, hitherto outspoken Ugandan anti-gay pastor, Martin Sempa, went quiet after the US court issued a subpoena against him as a US citizen to appear and testify on matters regarding his communications with Scott Lively.<sup>185</sup> This strategy therefore needs to be replicated elsewhere where US evangelicals continue to spread hate.

Another related strategy is to track the money trail as well as establish hate lists to track and expose who actually supports the anti-gay groups. This is because many of the funders of anti-gay groups do not do so openly.<sup>186</sup> According to Kapyra Kaoma, this is possible because the laws in the USA and those in many African countries do not require them to declare how much they donate.<sup>187</sup> That funding of anti-gay groups in Africa by US right wing evangelicals is a recent development meant to further the culture wars in the US. According

<sup>181</sup> *Sexual Minorities Uganda v Scott Lively*, No. 17-1593 (United States Court of Appeals for the First Circuit) (The *Scott Lively* Appeal).

<sup>182</sup> Interview with Frank Mugisha, n 32 above.

<sup>183</sup> C Santoscoy 'Anti-gay Scott Lively closing down 'hate group' Abiding Truth Ministries' *On Top Magazine* 31 May 2018 [http://www.ontopmag.com/article/43757/Anti\\_Gay\\_Scott\\_Lively\\_Closing\\_Down\\_Hate\\_Group\\_Abiding\\_Truth\\_Ministries](http://www.ontopmag.com/article/43757/Anti_Gay_Scott_Lively_Closing_Down_Hate_Group_Abiding_Truth_Ministries) (accessed 16 June 2018).

<sup>184</sup> See for example Southern Poverty Law Centre 'Anti-LGBT hate group leader Scott Lively garners enough votes for Massachusetts gubernatorial primary' 7 May 2018 <https://www.splcenter.org/hatewatch/2018/05/07/anti-lgbt-hate-group-leader-scott-lively-garners-enough-votes-massachusetts-gubernatorial> (accessed 16 June 2018).

<sup>185</sup> 'Pastor Sempa summoned by US court' *Daily Monitor* 22 May 2016 <http://www.monitor.co.ug/News/National/Pastor-Sempa-summoned-by-US-court/688334-3216918-m2t40nz/index.html> (accessed 17 June 2018). Also see 'Where is Pr. Dr. Martin Sempa?' 3 January 2017 *Christian News Uganda* <http://ugchristiannews.com/where-is-pr-dr-martin-sempa/> (accessed 17 June 2018).

<sup>186</sup> Kapyra Kaoma found evidence that evangelical groups gave money to anti-gay groups in Uganda, including the Anglican Church. See Kapyra Kaoma 'The US christian right and the attack on gays in Africa' *Huff Post*, 18 March 2010 [https://www.huffingtonpost.com/rev-kapyra-kaoma/the-us-christian-right-an\\_b\\_387642.html?guccounter=1](https://www.huffingtonpost.com/rev-kapyra-kaoma/the-us-christian-right-an_b_387642.html?guccounter=1) (accessed 22 August 2018).

<sup>187</sup> K Kaoma, *Globalising the culture wars: US conservatives, African churches and homophobia* Political Research Associates, 2009, 9-11.

to the *Scott Lively* decision, funding of efforts to demonise and injure LGB persons would perhaps qualify as an act done on US soil to aid and abet the persecution of LGB persons.<sup>188</sup>

Also tracking who such supporters are and exposing them helps to force such groups to come out in the open and declare whether they still support such activities.<sup>189</sup> The Southern Poverty Law Centre maintains a hate list and the role that groups on that list play in spreading anti-gay hate.<sup>190</sup> Such lists should be widely disseminated. For example, as a result of the exposure of Saddleback Ministries' Rick Warren's connections with Pastor Martin Ssempe, he openly severed ties with the latter after he was placed under pressure to explain his influence in Uganda and his stance on the Anti-Homosexuality legislation.<sup>191</sup> Having such supporters on the defensive is a key factor in stemming the export of US cultural wars to Africa.

With reduced US and other western support, radical evangelicals in Africa would remain with no external moral and financial support, which would cripple their ability to widely spread anti-gay hatred, and undermine their ability to oppose cases. In reducing resistance spurred by anti-gay groups, a better environment will be created for successful LGB SL to spur social change.

*c) Publicising positive aspects of 'traditional' culture*

Rather than seeing culture as an impediment to LGB equality, its more positive components that are supportive of LGB equality should be identified and explained. There are many ways in which LGB persons were treated culturally without necessarily punishing them. In many traditional African societies, homosexuality was neither condoned nor criminalised.<sup>192</sup> Indeed, the criminalisation of homosexuality was imported by colonialists,<sup>193</sup> together with the other written laws generally. Traditional culture also emphasised *ubuntu*, the concept that 'I am because we are, and since we are, therefore I am.'<sup>194</sup> This principle was focused on

<sup>188</sup> n 173 above.

<sup>189</sup> Southern Poverty Law Centre 'Extremist files' <https://www.splcenter.org/fighting-hate/extremist-files> (accessed 15 July 2018).

<sup>190</sup> Southern Poverty Law Centre 'Hate map' <https://www.splcenter.org/hate-map> (accessed 16 August 2018).

<sup>191</sup> 'Rick Warren denounces Uganda's anti-gay bill' *Time* 10 December 2009 <http://content.time.com/time/world/article/0,8599,1946921,00.html> (accessed 2 July 2018).

<sup>192</sup> See for example S Tamale 'Out of the closet: unveiling sexuality discourses in Uganda' <http://www.feministafrica.org/index.php/out-of-the-closet> (accessed 20 September 2011).

<sup>193</sup> Amnesty International 'Making love a crime: Criminalisation of same-sex conduct in sub-Saharan Africa' (2013) [https://www.amnestyusa.org/files/making\\_love\\_a\\_crime\\_-\\_africa\\_lgbti\\_report\\_emb\\_6.24.13\\_0.pdf](https://www.amnestyusa.org/files/making_love_a_crime_-_africa_lgbti_report_emb_6.24.13_0.pdf) (accessed 17 June 2018).

<sup>194</sup> See J Mbiti *African religions and philosophy* (1969) 108–109.

everyone being part of the society and therefore not to be discriminated against or excluded. In Botswana, *botho* was defined to mean ‘fellowship of mankind, co-operation, selflessness, compassion, and a spirit of sharing.’<sup>195</sup> These are certainly well recognised concepts in communitarian societies across Africa. These can be given as examples and brought to the knowledge of the masses, and may help change mindsets, a factor which is key to LGB court victories convincing people that change needs to happen. Indeed, in Botswana, LEGABIBO has been working with chiefs to engage them on the need to promote inclusion and acceptance of LGB persons.<sup>196</sup> This helps to change societal perceptions and make it easier for LGB SL to social stimulate change.

*d) Continuing to do LGB litigation despite court losses or backlash*

There is need for activists to continue doing LGB SL. This is important in order for the courts to get used to LGB issues and issues of marginalisation and discrimination generally and to build a jurisprudential base for future cases. LGB SL should continue even if there are losses in the courtroom as well as backlash and counter mobilisation. However, in such circumstances, there is need to change tactics and do SL differently. El Menyawi argues in the context of Egypt that in the current environment of the backlash against LGB persons, ‘stonewall’ strategies such as publicly demanding for LGB rights, which indeed includes SL, are counterproductive. He therefore advocates for other approaches, which he refers to as ‘activism from the closet’ that include engaging religious leaders within the framework of the Quran and other tenets of religion.<sup>197</sup> For Common Law Africa, where there is backlash and continued losses such as the case is currently in Uganda, there is need to revisit the strategy and instead of challenging the laws criminalising same-sex conduct, challenges are brought to other laws that directly affect LGB persons but which also apply to other groups generally, such as the laws on being rogue and vagabond, to address other legal impediments to the rights of LGB people without putting the sexuality question in issue. In Malawi, for example, there was a successful challenge to a provision criminalising being ‘rogue and vagabond,’ and the case was never expressed as an LGB case at all.<sup>198</sup> Indeed, such cases do not even have to be brought by LGB persons or have LGB rights mentioned. This was the situation in Uganda in the *Adrian Jjuuko case*,<sup>199</sup> where a lawyer who did not identify as LGB successfully challenged a provision of the Act, which affected LGB persons

<sup>195</sup> See Republic of Botswana, n 98 above.

<sup>196</sup> Interview with Bradley Fortuin and Botho Namatona, n 107 above.

<sup>197</sup> El Menyawi, n 6 above.

<sup>198</sup> *Gwanda v S* Constitutional Cause No. 5 of 2015.

<sup>199</sup> n 36 above.

and other minorities. What should matter is the nullification of the offending law rather than how it comes about. Therefore, there is no need to stop LGB SL even in the context of backlash and counter mobilisation. All that needs to be done is to be more innovative.

In situations where a direct case must be brought, such as the case was in challenging Uganda's AHA, then ways in which the case could be narrowed down to ensure a win, while at the same time reducing the possibility of harm arising from backlash, have to be discussed. In Uganda, it was found important to challenge the AHA at the East African Court of Justice as it was then thought that the Ugandan Court would delay. However, when the Ugandan courts decided the matter before the EACJ did, the case was revised to seek a declaration that would ensure that the parliament would never have carte blanche to pass such discriminatory laws in Uganda, as well as the other East African countries. A strategising meeting involving East African activists had to be held to discuss how this was to be done, and that is when it was decided that the challenge should be limited to only three provisions as well as the action passing the Act into law in the first place.<sup>200</sup> In the USA, after the loss in the *Bowers case*,<sup>201</sup> the lawyers and activists agreed to instead challenge state laws in the state courts, where they had high rates of success.<sup>202</sup> By the time they came back to the Supreme Court 17 years later on the same issue, it was simply a matter of the Supreme Court confirming what state courts had already done. *Bowers v Hardwick*<sup>203</sup> was overturned in *Lawrence v Texas*,<sup>204</sup> and sodomy decriminalised. Therefore, retreating and re-strategising is not failure, but rather recognition of the prevailing circumstances and working within them to create change. As such in Uganda, after the loss in the Lokodo case, activists decided to bring cases of enforcement of LGB rights to the Uganda Human Rights Commission rather than the courts.<sup>205</sup> Such an approach would minimise the effects of unsuccessful court decisions and counter-mobilisation on LGB persons and reduce the possibility of legislative backlash. Indeed like Keck observes, sometimes what appears to be 'losing by winning' such as what initially happened after *Baehr v Lewin*,<sup>206</sup> may later turn out

<sup>200</sup> Interview with Patricia Kimera, Head, Access to justice Division, Human Rights Awareness and Promotion Forum (HRAFP), Kampala, 24 April 2018.

<sup>201</sup> 478 US 186.

<sup>202</sup> Interview with Prof. Paul Smith, n 88 above.

<sup>203</sup> n 200 above.

<sup>204</sup> n 55 above.

<sup>205</sup> Cases brought before the High Court are *Frank Mugisha, Dennis Wamala & Ssenfuka Warry Joanita v Uganda Registration Services Bureau (URSB)* Miscellaneous Cause No. 96 of 2016 (filed 1 June 2016) and *the Rolling Stone case* (n 48 above). Cases brought before the Uganda Human Rights Commission are *Mukasa Jackson & Mukisa Kim v Attorney General*, UHRC No. CTR/24 of 2016, and *Shawn Mugisha and 6 Others v Attorney General and the District Police Commander (DPC), Kabalagala Police Station*, UHRC No. CTR/06/2017.

<sup>206</sup> *Baehr v Lewin*, n 15 above.



to be a blessing in disguise and help to launch the struggle for equality going forward.<sup>207</sup>

*e) Increasing the prospects of favourable judicial decisions*

Although it is true that SL is not all about winning, court victories are nevertheless important and critical and should be aimed at in all cases. However, in a context where homophobia prevails, a successful outcome can rarely be guaranteed. One way of ensuring that cases succeed is to adequately plan for all the internal factors that affect the case and try to effectively speculate and plan for the external influences on the case. To avoid losses reversing gains already made, it is advisable not to reopen issues where cases on the particular matter had already been won.

Activists need to bring one aspect of the law or conduct at a time before courts so that a decision in one case does not bar subsequent cases from being brought. Another way is to ensure that courts that are likely to bar further appeals are avoided at the early stages of the litigation. An example of such a court is the Ugandan Constitutional Court, which has original jurisdiction in constitutional matters, but one where if a case is lost, it can only be appealed to the Supreme Court. The High Court on the other hand gives two levels of appeal - to the Court of Appeal and then the Supreme Court, thus giving a chance to more judges to engage with the issue. By managing losses at an early stage, the litigation can continue, registering small gains as the general environment in which the cases are heard becomes more favourable. This is exactly what was done in Canada and the USA in the years before 1997. By 1997, the tide had started turning in favour of LGB groups. A complete shut down of litigation should be avoided. Indeed, it is quite clear that in Common Law Africa, as well as outside Common Law Africa, it is only in countries where SL has been continuous that social change has been registered.

*f) Responding to counter mobilisation of elites*

Finally as far as exogenous factors are concerned, there is need to respond to counter mobilisation. This is where counter-mobilisation of allies and the community against LGB persons after court victories is challenged with LGB groups doing their own mobilisation among neutral but influential allies and other persons. An important group that can be targeted to help create change are the parents of LGB persons. Parents are a powerful voice as they are usually drawn from the communities and at the same time have experienced the

<sup>207</sup> See generally, TM Keck 'Beyond backlash: Assessing the impact of judicial decisions on LGBT rights' (2009) 43 *Law and Society Review* 151.

kind of discrimination that is visited upon families with LGB persons. Such groups would be speaking from real life experience and their stories are likely to change people's views, while their evidence in court is also likely to influence how the judges decide the cases.

Another group to mobilise are friendly religious leaders who can counter the message of the anti-gay religions. Another group are leading politicians who are not afraid to put their careers on the line. In Uganda, Prof. Ogenga Latigo, the former leader of the Opposition in Parliament regained his seat even after being a petitioner in the AHA case. He stated the reasons why he supported the case, grounding them in human rights and science.<sup>208</sup> Member of Parliament and former Presidential Legal Advisor, Fox Odoi, also took a stand for LGB rights, even if this ultimately came at a cost of losing his seat. The profiles of such actors helped draw attention to the case and it was eventually won. This had been difficult to imagine in a situation where the evangelicals had mobilised support and largely had the President on their side.

Therefore, the exogenous factors need to be leveraged, taken advantage of, managed or otherwise exploited to create the conditions that would enable LGB SL to lead to social change. Once this is done, LGB SL can lead to social change even in situations where the factors have not completely changed into the perfect change-fostering conditions. In Common Law Africa, South Africa is a good example of how these factors were well managed and eventually significant social change achieved in situations of pre-existing and ongoing homophobia and biphobia. Outside Common Law Africa, Nepal is a good example as all the factors largely remained constant but activists manipulated them to be able to achieve a high degree of social change.

### 6.3 Controlling the endogenous factors

While the exogenous factors are largely beyond the control of LGB groups, the endogenous factors are almost entirely within the control of the groups. LGB activists therefore have much more leeway in influencing them. This section explores the role of activists over the

<sup>208</sup> '120 legislators lose parliamentary seats' *New Vision* 21 February 2011 [https://www.newvision.co.ug/new\\_vision/news/1016000/120-legislators-lose-parliamentary-seats](https://www.newvision.co.ug/new_vision/news/1016000/120-legislators-lose-parliamentary-seats) (accessed 16 August 2018); 'Battle of scientists as gay law storm persists' *The Observer* 16 March 2014 <https://www.observer.ug/viewpoint/guest-writers/30702--battle-of-scientists-as-gay-law-storm-persists> (accessed 16 August 2018).

four-phased life cycle of litigated cases: the development of the overarching strategy, the pre-litigation phase, the litigation phase and the post-litigation phase.

### 6.3.1 Influencing the factors that go to the overarching litigation strategy

At the level of the overarching litigation strategy, LGB activists set the long-term strategic objective and how to achieve it, taking into consideration the likely obstacles and potential measures to overcome them. At this level, the following measures are identified as potential accelerators to induce lasting social change in the selected Common Law African countries: revising and setting down the strategic objective to be followed when undertaking LGB SL and adopting a formal strategy to pursue the litigation. These are explained below in details:

#### *a) Setting the long term strategic objective at complete social integration*

Whereas the current struggles in all the selected Common Law African countries besides South Africa is decriminalisation, South Africa is a good reminder that there is a lot more to be achieved beyond decriminalisation. Indeed, decriminalisation is very important, as it is ‘an essential first step towards establishing genuine equality before the law.’<sup>209</sup> However, it is not an end in itself but rather a means to an end, and that end is complete social integration- the highest level on Kretz’s seven stage spectrum.<sup>210</sup> What is required is not just the first step but full equality and acceptance for LGB persons. As such, there is need to clearly set the overall strategic objective for litigation at complete social integration, even if it currently appears to be a far off goal. Beyond decriminalisation is marriage equality, from which issues such as joint custody of children, and succession rights would almost automatically follow. Although there is a school of thought within the LGB movement that looks at same-sex marriages as legitimising the institution of patriarchy and mimicking the very exploitative institutions that equality activists want to do away with,<sup>211</sup> it is important that it remains an option that is open to homosexual persons just as it is for heterosexual persons if full equality is to be achieved. After that, the remaining stage would be complete social integration. The danger of setting the target at decriminalisation or just same sex marriages is that after these are achieved, the movement may not be adequately prepared to

<sup>209</sup> M Bogner ‘Decriminalizing homosexuality is an essential first step towards establishing genuine equality before the law’ Op-ed, Office of the High Commissioner for Human Rights, regional office for the Pacific, 11 October 2011 <http://pacific.ohchr.org/statements.htm> (accessed 2 July 2018).

<sup>210</sup> See A Kretz ‘From “kill the gays” to “kill the gay rights movement”: The future of homosexuality legislation in Africa’ (2013) 11 *Northwestern Journal of International Human Rights* 207, 211-216. The seven stages are discussed in detail in Chapter 4 above.

<sup>211</sup> See discussion on same-sex marriages in the USA in Chapter 3 above, section 3.4.2.

go to the next stage of the struggle, as the situation is in South African. Therefore, the overall objective should be clearly stated, and then specific objectives such as achieving decriminalisation and getting same sex marriages recognised should also be stated and plans made to achieve them in the short term and the medium term, while aiming at the overall objective in the long term. What is clear is that the struggle for LGB equality in Common Law Africa still has a long way to go, and activists have to be ready for a long-term struggle.

***b) Adopting a formal strategy to pursue the litigation***

Having a formal, well-known and countrywide strategy is by and large more effective in making LGB SL contribute to social change than having informal *ad hoc* strategies. Activists therefore need to adopt formal litigation strategies clearly laying out all the different ways in which they can achieve their aims. All the selected Common Law African countries that are yet to achieve full legal equality need to revise their strategies, make them more formal and seek views and opinions of different stakeholders. This can be done through meetings about strategy with all the different stakeholders present to discuss what is to be done, and how it is to be done. Indeed, strategies do not have to be inflexible. Rather, they need to be revised from time to time to reflect the changing realities. Ugandan activists give the best example of this through the CSCHRCL, which was a platform where broader strategies were developed and reviewed.

***c) Establishing formal coalitions to support the litigation***

Formal coalitions ensure that there is enough popular support for the cases and significant buy-in into the overarching litigation strategy as well as into the individual cases. The Ugandan CSCHRCL would be the best model to follow as it brought together both LGB and mainstream human rights groups in order to oppose the Anti-Homosexuality Bill. However, the success and longevity of that coalition can also be said to have been restricted by its narrow vision of defeating the AHB. After this goal was achieved, the Coalition disintegrated and its different elements reverted to their previous activities.

Another model is that of the National Coalition for Gay and Lesbian Equality (NCGLE) in South Africa, which brought together different LGB groups to work towards equality. Having formal coalitions helps to more easily mobilise and attract elites, and they also present a united front that is difficult to intimidate. Such an approach makes the state and the courts aware that this is not simply a person or a few individuals seeking change, but rather a bigger group with varied interests. Nevertheless, the eventual collapse of both the

CSCHRCL and the NCGLE shows that coalitions should not be formed to last forever but rather to work towards a certain goal. Once achieved, the coalition can be disbanded.

### 6.3.2 Controlling factors at the pre-litigation phase

At this stage, activists can do the following to ensure that a case succeeds or that, even if it fails, it is nevertheless able to create positive change: increase consultations when building a case and increase local fundraising. These are explained below in details:

#### *a) Increasing consultations when building a case*

All the countries surveyed in the study need to ensure that consultations are meaningful, wide and address both the merits and the strategic aspects of the case. This is because consultations help in coming to a decision on the best approach to take and thus give activists and litigants an opportunity to prepare adequately to enable the case to stimulate social change. A well-planned case requires broad consultations with different stakeholders as this builds legitimacy.<sup>212</sup> The consultation should also extend to corporate entities that may be willing to support such work, as well as different state institutions. Such consultations help to identify allies that one may not have been able to recognise beforehand, and to build consensus as well as to explain to those who may think that the case is against them that there are broader concerns and interests. In Uganda, the Equal Opportunities Commission was initially hostile to the fact that a case had been brought challenging section 15(6)(d) of the Equal Opportunities Commission Act. However, after engaging them during the time the case was in court, they were able to see the benefits of the petition.<sup>213</sup> The lesson learned was that it was better to consult them before filing the case, such that all parties were clear as to the intention of the case. Consultations are a crucial foundation to the adequate planning of a case in order to ensure victory and to gain support for the case.

#### *b) Increasing local fundraising*

Financially contributing to a case makes one feel like an integral component of the case. This implies that the more people who are willing to support and fund a case, the more mobilisation that is done, and the more successful and popular a case is likely to be. Lessons from the USA and Canada show that mobilising resources from local supporters, including

<sup>212</sup> See D Feldman, 'Democracy, the rule of law and judicial review' (1990) 19 *Federal Law Review* 1-30, 23-30.

<sup>213</sup> Interview with Patricia Kimera, n199 above.

LGB persons, corporations and other supporting individuals goes a long way to ensure buy-in and also to show others that the case is important. Foreign funding on the other hand takes away ownership of a case from the community members, and also reduces the need for accountability to the community by lawyers and organisers. Foreign fundraising makes the planners of the litigation largely have the foreign funders as the persons to account to, and yet in most cases they are more interested in outcomes than processes.

Even if a victory is secured in a case where few people have an interest, it would have little impact on the ground, as the actual beneficiaries did not actively participate and do not own the cases. Studies in the USA show that LGB persons actually contribute more, financially, to causes than the general populations.<sup>214</sup> This may be due to the need to do something to improve the situation of other LGB persons, and the general population, having undergone discrimination themselves. As such activists in African countries need to consider local fundraising. While it is correct that many LGB persons in the different Common Law countries are considerably poorer, complementing donor support with local support, however minimal, still helps to ensure that the community owns the cases and supports them. This ultimately ensures social change as the cases have adequate support.

### **6.3.3 Controlling factors at the litigation stage**

The litigation stage is where the success of the individual case is determined. The factors at this stage are fully within the control of the activists as they usually are the ones filing the case. At this stage, the following need to be done in order to ensure that LGB SL stimulates social change: ensuring that cases go all the way to the highest courts whenever necessary; properly timing the filing of cases; mobilising elites; effectively mobilising the LGB community; using multiple petitioners representing different interests; having a multiplicity of respondents whenever practical and strategic; arranging and influencing who intervenes in a case and who joins as *amicus curiae* and ably defending against the arguments of those opposed to the cause; selecting the best suited lawyers possible for the different cases; relying on human rights arguments that have been used before; ensuring that detailed prayers for remedies are made; ensuring the case comes before liberal judges; avoiding condemnation in costs; and backing LGB cases with advocacy efforts, and these are discussed below in details:

<sup>214</sup> See for example Garvey, JC *Creating communities: Giving and volunteering by gay, lesbian, bisexual and transgender people* (1998) 7-11.



**a) Ensuring that cases go all the way to the highest courts**

Highest courts ensure the finality of cases and therefore it would be clear that what that particular court states is the final position of the law and cannot be reversed. Victory at the lower courts is important. However, unsuccessful cases at that stage should be appealed until the highest level of the judicial system. Care should however be taken to ensure that bad precedents do not get confirmed as law and therefore the decision to appeal a lost case should not be taken lightly. Also in countries such as Uganda where a different court of first instance exists for constitutional matters,<sup>215</sup> care has to be taken when choosing the court to approach. Whereas constitutional interpretation ensures finality, it can also close the way for further progress, as there are fewer appeals than in enforcement cases, which start at the lowest level. Therefore, cases have to be designed in such a way that only matters that must go for constitutional interpretation, such as interpretation of statutes, go to that court, and the rest go for enforcement. That way, the window of the number of appeals before a case gets to the highest court remains relatively wide.

In the case of Botswana, Kenya and South Africa where the High courts also hears constitutional matters, this issue does not arise as either way, cases end up at the highest court through appeals. In the case of South Africa, cases where legislation has been struck down by lower courts must be confirmed at the highest level.<sup>216</sup> Therefore, regardless of the judicial system in place, activists should aim for the highest courts in the system.

**b) Properly timing the filing of the cases**

The right time is all-important to ensure that a case creates the necessary impact. It is fundamentally important to know the right time for such litigation. Activists should look out for events that shock and attract publicity such as the Rolling Stone magazine's calling for the hanging of gay people in Uganda,<sup>217</sup> as well as the signing of the AHA into law.<sup>218</sup> These create publicity for the case well before it is filed and help to bring the issues to the judges' attention as well as that of the general public. However, not every such event may be

<sup>215</sup> The Constitutional Court is the court of first instance for constitutional interpretation, and appeals therefrom go to the highest Court, the Supreme Court. On the other hand, the High Court is the right court to go to for enforcement (*Ismail Serugo v Kampala City Council & Attorney General*, Constitutional Appeal No. 2 of 1998), and this approach gives two appeals- to the Court of Appeal, and to the Supreme Court.

<sup>216</sup> Section 172(2)(a) of the Constitution of the Republic of South Africa provides that an order of constitutional invalidity has no force unless it has been confirmed by the Constitutional Court.

<sup>217</sup> Which led to the *Rolling Stone* case (n 49 above).

<sup>218</sup> Which led to the case of *Prof. J Oloka-Onyango & 9 Others v Attorney General* Constitutional Petition No. 008 of 2014 (Constitutional Court of Uganda) (AHA case).

a good opportunity to litigate. One of the dangers is that as such a matter would be well known and, if discussed within a homophobic setting, it may prejudice the judges. The other danger is that there is usually no adequate planning for cases that arise out of such incidents, and a half-baked and poorly thought out case may be presented, which may lead to more losses and backlash.

Another aspect to timing concerns the decision of when to institute an appeal or another case in which similar issues are considered following an unsuccessful case. Where a judge's decision is widely criticised, the judiciary is much more alive to the dynamics and public reactions that ensue and may thus reverse the decision when an appeal or another case is filed. The Supreme Court of the USA received significant backlash with the decision in the *Bowers* case<sup>219</sup> and was able to correct this when it finally got a chance in the *Lawrence* decision.<sup>220</sup> However, such correction is never easy to come by as it takes time for cases to reach the upper courts.<sup>221</sup> A properly timed case is more likely to succeed, and even if it does not, it is more likely to create publicity and discussion of the rights, eventually leading to social change.

### c) *Mobilising elites*

Activists should ensure that elites and opinion leaders are well mobilised to be part of the case and to actively and publicly support the case. Despite the homophobia and the potentially negative impact on the reputation of such elites, there are some who are willing to take the risks. Having these groups of people supporting cases is very important. In South Africa, elites took the lead in LGB SL and were the voices calling for change.<sup>222</sup> The petitioners themselves in the *Du Toit* case and the *Satchwell* case were respected members of the legal fraternity. This fact contributed to the speed and success of the journey from decriminalisation to marriage equality in South Africa. In Uganda, the unexpected joining of the *AHA* case by a ruling party Member of Parliament and a former leader of the opposition in Parliament helped to give the case the clout that was needed to regard it as important. The fact that the lead petitioner was also a respected law professor gave the case much-

<sup>219</sup> n 200 above.

<sup>220</sup> n 55 above.

<sup>221</sup> E Bazelon 'Why advancing gay rights is all about good timing: Lessons for same-sex marriage from the Supreme Court's terrible decision in *Bowers v. Hardwick*' Oct. 19 2012, [http://www.slate.com/articles/news\\_and\\_politics/supreme\\_court\\_dispatches/2012/10/the\\_supreme\\_court\\_s\\_terrible\\_decision\\_in\\_bowers\\_v\\_hardwick\\_was\\_a\\_product.html](http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2012/10/the_supreme_court_s_terrible_decision_in_bowers_v_hardwick_was_a_product.html) (accessed 16 June 2018).

<sup>222</sup> According to Prof David Bilchitz, one of the reasons for this is the fact that elites are more protected from physical violence at the hands of the community in a way that grassroots activists are not. Skype interview with Prof. David Bilchitz, Director of the Southern African Institute for Advanced Constitutional, Human Rights, Public and International Law (SAIFAC), University of Johannesburg, 10 July 2018.

needed traction. All these joined the case due to the lobbying efforts of the activists under the CSCHRCL. Therefore, the extent to which elites are mobilised to join cases adds value to the case, draws attention to it, and thereby increases its potential to succeed and stimulate social change.

*d) Effectively mobilising the LGB community and allies*

It is crucial that despite all the differences within the broader LGB, transgender and intersex movement, groups should be seen to be working together and not against each other. The Kenyan incident where one organisation acted unilaterally in spite of the broader coalition's plans to institute a joint case is an example of lack of unity.<sup>223</sup> The image that the movement portrays to the public is crucial. It is also important for these cases to have a human face. The people who are affected by the laws should be given an opportunity to share their stories and explain how the status quo is affecting their day-to-day lives. Going to court without LGB persons supporting a case could also be largely detrimental to the case because it creates the impression that the number of people affected or extent of violations suffered under existing laws are negligible. This is still important even when the case itself does not require showing actual impact of the law or the action on the groups, as the case was in the *Adrian Jjuuko* case in Uganda.<sup>224</sup> In the selected Common Law countries where even the very existence of LGB persons is questioned, such visibility is crucial.

However, while community mobilisation is key to the achievement of SL, security concerns for LGB persons should not be underestimated. SL is a public strategy and the cases are most likely to be publicised on television and various other media. As such, there must be strategies in place to protect LGB persons who may not want to be visible during the hearing of cases. One way that it was done in Uganda was to warn all those intending to attend the court hearings and advocacy campaigns while the Bill was still under consideration about the presence of media.<sup>225</sup> Of course this did not necessarily stop many from coming, and indeed the media visibility contributed to the outing of many individuals, and also contributed to the massive departure of LGB persons to foreign countries in the aftermath of the passing of the AHA into law.<sup>226</sup> Therefore, whereas members of the LGB community are clearly needed in court and at other case-related events, there is a need to be

<sup>223</sup> See discussion in chapter 3 above, section 3.3.1.

<sup>224</sup> Above, n 36 above.

<sup>225</sup> Interview with Patricia Kimera, n 199 above.

<sup>226</sup> G Zomorodi 'SOGI-related migrations in East Africa, fleeing Uganda after the passage of the Anti-Homosexuality Act' Global Philanthropy Project (2015) 21.

alive to their security. Only by ensuring their security and privacy will such support continue, and stimulate social change in favour of LGB persons.

*e) Using multiple petitioners*

Where possible, activists should ensure that the petitioners are multiple with multiple interests and, wherever possible, repeat petitioners should be avoided. Key among such petitioners would be persons directly affected by the law being challenged, who would certainly be LGB persons. This is a lesson that Botswana and Kenya need to take seriously, as they have suffered from situations where individuals file cases without involving others in the planning. Having multiple and different petitioners helps to show the court and the general public the importance of the case as many persons are standing up to be counted, and also does away with the narrative of a few individuals being ‘paid’ or otherwise influenced to spread the ‘gay agenda’, thereby facilitating LGB SL to stimulate social change.

*f) Having a multiplicity of respondents whenever strategic*

Every person who can reasonably and practicably be added as a respondent should be added to the case. This helps to make all the others realise that it is not just about the state but also about private individuals or persons abusing power that can be brought to book over LGB violations. It may also be important where the case is severed and some of the respondents are declared by the court as not liable while the rest are declared liable. For example in the *Victor Mukasa* case in Uganda,<sup>227</sup> although the applicants had considered the Attorney General as representing the local council authorities together with the police, the judge declared that the Attorney General cannot be held liable vicariously for the actions of the local council authorities.<sup>228</sup> As a result, the orders for compensation that the judge made were only directed at the violations suffered at the hands of the police and the atrocities committed by the local council authorities could not be addressed.

In the *Lokodo* case, the judge also held that the Minister who was cited as a respondent in his personal capacity was not personally liable. Nevertheless the fact that a Minister could be dragged to court over actions affecting LGB people was an important element of the publicity surrounding the case. However, caution should be exercised since suing officials in their personal capacity may be interpreted as a personal affront and they may take it upon themselves to pursue a campaign against LGB persons. This is indeed what seems to have

<sup>227</sup> n 47 above.

<sup>228</sup> Above, para 39-40.

happened in Uganda after the *Lokodo* case was lost. The Minister went on the offensive by closing down LGB events.<sup>229</sup> Another challenge would be that if there are so many respondents, this will increase the magnitude and impact of a negative costs order and may make people cautious about instituting further LGB cases. Therefore, whereas it is important to have multiple respondents, these respondents have to be selected with care and thought should be given to the possible ramifications of suing each of the individuals or institutions.

*g) Engaging interveners and amicus curiae*

Interveners and *amici curiae* are important as regards to showing the court different opinions and viewpoints. They bring to the court matters that the court would otherwise not be aware of. Although the parties cannot entirely control *amicus curiae*, identifying and asking institutions or individuals to apply to join the case as *amicus curiae* is important. This worked well in Uganda for the *HRAPF* case.<sup>230</sup> Thus, UNAIDS which was one of the four applicants, was eventually admitted as *amicus curiae*. Also the joining of the case by an international body such as UNAIDS considerably raised its profile.<sup>231</sup> Inversely, there is a need to adequately prepare for opposing groups, particularly evangelical groups who are almost guaranteed to intervene or join cases as *amici*. Their arguments should be readily anticipated and an appropriate defence formulated. This trend has been seen in the three selected African Common Law countries besides Botswana.

*h) Selecting the best suited lawyers*

Different cases require different sets of expertise. Community lawyers or cause lawyers are best placed to argue LGB cases as that is their specific area of specialisation. However, in the selected Common Law African countries, there are often no such lawyers who are dedicated to LGB cases. As such this reality needs to be considered, and recourse may thus need to be made to lawyers in private practice. Lawyers working with friendly public interest litigation organisations and international lawyers could assist.

However, where possible, international lawyers should be kept in the background and mainly provide research and other technical support. The actual litigation of the cases should be left to local lawyers, in order to avoid fuelling the anti-gay groups' propaganda

<sup>229</sup> 'No gay promotion can be allowed': Uganda cancels pride events' 21 August 2017. <https://www.theguardian.com/global-development/2017/aug/21/no-gay-promotion-can-be-allowed-uganda-cancels-pride-events-lgbt> (accessed 14 April 2018). Also see discussion in chapter 4 above; section 4.2.2.

<sup>230</sup> n 78 above.

<sup>231</sup> Interview with Fridah Mutesi, member of the legal team appearing before the EACJ in the *HRAPF* case, 28 April 2018, Kampala.

that LGB rights are a foreign agenda. The fact that the strategy of bringing foreign lawyers worked out well in Belize is largely due to the nature of its judiciary, which remains attuned to the Commonwealth norms. Lawyers from other Commonwealth countries handling the cases were not viewed as a foreign imposition. The selected African Common Law jurisdictions, however, no longer subscribe to Commonwealth norms and lawyers from Commonwealth countries are viewed as foreign. Foreign lawyers would be frowned at even if they were legally allowed to represent clients in these countries. Therefore, in light of this reality, highly respected senior lawyers should be used as lead lawyers. Community lawyers should also actively be involved. This will increase the likelihood of cases being won and, even if they are lost, it ought to spur enough debate to stimulate social change in favour of LGB persons.

*i) Relying on tested human rights arguments*

Human rights arguments are clearly tested as regards LGB SL cases. As such, these are the arguments that should continue to be relied upon in such cases. However, care should be taken to rely on human rights arguments that have been used before elsewhere in LGB cases. These include non-discrimination arguments particularly in countries where the constitution is more open, the right to dignity, and the right to privacy where these rights are framed clearly in the country's constitution. These are arguments that have been relied on before and which thus would be helpful to ensure that the cases succeed.

Of course cases that by their very nature give rise to other arguments such as constitutionally laid down procedures and quorum, as it was in the *AHA* case in Uganda, ought to have such arguments raised. Cases decided by the particular country's highest courts should be primarily relied on, as they are binding precedents. These should be followed by cases from countries, which have a similar legal culture or social-economic set up like the country in question. Other African Common Law countries would be good to use if they have persuasive precedents. Decisions from courts in other countries and international courts can also be used. The Common Law system still has precedent as a key feature and therefore, it makes it easier to argue cases where precedents exist, and LGB precedents are building up all the time, as do general human rights precedents. Nevertheless, carefully constructed arguments with precedents to support them help to ensure success of the cases, and also to support the legitimacy of the decisions and eventually stimulate social change. However, the recent SMUG registration case in Uganda



shows that both foreign precedents and local precedents may be easily distinguished and not lead to what is desired.

*j) Making detailed prayers for remedies*

Courts usually grant prayers and remedies that have been asked for by the lawyers. As such, the lawyers should always make detailed prayers for remedies in order to enable the court to issue detailed orders in case of success. The South African cases should be taken as examples in this regard as they indeed pay attention to the issue of remedies. All constitutions frame the remedies which courts are authorised to make in an open way and this leaves space for lawyers to ask the courts to do much more than make declarations where necessary. Structural interdicts in particular need to be tried as an effective way of ensuring that what the court orders is done.

However, care should be taken not to put the courts in a situation that they are expected to make orders that will be seen as counter-majoritarian to the point of being rendered illegitimate. This is a consideration that was given much attention when the *HRAPF* case was taken before the East African Court of Justice.<sup>232</sup> The legal team was careful to place the Court in a position where it was required to make declarations on clear points in respect of human rights. Similarly, legal teams would prefer framing relief sought as a declaration of the existence of a human right in accordance with the Constitution, rather than requesting an open-ended remedy requiring constitutional interpretation.<sup>233</sup> Where courts and tribunals have made orders that are strongly opposed by prevailing political powers, the consequences have been dire, as was seen with the Southern African Development Community (SADC) Tribunal.<sup>234</sup> In 2008, the Tribunal made a ruling that the government of Zimbabwe's interference with white farmers' ownership of property violated the SADC Treaty principles of non-discrimination and the rule of law.<sup>235</sup> In response to this ruling, the Assembly of the Heads of State, the highest organ of the SADC, called for a review of the role of the tribunal<sup>236</sup> and did not appoint judges to it, which amounted to the *de facto*

<sup>232</sup> Interview with Fridah Mutesi, n 231 above.

<sup>233</sup> Interview with Patricia Kimera, n 200 above.

<sup>234</sup> L Nathan 'The disbanding of the SADC Tribunal: A cautionary tale' (2013) 35:4 *Human Rights Quarterly* 871.

<sup>235</sup> In *Mike Campbell (Pvt) Ltd v The Republic of Zimbabwe*, Case 2 of 2007 (*Campbell case*). Article 21(b) of the Protocol on the Tribunal in the Southern African Development Community, 2000.

<sup>236</sup> Southern African Development Community 'Communiqué of the 30th Jubilee Summit of SADC Heads of State and Government' (2008) para 32  
[http://www.sadc.int/files/3613/5341/5517/SADC\\_Jubilee\\_Summit\\_Communique.pdf.pdf](http://www.sadc.int/files/3613/5341/5517/SADC_Jubilee_Summit_Communique.pdf.pdf) (accessed 25 April 2014).

suspension of its operations. A new Protocol to establish a new court with only the mandate to hear interstate complaints<sup>237</sup> is yet to come into force.<sup>238</sup>

*k) Trying to ensure that cases come before experienced and liberal judges*

The background of judges is usually reflected in how they make their decisions. As such, it is important to study which judges sit in which courts and to ensure that the LGB cases go to the more liberal judges. Usually, judges that sit on more specialised constitutional courts, such as those in Kenya's Constitutional Division of the High Court, Uganda's Constitutional Court, or South Africa's Constitutional Court, appreciate constitutional matters more than their counterparts who sit on courts that hear all matters. This is largely a matter of experience as such judges have handled many such cases before. Generally, not many judges have handled LGB issues before, and thus finding such judges may prove a challenge. Nevertheless, activists and lawyers should try and ensure that the cases are allocated to the judges who are more experienced in human rights matters and may thus be more liberal. Having a case going to liberal judges increases the chances of success, which may speed up the rate at which social change happens. When a case is allocated to a less experienced and less liberal judge regarding human rights, the lawyers and activists have to be much more prepared to come up with persuasive arguments.

*l) Avoiding condemnation in costs*

Although it is important to obtain costs in a case, for LGB SL, orders as to costs should be avoided. A loss, which also requires the payment of costs may make it difficult for an organisation to continue doing litigation. One of the ways that have been tried in Uganda to avoid being condemned in costs is not to pray for them and to expressly state so.<sup>239</sup> This is because the lawyers are usually paid by the petitioners at agreed rates and it would not be necessary for them to recover costs. Not asking for costs however does not always guarantee that the court will not award them but at least it would be clear that they were not sought. An example is in the *AHA* case where costs were not prayed for but nevertheless the court awarded half the costs to the applicants.<sup>240</sup>

<sup>237</sup> Southern African Development Community 'Protocol on the tribunal in the Southern African Development Community' <http://sadctribunalcoalition.org/sadc-tribunal/protocol/2014-sadc-tribunal-protocol/> (accessed 25 April 2014).

<sup>238</sup> See Southern African Development Community 'SADC tribunal' <https://www.sadc.int/about-sadc/sadc-institutions/tribun/> (accessed 17 July 2018).

<sup>239</sup> Interview with Patricia Kimera, n 200 above.

<sup>240</sup> n 217 above.

Another way to avoid costs is to ensure that the arguments raised in the case are good enough so that a win is more or less guaranteed or such that, even where a case is not won, the arguments were solid enough that costs are not awarded against the petitioners as a penalty for frivolous or vexatious litigation. This however may not always be pre-determined. Nevertheless, activists should prepare the best possible case, and avoid asking for costs or state that they prefer that each party covers their own costs. This may be put into consideration by the courts. LGB SL should be about creating precedents and ensuring legal change rather than as a way of remunerating lawyers.

*m) Backing LGB cases with advocacy efforts*

The court efforts should be backed up with the lobbying of legislators, engaging the executive and interfacing with the public, wherever possible. This helps to gain publicity for the case, secure allies, mobilise elites and community members and inform the public about the case and why it has been brought. These are very important factors in influencing the success of the case, but also ensure buy-in from all the different actors. It also helps to stem opposition from those who may think the case targets them. In all countries, summaries of cases are shared with many persons explaining what the case is about, a practice that should continue.

### **6.3.4 Controlling the factors at the post-litigation stage**

At this stage, the decision if a case was successful needs to be enforced, and if unsuccessful, appeals and other ways of engagement and building up on the case should be planned. At this stage, LGB activists can control the factors by: ensuring the enforcement of successful decisions; and appealing lost cases and documenting lessons learnt, and these are explained below:

*a) Ensuring the enforcement of successful decisions*

Langford et al have noted that far too many successful social rights cases are left unimplemented<sup>241</sup>. Successful decisions have to be enforced, primarily by government, and this has to be done in a way that allows the public to know that enforcement took place. Of course, the issue of enforcement is not always directly under the control of the activists, as it depends on the nature of the cases at hand. Activists and their lawyers can however play a

<sup>241</sup> M Langford et al 'Introduction: from jurisprudence to compliance' in M Langford et al (eds) *Social rights judgments and the politics of compliance: Making it stick* (2017) 3-5

key role in reminding the persons directed to implement the decision. If the decision requires an action to be taken by the executive, activists and lawyers should reach out to the office in question and demand for the specific action to be done. This is what activists in Botswana did to have LEGABIBO registered. They delivered the court order and the documents to the registrar and went through the processes of registering LEGABIBO.<sup>242</sup>

For actions that require the legislature to pass a law, such as in the *Fourie* case in South Africa, the activists also need to lobby for such a law to be passed. For declarations that do not require anything to be done, such as those nullifying a law, activists need to test how state organs act in the aftermath of the decision. For example, following the *Adrian Jjuuko* case in Uganda, the need arose to test the Equal Opportunities Commission by filing a case that clearly concerns LGB persons.<sup>243</sup>

Another way in which compliance can be enforced is through engaging international human rights mechanisms as already discussed under section 6.2.3 above. The most important mechanisms in this regard are the political bodies, the UN Human Rights Council and its UPR process and special mechanisms as well as the African Commission and its special mechanisms.

Therefore, ensuring compliance goes a long way toward creating a favourable environment in which the effect of LGB SL on societal attitudes can be amplified.

#### *b) Appealing lost cases*

Cases that have been lost need to be appealed such that the negative precedent does not remain binding. The Kenyan case of *COL* was appealed as it allowed anal examinations to go on, and luckily the negative precedent was overturned.<sup>244</sup> However, the decision on filing an appeal should also depend on the nature of the case. For example the *HRAPF* case at the EACJ was not appealed while the *Lokodo* case was. The tactical decision not to appeal the *HRAPF* case took account of the fact that the case had reached a dead-end and in any case, it had been designed in such a way that the Court's refusal to hear the case would have no direct impact on LGB persons in Uganda.<sup>245</sup>

<sup>242</sup> Interview with Caine Youngman, Gaborone, 10 October 2017.

<sup>243</sup> n 36 above.

<sup>244</sup> 'Anal exam to test homosexuality illegal, court finds' *Daily Nation* 23 March 2018 <https://www.nation.co.ke/news/Appeals-court-rules-forced-anal-tests-illegal/1056-4353800-r7qqs8/index.html> (accessed 2 July 2018).

<sup>245</sup> Interview with Fridah Mutesi, n 231 above.

For the *Lokodo* case however, the impact on LGB persons is direct and disastrous as in essence it allows any state agency to refuse to do anything for LGB persons simply based on the criminalisation of same-sex conduct. Failing to appeal such a decision to the highest national, regional and even international fora would be irresponsible and dangerous. Where a case has been grounded in proper legal arguments, appeals are likely to succeed and should be pursued. Activists should always be ready to appeal. The other side of appeals is defending appeals filed by the respondents in cases that have been won. This is what happened in the *Attorney General v Rammoge* case<sup>246</sup> in Botswana. Usually, activists do not initially plan for such appeals. However, it is important that appeals to successful cases are properly defended to avoid a reversal of the successes initially obtained to the detriment of LGB persons. Appeals need to be brought or defended as and when necessary.

### *c) Documentation of lessons learnt*

There is a need to document the lessons learnt during litigation if LGB SL is to lead to social change. A record of experiences and lessons learnt accumulated over time is necessary to enable activists that will come after the current group to understand what the earlier group went through and how they solved the challenges they confronted. It is also helpful in terms of other people understanding what the struggle is about and thus ensuring that the struggle is seen as important and legitimate. Up to now, the struggles that the US activists went through to achieve LGB victories are known because all of them were well documented, analysed and discussed. With the exception of South Africa, little has been written about the litigation efforts and struggles in the other countries forming part of this study<sup>247</sup>. More of this needs to be done if at all the litigation is to change minds.

### **6.3.5 Engaging the media as a cross cutting factor**

Engaging the media cuts across all the different stages of a SL case. As such it needs to be managed differently. The media is a powerful tool that changes mindsets. Newspaper and other media editors need to be engaged on the need to avoid the sensational reporting on LGB issues. The media has the power to change how people think about particular issues. Sensational reporting leads to moral panics, which worsen the situation for LGB persons as they are regarded as monsters out to harm society. Such sensational reporting was displayed

<sup>246</sup> *Attorney General v Thuto Rammoge & 19 Others* (2014) CACGB-128-14.

<sup>247</sup> Notably, Ugandan Activists have documented the processes in the AHA case and earlier cases. See Jjuuko and Mutesi (n 6 above). Also see Jjuuko (n 4 above)

by the Rolling Stone newspaper in Uganda, which claimed that homosexuals were after children and intended to recruit them into homosexuality, and called upon the public to hang them.

Another way in which the media may affect a case is by not reporting about it at all. Again Uganda has the example of the biggest media house, the Vision Group, whose editorial policy excludes the publication of news or advertisements on homosexuality except if they come from the President, parliament or the judiciary.<sup>248</sup> However, even when they report on cases, the stories are usually short and devoid of detail or narrative which would evoke empathy with the LGB persons involved. At the same time negative stories are sensationalised. Engaging such media houses on the different cases needs to begin right from the time the case is being planned, at the point of filing, during the hearing, on judgment day and during the enforcement process. Engagement should be by way of inviting them to press conferences, buying space for press releases and statements and training the different editors on LGB rights. In this way, they would be in position to give the public news as well as avoid sensationalising stories against LGB persons. This is important for changing perspectives and ensuring that LGB SL stimulates social change.

Another important component of the media to consider is the non-traditional media, or social media. This is extremely popular as it is cheaper and easier to access than traditional media, and everyone is able to distribute news. LGB activists need to be able to use social media to influence the narrative about the cases and invoke conversations and discussions about them. However, care should be taken to avoid the outing of LGB persons and to ensure protection against cyber-harassment and bullying. Also, in countries that unduly restrict the use of computers such as Uganda,<sup>249</sup> there is a need to ensure that such reporting is not regarded as computer misuse. In Uganda, the case of Dr. Stella Nyanzi of Makerere University who uses social media to do political commentary and criticism using sexual imagery helps to illustrate the dangers that using social media for activism can bring about. She was arrested and charged under the Computer Misuse Act for calling the president of Uganda, 'a pair of buttocks' on her Facebook page.<sup>250</sup> Also, a number of LGB persons have been arrested and charged under this

<sup>248</sup> Vision Group (2014) 'Editorial Policy' <https://issuu.com/newvisionpolicy/docs/243661083-editorial-policy-complete> (accessed 24 July 2017).

<sup>249</sup> Uganda's Computer Misuse Act, 2011 in its section 25, criminalises the use of electronic media to 'disturb the peace' of an individual, defining it in deliberately vague terms and yet it imposes a heavy penalty for this crime.

<sup>250</sup> For details of the case see S Nyanzi '#PairOfButtocks: Uganda v. Stella Nyanzi' in Human Rights Awareness and Promotion Forum (HRAPF) 'The Computer Misuse Act, 2011: Yet Another Legal Fetter to the Basic Rights and Freedoms of Marginalised Persons' (2017) 4 *The Human Rights Advocate* 46-49.



Act for posting LGB content on social media.<sup>251</sup> One therefore has to be careful when using social media for LGB advocacy in countries that restrict freedom of expression. The extent to which LGB activists engage both traditional and social media goes a long way in determining how LGB SL stimulates social change.

#### 6.4 Other strategies that can complement SL

Besides adequately planning for SL, the court case itself should not be taken as the ultimate and a lot more should be done whether there is a case or not. Some of what needs to be done is: participation in law-making processes; engagement in subsidiary legislation and policy processes; engaging the executive and engaging law enforcement officials; use of National Human Rights Institutions (NHRIs); influencing popular culture and including human rights in school and other training institutions curricula.

##### *a) Participating in law-making processes*

One avenue available for citizens is to engage in the law-making process. There are many laws that have a direct impact on LGB persons and therefore ensuring inclusive language in such laws is crucial. Indeed in Uganda and Kenya there have been attempts at the further criminalisation of same-sex relations.<sup>252</sup> Activists actively campaigned against these and eventually won in both countries. Nevertheless, restrictive provisions that obviously target LGB persons have been included in several other laws. This has largely been common in Uganda, and the relevant laws include: the Anti-Pornography Act, 2014; the Computer Misuse Act 2016; and the Non-Governmental Organisations Act 2016. Each of these laws has provisions that would in effect import some of the repressive provisions of the AHA.<sup>253</sup>

One way in which the anti-gay groups have been able to fight LGB groups in Uganda is through constitutional amendments, having successfully lobbied for a prohibition on same-sex marriage

<sup>251</sup> A Jjuuko 'Editor's note' in Human Rights Awareness and Promotion Forum (HRAPF) 'The Computer Misuse Act, 2011: Yet another legal fetter to the basic rights and freedoms of marginalised persons' (2017) 4 *The Human Rights Advocate* 4-5.

<sup>252</sup> In Uganda these efforts succeeded, as the Anti-Homosexuality Act became law, even if it was later nullified. For Kenya, August 2014, the Liberty Party proposed a bill in similar terms to the Ugandan Anti-Homosexuality bill before the National Assembly, although it was never debated. See 'New bill wants gays stoned in public' *The Star* 12 August 2014, <http://allafrica.com/stories/201408120968.html> accessed 7 June 2015.

<sup>253</sup> For analyses of some of these laws see: Human Rights Awareness and Promotion Forum (HRAPF) 'The Computer Misuse Act, 2011: Yet another legal fetter to the basic rights and freedoms of marginalised persons' (2017) 4 *The Human Rights Advocate* (for the Computer Misuse Act); Human Rights Awareness and Promotion Forum 'Legal Analysis of the NGO Bill, 2015 (2016) and Human Rights Awareness and Promotion Forum 'The Likely implications of the Non-Governmental Organisations Act 2016 on marginalised groups' (2016) 3 *The Human Rights Advocate* (for the NGO Act 2016).

to be included in the 2005 Constitutional amendment.<sup>254</sup> The anti-gay group Family Life Network made submissions to the Legal and Parliamentary Affairs Committee of Parliament to include the prohibition of homosexuality in the Constitution during the recent amendment process in 2015.<sup>255</sup> Therefore, it becomes necessary for the LGB groups to respond in similar fashion and engage in the law-making process. If the law changes through the legislative process, there would be no need to do LGB SL. Indeed, it has been argued that using the legislature to change laws is the more democratic and thus most legitimate way to effect change than judicial review of parliamentary action.<sup>256</sup> Wherever possible, this avenue should be tried. Activists in Kenya, South Africa, and Uganda are in a much better position to lobby lawmakers, as adequate consultations are part and parcel of the law-making process.<sup>257</sup> Even for Botswana and Uganda, which do not have express constitutional provisions requiring public consultations, there is still space for engagement in the legislative process, and indeed such consultation are usually done in practice.

**b) Engagement in subsidiary legislation and policy-making processes**

Another important but often-overlooked part of the law is subsidiary legislation and policy. At this level, ministers and other government officials make laws giving effect to the principal legislation. Usually however, many of the subsidiary instruments go beyond the mandate of the parent Acts, and this needs to be checked. In other cases, it may be helpful to ensure that the subsidiary laws or policies provide more details and expressly comment on LGB issues, which can ensure protection. Usually, the relevant ministries allow the public to get involved in the development of these policies and LGB activists need to take advantage of these processes and ensure that progressive and protective provisions for LGB persons are included.

<sup>254</sup> For a discussion of how this prohibition came to be included in the Constitution, see JD Mujuzi 'The absolute prohibition of same-sex marriages in Uganda' (2009) 23 *International Journal of Law, Policy and the Family* 278.

<sup>255</sup> Parliamentary Watch 'Meeting with Family Life Network' May 20th, 2015 <http://parliamentwatch.ug/meeting/meeting-family-life-network/#.WybXP6l9h0s> (accessed 17 June 2018).

<sup>256</sup> See for example R West 'Progressive and conservative constitutionalism' (1990) *Georgetown Public Law and Legal Theory* Research Paper No. 11-46; J Waldron 'The core of the case against judicial review' (2006) 115 *The Yale Law Journal* 1346; and LD Kramer *The people themselves: Popular constitutionalism and judicial review* (2004) 128, 144.

<sup>257</sup> For Kenya, articles 118 and 196 of the Constitution require Parliament and county assemblies to consult the public while making laws. For South Africa, the requirement for public consultations is in section 59(1)(a); 72(1)(a); and section 118(1)(a) of the Constitution of South Africa. This was held to be mandatory in law making processes in *Doctors for Life International v the Speaker of the National Assembly & Others* 2006 (12) BCLR 1399 (CC). For Uganda, the Constitution in the National Objectives and Directive Principles of State Policy requires public participation in governance, and as such people have to be consulted in the law making process. *Male H Mbirizi v Attorney General* Constitutional Petitions Nos. 49 of 2017, 3 of 2018, 5 of 2018, 10 of 2018, and 13 of 2018.

### c) *Engaging the executive*

The executive branch has the power of the 'sword and the purse' and is therefore critical in the process of creating social change. The heads of state need to be engaged in order to change their minds as regards LGB rights. However, like Ugandan activists found out, this is not always an easy task as access to such officials by sexual minority groups is largely closed.<sup>258</sup> However, other country's leaders can also easily lobby such persons, and therefore there is a need to involve such persons as was done in Uganda.<sup>259</sup> The President may be hostile to LGB rights, but there are many technocrats who may be friendlier towards gay rights. All these need to be engaged within their own capacities and powers. Those who are friendly should be mapped and then targeted. In Uganda, activists engaged the Minister of Health until he issued Ministerial Guidelines on non-discrimination in service provision.<sup>260</sup> They also engaged the Inspector General of Police and since then, the training of police officers on LGB rights have been able to actively go on and the police have even accepted that such training takes place within the force.<sup>261</sup>

Kenyan activists have been able to actively engage the Ministry of Health on LGB issues.<sup>262</sup> South African activists have also lobbied their country's representatives at the UN Human Rights Council, reminding them of their country's laws and the need for South Africa to take the lead in the protection of LGB rights on the continent.<sup>263</sup> Therefore it would be better to work with rather than against the government in order to achieve LGB rights. Even in the most repressive state, there will be a few government functionaries willing to engage on LGB rights.

### d) *Engaging law enforcement officials on LGB issues*

Even if individual police or judicial officers may be hostile to LGB issues, going through their formal command structure is something that has proved effective in countries like Uganda.<sup>264</sup> The trainings help the police officers and the judges/magistrates interface with LGB persons and understand first hand their experiences. This means that when cases come before such

<sup>258</sup> A Jjuuko 'The incremental approach: Uganda's struggle for the decriminalisation of homosexuality' in C Lennox & M Waites (eds) *Human rights, sexual orientation and gender identity in the Commonwealth: Struggles for decriminalisation and change* (2013) 381, 401-403.

<sup>259</sup> As above.

<sup>260</sup> Republic of Uganda, Ministry of Health 'Ministerial directive on access to health services without discrimination' (2014) <https://www.scribd.com/document/233209149/MoH-Ministerial-Directive-on-Access-to-Health-Services-Without-Discrimination-19-June-14> (accessed 8 September 2017).

<sup>261</sup> 'Police organise workshop on how to protect gays' *Daily Monitor* 15 November 2017.

<sup>262</sup> n 11 above.

<sup>263</sup> 'LGBTI activists praise South Africa's UN vote to "fight discrimination everywhere"' Mail & Guardian, 22 Nov 2016 <https://mg.co.za/article/2016-11-22-lgbti-activists-praise-south-africas-un-vote-to-fight-discrimination-everywhere> (accessed 17 July 2018).

<sup>264</sup> Interview with Patricia Kimera, n 200 above.

judges or police officers, they understand what to do. Indeed, activists in Uganda have been training both the police and the judiciary, and they have received feedback from both agencies with many of the trained individuals referring cases or sharing stories of the more respectful ways in which they treated the suspects as a consequence of the trainings.<sup>265</sup> Such a change of minds goes a long way in ensuring that social change happens.

*e) Use of national human rights institutions (NHRIs)*

NHRIs have the mandate to protect and promote human rights within the country, and this certainly includes LGB rights regardless of what the current holders of the offices may think. They thus need to be reminded of this duty and encouraged to engage the state organs on LGB issues. The SAHRC is an example of an active NHRI that even got engaged in litigation in favour of LGB persons.<sup>266</sup> The Uganda Human Rights Commission is another NHRI that has been actively speaking out in favour of LGB persons, and which has also trained magistrates, public prosecutors and civil society actors on LGB rights.<sup>267</sup> The UHRC also submitted before Parliament opposing the Anti-Homosexuality Bill. Again, beyond simply making reports, the NHRIs have tribunals that investigate the violation of rights. These should be utilised by bringing LGB cases before these tribunals. So far two cases involving violations of the rights of LGB persons have been brought to the UHRC in Uganda, and many more before the SAHRC in South Africa.<sup>268</sup> The Kenya National Human Rights Commission (KNHRC) has also largely been supportive of LGBT rights.<sup>269</sup> Decisions by these bodies on the rights of LGB persons go a long way in making it clear that such persons also deserve protection. For countries like Botswana which do not have an NHRI, other available bodies that play the equivalent role should be engaged.

<sup>265</sup> The Consortium on Monitoring Violations Based on Sex Determination, Gender Identity and Sexual Orientation and Human Rights Awareness and Promotion Forum (HRAPF) 'Uganda report of violations based on sexual orientation and gender identity, 2015' (2016) 22-24.

<sup>266</sup> *Sodomy* case (n 43 above); *South African Human Rights Commission v Rev OP Bougart* (Equality Court, Cape Town).

<sup>267</sup> The author has facilitated at four such trainings.

<sup>268</sup> The two cases brought before the Uganda Human Rights Commission are *Mukasa Jackson & Mukisa Kim v Attorney General* UHRC No. CTR/24 of 2016 and *Shawn Mugisha and 6 Others v Attorney General and the District Police Commander (DPC), Kabalagala Police Station*, UHRC No. CTR/06/2017. The SAHRC does not release public reports on the complaints that it hears; see [www.sahrc.org.za](http://www.sahrc.org.za).

<sup>269</sup> The Kenya Human Rights Commission have published studies on LGB rights such as 'The outlawed among us' (2011) which explores the quest for equality for LGBTI people in Kenya; see Kenya Human Rights Commission 'The outlawed among us' (2011) <https://www.khrc.or.ke/mobile-publications/equality-and-anti-discrimination/70-the-outlawed-amongst-us/file.html> (accessed 18 August 2018).

*f) Influencing popular culture*

One of the ways through which activists in the USA and other countries were able to mobilise and 'normalise' LGB issues was through music and movies, and otherwise influencing popular culture.<sup>270</sup> To some extent South Africa's many popular figures who are gay has also helped shape mindsets in that country. LGB activists in the other countries need to exploit this more and engage music and movie stars, as well as other persons that shape popular culture, to start speaking out against LGB violations. They can also point out homophobic statements by artists and bring this to the attention of the public. This for example worked in Uganda, where music star and current Member of Parliament, Hon. Robert Kyagulanyi Ssentamu (Bobi Wine) blasted LGB persons on his social media pages,<sup>271</sup> and after receiving public backlash, including his shows being cancelled in London and an anti-gay song he wrote being blocked on YouTube,<sup>272</sup> he apologised.<sup>273</sup>

There is a risk that such music, videos and shows or books may be censored or cancelled for 'promotion of homosexuality' as has been the case in Uganda in the past.<sup>274</sup> Activists in South Africa and Botswana have been able to do such shows however, highlighting the difference between Uganda and Botswana in that respect. South Africa also recently banned 'Inxeba-The Wound' over its depiction of homosexuality, although the Film Certification Board officially used pornography as the reason for the x-rating.<sup>275</sup> Kenya also recently banned the movie 'Rafiki' over the depiction of lesbian love.<sup>276</sup> Where possible, LGB activists should endeavour to influence the message sent to the public through popular culture such that it correctly depicts the truth and reality about LGB persons, and thus helps to spur social change.

<sup>270</sup> See for example S Kornhaber 'The *Modern Family* Effect: Pop Culture's Role in the Gay-Marriage Revolution' *The Atlantic* 26 June 2015 <https://www.theatlantic.com/entertainment/archive/2015/06/gay-marriage-legalized-modern-family-pop-culture/397013/> (accessed 17 June 2018).

<sup>271</sup> 'Bobi Wine speaks out on homosexuality' *Daily Monitor* 30 July 2014 <http://www.monitor.co.ug/artsculture/Entertainment/BOBI-WINE-SPEAKS-OUT-ON-HOMOSEXUALITY/812796-2402796-dnftuuz/index.html> (accessed 17 June 2018).

<sup>272</sup> 'Bobi Wine's anti-gay song blocked on YouTube?' *Daily Monitor* 15 August 2014 <http://www.monitor.co.ug/artsculture/Entertainment/Bobi-Wine-s-anti-gay-song-blocked-on-YouTube-/812796-2419998-j14yww/index.html> (accessed 17 June 2018).

<sup>273</sup> 'Singer Bobi Wine Apologises to Ugandan LGBTI over Previous Backlash' *Kuchu Times* 12 January 2016 <https://www.kuchutimes.com/2016/01/singer-bobi-wine-apologises-to-ugandan-lgbti-over-previous-backlash/> (accessed 17 June 2018).

<sup>274</sup> See discussion on status on criminalisation of consensual same-sex relations in chapter 4, section 4.2.1 above.

<sup>275</sup> 'Homophobia wins as 'Inxeba (The Wound)' effectively banned in SA' *Mamba online* 14 February 2018 <http://www.mambaonline.com/2018/02/14/breaking-outrage-fpb-effectively-bans-inxeba-wound/> (accessed 17 June 2018).

<sup>276</sup> 'Banned gay film 'Rafiki' film reveals Kenya's sexuality progress' *Daily Nation* 8 May 2018 <https://www.nation.co.ke/news/What-ban-of-gay-film--Rafiki--indicates-about-Kenya/1056-4549802-r5p0flz/index.html> (accessed 17 July 2018).

*g) Including human rights in training institutions' curricula*

Comprehensive Sexuality Education (SE) has proved to be controversial in many countries of recent due to concerns about children and the issue of alleged 'recruitment'.<sup>277</sup> However, discussions on human rights generally and the principles of equality and non-discrimination are much less controversial and should be taught as part of the school curriculum. Where this is not possible, activists themselves should engage training institutions to include it. This can even be done without mentioning LGB rights, as human rights apply to all and the message would still be the same. Some of the training institutions to be targeted are: leadership institutes, lawyers training institutions, medical institutions and those for journalists. These would help to ensure that persons who graduate out of these schools and institutions understand the importance of equality and non-discrimination for all, persons including LGB persons. Such trainings are entirely legitimate as this is a constitutional principle that every constitution protects. There is no way LGB rights will be properly appreciated without first appreciating the whole concept of human rights and how it applies to all.

## 6.5 Is there an 'African' way of engaging in LGB SL?

Much has been made of the argument that Africans need to adopt 'African' ways of engagement on LGB issues, rather than using foreign approaches, if at all they are to attain social change in favour of LGB persons.<sup>278</sup> SL is one of those approaches that are considered foreign and un-African as it did not originate in Africa, just like the terminology that is used to describe LGB persons.<sup>279</sup> The argument goes that if successful, such foreign approaches will also deliver foreign solutions—solutions that are not applicable to local conditions and thus largely impractical.<sup>280</sup> South Africa is an example of a country in which court victories delivered legal change but social acceptance has remained largely illusory.<sup>281</sup> Among the strategies suggested is 'going back to the closet' and using the privacy discourse that the

<sup>277</sup> For example, it was banned in Uganda by the Ministry of Education and Parliament in 2016 after a moral panic arose when books were found portraying 'sexual orientation and a non-negative portrayal of masturbation.' A new policy has been unveiled that is 'cultural, religious sensitive and age appropriate.' 'Education ministry approves sexuality education framework' *The Monitor* 25 March 2018 <http://www.monitor.co.ug/News/National/Education-ministry-approves-sexuality-education-framework/688334-4356722-w39af/z/index.html> (accessed 17 June 2018).

<sup>278</sup> See for example ZZ Devji 'Forcing paths for the African queer: Is there "African" mechanisms for realising LGBTIQ rights?' (2016) 60 *Journal of African Law* 343. Also see El Menyawi, n 6 above.

<sup>279</sup> Devji, above, 344.

<sup>280</sup> El Menyawi (n 6 above).

<sup>281</sup> Devji (n 278 above) 349.



local communities and leadership understand.<sup>282</sup> However, Devji suggests more litigation, which should be combined with greater visibility, and then seizing the political moment and using HIV and AIDS based arguments.<sup>283</sup>

Fritz also supports taking note of African realities and thus not putting courts in situations where they would be clamped down upon the way the SADC tribunal was.<sup>284</sup> On the other hand, Polly Haste and Kevin Thierry Gatete suggest that there should be less emphasis on individual rights as regards LGB rights, specifically within the context of Rwanda. This is based on their observations that there is 'strategic silence' by the government on LGB issues, which the LGB community has also learnt to work with.<sup>285</sup>

This study adopts the view that rather than being considered as 'African approaches' to LGB social change, the concerns above would be best addressed by measures that are context-responsive and effective. Current political, social and economic realities, rather than vague notions of an overarching 'African' approach, should frame the struggle for LGB social change. Calling for the abandonment of SL and other such so-called 'stonewall' strategies in favour of more African ways, may not be practical. All the countries have adopted democracy and the separation of powers as the way government runs and therefore put in place avenues to engage the state, which are largely effective. Therefore, there would be no reason not to use these. Also, the non-binding nature of the so-called African approaches makes it difficult to know for sure that change has been obtained. Again, what are called 'African approaches' are in fact already embedded in the current mechanisms. The judicial system supports alternative dispute resolution, there is respect for the law and for due processes, and respect for each other even within the adversarial system. Therefore, the main values embedded within the African approaches are values that have also found their way into the current SL system and are therefore not alien. Demonstrations, riots and such other violent means of conflict resolution have been castigated as un-African in favour of dialogue, but they are also not necessarily foreign in origin as violence has at different times been used everywhere to resolve issues. It depends on the circumstances and the level of oppression.

<sup>282</sup> El Menyawi (n 6 above).

<sup>283</sup> See generally Devji, n 278 above.

<sup>284</sup> N Fritz 'Human rights litigation in Southern Africa: not easily able to discount prevailing Public opinion' (2014) *International Journal on Human Rights* 193-198.

<sup>285</sup> See generally P Haste and TK Gatete 'Sexuality, poverty and politics in Rwanda' April 2015. [https://opendocs.ids.ac.uk/opendocs/bitstream/handle/123456789/6062/ER131\\_SexualityPovertyandPoliticsinRwanda.pdf;sequence=1](https://opendocs.ids.ac.uk/opendocs/bitstream/handle/123456789/6062/ER131_SexualityPovertyandPoliticsinRwanda.pdf;sequence=1) (accessed 21 July 2018).

SL is not a foreign approach to resolving issues. Rather, it is an approach that has been developed over time regardless of its origins. It now fits within the local circumstances of each country as the judiciary has been designed and equipped for local conditions. Whereas it is true that every country should adapt its own approach towards SL to its local circumstances, at the end of the day it remains about what works where and what does not. The 'African approaches' mantra should not be used simply to castigate anything that may not have originated in Africa. Even though SL has originated outside Africa, it must be accepted that cultures enrich and feed into each other, and this is a normal process.

## 6.6 Conclusion

LGB SL remains a viable way of stimulating social change in favour of LGB persons in Common Law Africa. As such, there is a need for activists to manage the exogenous factors and to effectively control the endogenous factors in their favour. There is a further need to do much more beyond the cases. SL is about using litigation in combination with other strategies, and therefore the more deeply strategising is done, the better. Activists should endeavour to remain in control of all the processes and beware of what to do in all circumstances.

The most important thing is that the LGB movement should not work in isolation. Difficult as it is, the movement must work to create linkages with other movements and also fight for other causes beyond their own. The struggle for equality is a struggle for everyone. African Common Law countries need to be sensitive to their own peculiarities and local conditions and work within these. A prescribed 'African approach' to doing things is unrealistic and impractical. What is important is to use what is available in a way that is conscious of the realities of the specific communities in order to spur change.

The views, beliefs and concerns of the general community and the state must be listened to, weighed and responded to in an appropriate manner. SL is not done simply for its own sake but to change minds, and this takes time and the right approach. The right approach must be determined on a case-to-case and trial-and-error basis. Different approaches have been tested elsewhere yielding different results, and the lessons drawn from within and outside

Common Law Africa can be adequately applied to the situation to boost positive results from LGB SL.



## CHAPTER 7

### CONCLUSION

#### 7.1 Introduction

This study aims to establish and examine the conditions under which LGB strategic litigation (SL) can stimulate social change in situations of homophobia, lesbophobia and biphobia<sup>1</sup> in selected Common Law African countries. To achieve its main objective, the study examines the state of LGB SL in four selected Common Law African countries: Botswana, Kenya, South Africa and Uganda. These are the countries in which there was at least one court victory by the end of the year 2015. The study was first conceptualised in 2016 and thus only countries that fitted that criteria were considered. However, the developments in these countries are tracked for the past 20 years – from 1998 to the end of August 2018. These countries are contrasted with four selected Common Law countries outside Africa where successful LGB SL has also been undertaken in the past 20 years, and where there has been at least one courtroom victory. These countries are Belize, Canada, Nepal and the United States of America (USA). Activists in each of the countries in the non-African group are at different stages of LGB SL, and at different stage of achieving significant social change to advance the rights of LGB persons. There is therefore much that the African Common Law countries can learn from them. Canada can be said to have achieved significant social change, while the USA is following closely and is more or less at the same level as South Africa having achieved broad legal change but still struggling with achieving more deep-seated social change across the different racial, economic and social divides. Belize and Nepal have both achieved decriminalisation and, for the case of Nepal, constitutional protection for LGB persons, but the societal attitudes remain largely against LGB equality, reflecting a situation that is largely similar to that in Botswana, which is yet to achieve decriminalisation but

<sup>1</sup> Collectively referred to in the study as homophobia for brevity.

where societal attitudes have nevertheless changed significantly. Belize has the least social change so far and there is a lot more contestations, and therefore it can be said to be closer to the level of Kenya. Uganda remains more hostile to LGB equality than all the different countries, and there is slower positive change.

The study is informed by the fact that, despite major successes in the courtroom in the four selected African Common Law countries, there have been no major changes in the legal situation of LGB persons- with the exception of South Africa. There is also limited social acceptance of LGB persons among the general population, including in South Africa. Violations against LGB persons, including rapes and murders, continue and it appears that the more egregious of these happen mainly in the country that has achieved the most significant legal change through LGB SL: South Africa. This state of affairs seems to weaken the popular argument that SL is crucial as a catalyst for social change, since court victories lead to a change in laws, and eventually a change in societal attitudes towards LGB persons. In situations of active homophobia, courts are the only direct avenue available to the LGB activists to bring about social change since individuals are free to file any case, and yet the legislature or the executive may decline to attend to the relevant issue. The state of affairs prevailing in the selected Common Law countries seems to suggest that even this avenue is sometimes not effective since, even if it is used successfully, it is difficult to achieve significant social change. Indeed, it seems to fit into the emerging discourse that courts are by their very nature incapable of delivering social change, since they neither control the resources nor have the power to independently enforce their decisions. According to this argument, courts are counter-majoritarian since judges are not elected and thus do not have the legitimacy to make major decisions reversing the actions of either the executive or the legislature, both of which are elected bodies. This becomes far more important when the courts are making unpopular decisions such as nullifying statutes that have been passed by legislatures to criminalise same-sex conduct. In cases where judicial decisions strongly contradict the sentiment of the other branches of government and the public at large, the courts will at best be ignored, and at worst face massive backlash from both the state and the general public, leaving courtroom victories as largely illusory.

This part of the thesis summarises the main findings of the study, corresponding to the research questions set out in the first chapter, and then makes recommendations to LGB



activists in Common Law Africa on how to more effectively use LGB SL to spur social change in favour of LGB persons. It also charts some areas for further research.

## 7.2 Summary of major findings

The study set out to answer a number of research questions, as follows:

The first question is about how LGB SL stimulates social change in situations of homophobia and active hostility. The study finds that LGB SL can indeed stimulate social change even in situations of homophobia and active hostility. However, this can only be so if certain conditions are met. This is due to the inherent challenges of the judiciary to create change as well as the overarching political and judicial independence challenges in Common Law Africa.

The second question concerned the trends of LGB SL in Common Law Africa in the past 20 years, and how these differ from those in other Common Law jurisdictions. The study finds that SL has become very popular over the past 20 years as a tool for social change. It has been used with more courtroom success in South Africa, followed by Uganda, and then Kenya and Botswana. Similarly it is also an important tool in other countries, such as Canada, the USA as well as Belize and Nepal.

The third question was concerned the contribution of LGB SL to social change on the issue of LGB equality in Common Law Africa. On this, the study finds that where LGB SL has been actively and effectively employed, the immediate benefit is legal change. However, this is also followed by change in perspectives and attitudes. South Africa leads and they are on course to achieving significant social change; and Botswana follows. Kenya and Uganda are largely struggling although Kenya is clearly ahead.

The fourth question was about the conditions under which LGB SL can meaningfully stimulate social change in situations of active homophobia. The study finds that the conditions are both exogenous and endogenous to the cases being pursued. However, regardless of how well organised a case is, it cannot lead to social change unless the right conditions are prevalent in the country. The key to these factors is the ability of the judiciary to deliver positive judgments that can be enforced. This goes to judicial

independence, the prevalent legal culture, the level of economic development in the country, as well as the social-religious attitudes in the country.

Finally the fifth question, which was about strategies that can be employed to make LGB SL be employed to play a more effective role in stimulating social change, as well as strategies that can complement it. On this, the study finds that since SL would play out differently under different circumstances, activists can control the endogenous factors- but also engage with the exogenous factors to turn them in their favour. Engaging in the broader struggles for democracy and judicial independence, supporting the judiciary by bringing cases, and engaging the media as well as the executive and the legislature are some of the suggested ways. No one answer fits all and activists in different countries have to study and adapt their strategies to the conditions in their own countries.

These findings are discussed in more details below:

### **7.2.1 The potential of LGB SL to stimulate social change even in situations of active homophobia and hostility**

SL is a type of public interest litigation (PIL) in which cases are brought before the courts in a coordinated way with the aim of creating change in the laws and policies, as well as societal attitudes to marginalised groups over a period of time.<sup>2</sup> The central word in SL is 'strategy.' SL takes advantage of the now well-developed rules and processes for PIL in different countries to spur the desired change. PIL for example has relaxed rules on standing in all the different countries, which allow any person, even those not directly affected, to bring a case. Only Belize and Botswana are exceptions among the selected countries, as the laws still insist on only those directly affected.<sup>3</sup> PIL also allows the judge to play a more central role in the litigation, directing and inquiring into issues rather than being the more passive and disinterested judge that usually characterises civil litigation;<sup>4</sup> and it allows for more flexible remedies beyond declarations. Since the judiciary is part of the state and is given special powers to review statutes and actions of the executive under the different constitutions for all the selected countries, its decisions

<sup>2</sup> CC Barber 'Tackling the evaluation challenge in human rights: assessing the impact of strategic litigation organisations' (2012) 16 *The International Journal of Human Rights* 411-435, 412.

<sup>3</sup> Section 18(1) of the Constitution of Botswana, 1966 and Section 20(1) of the Constitution of Belize, 1981.

<sup>4</sup> See A Chayes 'The role of the judge in public law litigation' (1976) 89 *Harvard Law Review* 1284.

are binding on the other organs, which must then implement what the courts have ordered. This makes SL a particularly important avenue if one is to ensure that the change desired will actually be effected. SL thus becomes a very important tool in the hands of marginalised persons such as LGB persons, who may be discriminated against by the majority, but who are nevertheless protected in the Constitution and entitled to the same rights as everyone else. This special power that is given to the courts is intended to avoid the tyranny of the majority, and is a safeguard for minorities within democratic systems, which are based on the principle of majoritarian rule.<sup>5</sup> A decision made by a court of law is binding, and this implies that the organ of the state against which such a decision is made has the obligation to implement the court's orders, even if it disagrees with the decision. If this decision affects laws passed by the state, then the conduct of individuals within the state is also regulated by what the court decided. This ensures protection for marginalised groups and consequently leads to social change.<sup>6</sup> A court decision also usually has more effects beyond what is directly ordered through its 'radiating effects.'<sup>7</sup> This extension of a single decision makes SL such a potent tool for social change. Indeed, the progress towards significant social change made in Canada and the USA, as well as in South Africa, shows that LGB SL has the potential to spur significant social change.

However, SL is limited by inherent flaws, which affect its ability to create social change. The first flaw is that the power of the courts to review statutes and nullify executive action is largely seen as counter-majoritarian, and as an illegitimate power that goes against popular will- and is therefore undemocratic.<sup>8</sup> The implication of this is that the judicial decision should legitimately be disregarded and only decisions made by parliament or the executive, which are elected bodies, should be implemented. This argument makes it difficult for court decisions to be implemented as people who may hold such views and are in positions of power may simply refuse to implement the court decision.<sup>9</sup> However, this is not a very valid argument for most Common Law African countries as the courts expressly have these powers. This situation is exacerbated when

<sup>5</sup> See A Tocqueville *'Democracy in America'* Vol. 3, Historical-critical edition, ed. Nolla, E (ed) trans Schleifer J (2010) 427-450; and JS Mill *On liberty* (1859) 7.

<sup>6</sup> See JF Handler *Social movements and the legal system: A theory of law reform and social change* (1978), 22.

<sup>7</sup> M Galanter 'The radiating effects of courts' in K Boyum & L Mather (eds) *Empirical theories about courts* (1983) 117, 125-26.

<sup>8</sup> Bickel AM Bickel *The least Dangerous Branch: The Supreme Court at the Bar of politics* (1962) 16-17.

<sup>9</sup> G Rosenberg *Hollow hope: Can courts bring about social change?* (2008) 415.

the public is opposed to the decision. The second flaw arises from the fact that if the other organs disobey what the courts say, the courts cannot do much to enforce their own decisions. This is because Parliament controls the purse to implement decisions through its budgetary oversight role, while the executive controls both the money and the monopoly to use force. This makes the judiciary the weakest branch.<sup>10</sup> The implication of this for the ability of SL to create social change lies in the impact that this has on the mind-sets of judges. Judges may not want to make decisions that will not be enforced, and are therefore most likely to rule in favour of marginalised groups only when there is an indication of public opinion being in favour of such a position. If these factors are aligned, going to court may become pointless for activists who may want effective change. However, courts alone have powers to enforce their judgments, including issuing orders and holding people in contempt. Nevertheless, by and large, courts do not directly implement their own decisions.

The other challenges are not inherent to the democratic system, but are rather caused by litigation itself and how it works and is perceived. As a visible strategy, litigation takes the spotlight away from other strategies, as it is resource intensive and more attractive. It however narrows complex social claims and issues into crisp legal claims.<sup>11</sup> In other words, the remedies that the law is capable of giving cannot fully satisfy broader needs of the LGB community or any other marginalised groups. It therefore creates an aura that all has been achieved yet in reality many aspects that affect people's day to day lives have not been touched by the litigation.<sup>12</sup> Unpopular court decisions are also very prone to backlash and counter-mobilisation, which usually lead to a reversal of prior gains made before by the LGB community.<sup>13</sup> Backlash may be in form of laws reversing the decision of the court being passed by the legislature and supported by the majority of the people, or it may be in form of violence against LGB people, or both.

Moving away from the debate of whether it inherently works or not, within the context of Africa, there are additional challenges with using SL to create social change. The first is that within an African framing, litigation is seen as a very adversarial system, which is

<sup>10</sup> A Hamilton et al *The Federalist Papers* (1961) 465.

<sup>11</sup> Rosenberg (n 9 above) 13.

<sup>12</sup> SA Scheingold *The politics of rights: Lawyers, public policy, and political change* (1974) 131.

<sup>13</sup> See generally, MJ Klarman *From Jim Crow to civil rights: The Supreme Court and the struggle for racial equality* (2006) 385, 441-442; and MJ Klarman (1994) "Brown, racial change, and the civil rights movement," 80 *Virginia Law Review* 7-150. For LGBT rights specifically, see Rosenberg (n 9 above) 339-429.

at odds with African notions of dispute resolution, which are focused more on mediation and negotiation.<sup>14</sup> As such, even victories come at the costs of ruining relationships with the state and the public due to the contestations. Litigation is a winner takes all strategy. A related challenge lies with the nature of the courts, which are part of the received colonial system and as such were part of the oppression machinery during the colonial period and continue to be so even post-independence, as they are largely not independent from the executive and the legislature. The courts themselves generally lack legitimacy for as long as they side with oppression and are stained with issues such as corruption and failure to arrest, affects their independence, which makes it easy for their decisions to be ignored. As such, the people usually ignore them, and therefore, even positive decisions are unlikely to receive much attention or spur any change. This becomes worse if the courts, in their lack of independence, make positive decisions on an issue like homosexuality, which is largely regarded as un-African, and a foreign import.

SL is a potent force in creation of social change, but also one that is inherently flawed and problematic. However, if the factors that influence the ability of litigation to create social change are well studied and managed, SL can be managed to play a more important role in spurring social change in favour of LGB persons.

### 7.2.2 The trends of LGB SL in Common Law Africa

LGB SL experienced significant growth over the past 20 years. This is true not only for Common Law Africa, but also for the other parts of the world covered in this study. One could quite appropriately title this period 'the age of LGB SL.' Before 1998, there was no single SL case in Common Law Africa on LGB rights. Change occurred when the *Sodomy* case<sup>15</sup> was decided that year in South Africa. For about six years, South African courts continued taking the lead in terms of LGB cases, until 2003, when the *Kanane* case<sup>16</sup> was decided in Botswana. The next case came after five years in 2008 in Uganda, the *Victor Mukasa* case.<sup>17</sup> By then, almost all the South African cases had been completed.<sup>18</sup>

<sup>14</sup> ZZ Devji 'Forcing paths for the African queer: Is there "African" mechanisms for realising LGBTIQ rights?' (2016) 60 *Journal of African Law* 343.

<sup>15</sup> *National Coalition for Gay and Lesbian Equality v the Minister of Justice* 1999 1 SA 6 (CC).

<sup>16</sup> *Kanane v The State* [2003] 2 BLR 67 (CA.)

<sup>17</sup> *Victor Mukasa & Yvonne Oyoo v Attorney General* (2008) AHRLR 248 (High Court of Uganda) 22 November 2008.

Ugandan activists then took the lead on the number of LGB cases as eight more were filed in a period of 10 years.<sup>19</sup>

Litigation in Botswana resumed with the *Thuto Ramogge* case,<sup>20</sup> which was finalised in 2016 by the Court of Appeal, after an initial victory in 2015.<sup>21</sup> Meanwhile, litigation had also started in Kenya and victory secured in the *Eric Gitari* case<sup>22</sup> in 2015. As at the end of August 2018, there are four cases/appeals currently pending in every single African Common Law country studied, and there are no signs that the SL is likely to diminish. One potential factor pushing the litigation on is prior success. Of the eleven cases in South Africa, only one did not get a favourable substantive decision. In Uganda, four cases out of the eight were won, with only two outrightly lost and another dismissed on technicalities. In Kenya, the case which was lost at first instance was later won on appeal, while in Botswana, the *Kanane* case remains the only loss in LGB SL. Therefore, SL is steadily gaining as a strategy for the realisation of LGB rights. The timing of this general increase in LGB SL is a matter for consideration. It largely has to do with the third wave of democratisation, which has made SL possible, but it may also have much to do with the increased wave of attacks on LGB persons and organisations. In contexts of active homophobia, the courts present the avenue most likely to provide redress. The fact that over the same period litigation was taking place in Belize, Canada, Nepal and the USA, among other countries, and that there was an upsurge in litigation in Canada

<sup>18</sup> These are: *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being and Another* 2016 1 BCLR 1 (CC); *Du Plessis v Road Accident Fund* 2004 1 SA 359 (SCA) 19; *Du Toit & Another v Minister of Welfare and Population Development & Others*, 2002 ZACC 20; *Geldenhuis v National Director of Public Prosecutions & Others* 2009 5 BCLR 435 (CC); *Gory v Kolver NO & Others* 2007 3 BCLR 249 (CC); *J and D v Director-General, Department of Home Affairs, Minister of Home Affairs, President of the Republic of South Africa*, (2003) AHRLR 263 (SACC) 28 March 2003; *Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* 2005 ZACC 19; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*, 2000 1 BCLR 39 (2 December 1999); *National Coalition for Gay and Lesbian Equality v the Minister of Justice* 1999 1 SA 6 (CC); *Satchwell v President of the Republic of South Africa and Another*, 2004 1 BCLR 1 (CC) (17 March 2003).

<sup>19</sup> These were: *Adrian Jjuuko v Attorney General* Constitutional Petition No. 1 of 2009; *Frank Mugisha, Dennis Wamala & Ssenfuka Warry Joanita v Uganda Registration Services Bureau (URSB)* Miscellaneous Cause No. 96 of 2016; *Kasha Jacqueline Nabagesera & 3 Others v The Attorney General and Hon. Rev. Fr Simon Lokodo*, High Court Miscellaneous Cause No. 33 of 2012 (High Court of Uganda) 24 June 2014; *Kasha Jacqueline Nabagesera, David Kato Kisuule & Pepe Julian Onziema v The Rollingstone Newspaper* Miscellaneous Cause No. 163 of 2010 (High Court of Uganda) 30 December 2010; *Prof. J Oloka-Onyango & 9 Others v Attorney General* Constitutional Petition No. 008 of 2014 (Constitutional Court of Uganda); *Victor Mukasa & Yvonne Oyoo v Attorney General* (2008) AHRLR 248 (High Court of Uganda) 22 November 2008.

<sup>20</sup> *Attorney General v Thuto Ramogge & 19 Others* (2014) CACGB-128-14 (Thuto Ramogge case).

<sup>21</sup> *Thuto Ramogge & 19 Others v The Attorney General* Case MAHGB-000175-13.

<sup>22</sup> *Eric Gitari v Attorney General & Another* Petition 440 of 2013 [2015] eKLR.



and the USA where litigation was resorted to even before 1997, shows that the last twenty years were the time of LGB SL.

### **7.2.3 The contribution of LGB SL to social change on the issue of LGB equality in Common Law Africa**

SL has led towards achievement of social change in the countries forming part of this study. No single country in which role players have engaged in LGB SL has backtracked. Even at the height of LGB opposition in countries like Uganda, there were opportunities for visibility and increased acceptance. The most positive social change witnessed has been in South Africa, which is the country that has experienced the most litigation and registered most success in the courtroom. It has achieved all there is in terms of legal equality and made major strides towards social acceptance. In affluent areas of the country, LGB persons are largely accepted as equal citizens. The challenge remains with the rampant economic and racial inequality that has dogged that country. The minority white population is much richer than the black majority. As such, even in the LGB community, white people are on average richer than black people, and so they are able to enjoy more of the rights than most black persons. South Africa therefore is yet to achieve 'significant social change' but is rapidly making progress towards it.

South Africa is followed by Botswana, which, although it has not seen as much LGB SL as Uganda, has achieved more by way of legal change, and significantly greater social acceptance, than the latter. It has legal protections for LGB persons in its employment laws and has gone ahead to respect court decisions and to uphold the registration of the civil society organisation, LEGABIBO. Botswana has thus registered moderate social change. Next is Kenya which, although starting litigation as late as 2010, has had two major victories to date, leading to the registration of LGB organisations and outlawing anal examinations. Since 2010, it also has a new, more inclusive constitution, which makes it possible for many of the rights that were not recognised or enforceable in the past to be vindicated. Social acceptance is also slowly increasing.

Although registering the second highest number of cases among the four countries examined in this study, Uganda has registered the least social change. The legal

victories have generally not swayed the state, except to allow police trainings on LGB rights and to put in place non-discrimination guidelines in respect of access to healthcare. Conversely, the state has actively moved to further limit LGB rights through legislation. The prohibition on same-sex marriages was a recent addition to the Constitution, and at one time the Anti-Homosexuality Act was adopted and, although nullified, many of its provisions are still reflected in other laws. Social acceptance is also largely low and the shift in attitudes since the time that LGB SL was first instituted is very small. Uganda has therefore achieved limited social change.

What clearly emerges from the preceding summary is that there is no direct correlation between the number of court victories and the extent of social change. It is far more nuanced than that. Indeed, a similar conclusion can be drawn from all four of the selected countries outside Common Law Africa, with the most cases having been litigated in the USA, and Canada registering the most social change. Nepal has had only two cases while only one has been brought in Belize; nevertheless Nepal has made more progress towards social change than Uganda and Kenya and is almost at the same stage as Botswana. Even though it has decriminalised same-sex conduct, Belize still faces many challenges. LGB SL therefore seems incapable of driving social change by itself without anything else changing in society at large. Needless to say, SL helps in supporting an overall transformative agenda within a country that aims at a greater level of equality and human rights for all. None of the countries that achieved the legal changes they did through litigation would have achieved them otherwise. South Africa and Canada are examples. Every single victory had to be struggled for through the courts – except, at least to some extent, for decriminalisation in Canada. Although this legal change came about through the executive and legislature, it only took place after – and partly as a result of an uproar over the mistreatment of a gay man by public authorities.

It is however worth noting that just because social change is happening even where less LGB SL is being undertaken does not imply that SL has no role. SL is a necessary but not a sufficient condition for social change.

#### **7.2.4 Conditions under which LGB SL can meaningfully stimulate social change in situations of active homophobia in Common Law Africa**

Using the data obtained from the different countries, the study laid down a number of factors that are responsible for LGB SL being able to stimulate social change in some countries, while being unable to do so in others. These factors dictate the conditions under which LGB SL can meaningfully stimulate social change. Some of these factors are exogenous to the case, and these have been found to be more crucial since they dictate how court decisions are perceived and implemented. The exogenous factors go to the political state of democracy in the country, the role of the courts in the country, the occurrence of transformative events and the presence of strong and visionary political leadership. They also include the legal set up of the country, the state of judicial independence, the role of international law in the country, the legitimacy of the constitution and the human rights regime, the institutional legitimacy of the judiciary and the legal culture. The other factors are trans-national such as the extent of the foreign influence from other countries, and the use of international human rights and political mechanisms. Other factors go to the economic set up of the country: whether the country is capitalistic and economically developed, or more communitarian and developing, as well as the economic situation of LGB persons *vis-a-vis* the general community. Finally, they go to the social component, where religion, traditional culture and popular culture take the lead in determining how court decisions are perceived.

Endogenous factors largely go to whether a particular case will be successful or not, or at the very least, not attract backlash if the case is unsuccessful, and where possible lead to positive demands for change from the general community. These factors align with the four stages of a SL case: the overarching strategy phase where the ultimate objective of the litigation is laid down as well as the strategy to follow; the pre-litigation phase where each case is adequately planned; the litigation phase where the actual pursuing of the case happens and so where victory or loss in court is determined and finally, the post litigation phase, which is about enforcement of the decision. These factors concern how activists design the case and how much they mobilise and involve allies in its formulation and execution. From these factors, conditions necessary for LGB SL to stimulate social change in favour of LGB persons were identified and laid down.

At the overarching strategy phase, an important factor identified is the framing of a strategic objective or overarching goal to guide the overall SL. A formal, well-known and countrywide strategy was also identified as an important factor, as opposed to an informal strategy implemented by an isolated segment of the LGB movement. It was also found that where a formal coalition approach is adopted, LGB SL is more likely to be successful and lead to more social change, since an image of unity can be portrayed and both elites and community members can be more easily mobilised.

Factors identified at the pre-litigation phase are broad consultations with various stakeholders as well as the availability of funds. Where funds are locally generated, there is more ownership of the case by the LGB community.

At the litigation phase, the choice of forum is a very important factor. Ideally, SL cases should be heard by the highest courts in a country or even be taken to international bodies in order to have maximum force and impact in a country. The timing of the filing of a case is also very important as there could be temporary circumstances present in a country, such as political transition and liberation, which make the political and legal systems more accessible and increases the likelihood of progressive judgements. It was also found that both elites and community members ought to be effectively mobilised to participate in the cases. Another important factor is the nature of the petitioners or applicants involved in the case. The study finds that individuals are often more appropriate petitioners than institutions, and that repeat petitioners should best be avoided. It is also important to choose as a respondent, the state, in cases of interpretation of the constitution or enforcement of human rights, or private individuals in cases of abuse of power. Another important factor is the involvement of third parties in the SL who stand by the applicants and raise the status of the case. The lawyer or lawyers used in a case is another extremely important factor and ideally, a combination of experienced lawyers in private practice, community lawyers and international lawyers should be used. It is also found that, as far as the nature of the legal and factual arguments raised are concerned, it is best to raise human rights arguments. The remedies prayed for, mapping of judges and incidence of costs are all factors that come into play. Other advocacy strategies to support LGB SL are also very important; in particular media coverage, which ensures that public discourse, is sparked around the issue.

Factors that play an important role at the post-litigation phase are the extent to which positive decisions are enforced as well as the extent to which unsuccessful cases are appealed.

What is clear from the study of the factors is that the exogenous factors have a far more important role to play than the endogenous ones. These factors are of overriding importance in the success of cases, as well as in their enforcement. These factors differ from one country to another in how they operate, and what weight they carry. Another key conclusion is that some factors have a much stronger correlation of LGB social change than others. Those identified as most significant can be arranged into five broad categories: the judiciary and legal 'climate' (the nature of the legal culture and extent of judicial independence); the broad political context (the extent of democratic governance); the economy (the extent to which there is relative affluence in a country); the socio-religious situation (the importance of religion and existence of extremism in a country); and visibly sympathetic political leadership. Legal culture rhymes perfectly with the extent of social change and as such it is an important factor to consider. It goes to what the importance of the law is in society and how seriously court decisions are taken. The other important factors are those that go to judicial independence and the legitimacy of the judiciary. The judiciary is key in LGB SL and therefore how independent it is will go along way in determining whether positive decisions will be made and whether these will be enforced. The economic set up of the country - how capitalistic or communitarian a certain country is and its level of economic development. LGB SL will tend to thrive in more capitalistic and more economically developed countries. Social-religious factors, which go to how a society adheres to religious conservatism, the role of traditional culture in public and, the extent of importation of culture wars, are also significant. The more these are observed, the less likely is it for LGB SL to spur social change. Finally, having strong and visionary political leaders who are champions of LGB rights helps to speed up the process, as they help to appoint LGB friendly judges and also make the environment more friendly to LGB rights.

Therefore, LGB SL does not operate in vacuum. It is influenced by many factors, and to have it to stimulate social change, it must be done in a way that takes advantage of the exogenous factors, and that takes control of the endogenous factors.

### **7.2.5 How LGB SL can be employed to play a more effective role in stimulating social change on LGBT equality in Common Law Africa and other strategies to complement it**

The study concludes by identifying the ways in which LGB activists can harness the different factors, both exogenous and endogenous to a particular case, in order to make them more favourable to creating social change. Indeed, whereas the endogenous factors are almost completely within the control of the activists, the exogenous ones are not. LGB activists and litigants therefore need to control the endogenous factors and then take advantage of the exogenous ones, which calls for proper timing, building convenient and lasting alliances, and doing deliberate elite and community mobilisation. Apart from simply relying on how much they can control the factors, activists also need to be alive to the other aspects that have nothing to do with the cases, but which nevertheless do create social change - things that can be done even without SL. These include: engaging in the law making process in order to avoid anti-LGB laws being adopted, and advocating for better laws; engaging in the policy-making process for LGB friendly policies; engaging the executive on LGB violations; working with NHRIs as much as possible; leveraging on the media including the use of social media, and ensuring that human rights are part of the school curriculum and training curricula for lawyers, journalists and other professionals, among others.

There is also a need to look into the more 'African ways' of engaging the state, such as practices and actions that are more reflective of traditional ways of engagement as opposed to the more western or 'stonewall'-type methods of SL, including protests, pride marches, and lobbying. The more African ways include: engaging the political leaders on the situation of LGB persons, using the privacy argument and paradigm, appealing to the concepts of 'ubuntu' and using the HIV/AIDS discourse. There is need to take special note of these 'African' ways of engaging the state since African governments and even persons seem to be largely wary of rights-based demands, and what they consider 'exhibitionism'- pride parades and other public spectacles and events. Indeed this rhymes with the general reluctance in many African countries to openly discuss matters of sexuality, including heterosexual sex. Strategies that may tap into this mind-set may thus be more useful. Such methods are currently employed but ought to be emphasised. Adopting such mechanisms however has to be balanced with the danger of LGB persons becoming completely invisible and returning to the closet.



Engaging in ways that are ‘polite’ and ‘African’ does not mean that LGB persons should keep silent and pretend that all is well. What is clear is that all avenues need to be explored; everything possible needs to be done - whatever it takes to lead to social change. What works in one context may not work in another, which is why the above factors need to be carefully considered and balanced.

### 7.3 Conclusion

Achieving significant social change on LGB rights, which is deep and lasting social change in Common Law Africa may at present appear impossible in some of the study countries. However, South Africa has demonstrated that it is possible, even though the benefits are largely experienced by middle and upper class members of society in a way that is yet to become a reality for lower income LGB persons. This keeps everyone aware of how easy it would be for some persons to be left behind in the struggle for equality. Canada shows that social change is possible. Once the country was able to get the legal protections in place through litigation, it was able to build on the decriminalisation of same-sex relations by its legislature in 1969, and its advanced state of democracy and high levels of economic development, to ensure social change for LGB persons. The SL played a very important role in this, but a lot more than SL was going on. All factors were employed together to ensure that social change happened. While violent incidents occasionally occur, the country has largely achieved complete social integration. These developments show that SL does stimulate and contribute to social change in favour of LGB persons. LGB rights have not simply been given on a silver platter; there has been a fight involved in obtaining and retaining them.

SL still remains a highly relevant and important strategy for achieving LGB equality. While the arguments that it cannot on its own lead to social change due to its inherent flaws as a counter-majoritarian strategy are partly valid, in combination with other strategies it remains a potent weapon. SL is of great importance particularly when the interests of unpopular minorities, such as LGB persons, or other issues that are viewed by the population generally as controversial, are at stake. Without a sense of being mandated by the majority, from whom they derive their legitimacy and to whom they consequently owe their allegiance, the legislature and the executive are not likely to take up these interests and issues. The experience in South Africa, where the legislature only

initiated legislative amendment and renewal after the Constitutional Court had ordered it to do so, confirms this view. Where the majority takes a stand against a powerless minority, the result can very easily be tyranny of the majority. In constitutional democracies, the judiciary is the inbuilt mechanism to ensure that this does not happen. As held by Justice Albie Sachs in the *Fourie* judgment, since the law by and large ‘embodies conventional majoritarian views’, groups that are in the minority are to count on the courts, rather than the legislature, to protect and uphold their fundamental rights.<sup>23</sup>

While it is also true that courts do not always find in favour of marginalised groups and do indeed take account of negative public opinion, where it is glaringly clear that a law or action is unconstitutional the courts would have few legitimate options but to declare it as such. This was the case in Uganda where the Constitutional Court struck down the AHA: the fact that the Act enjoyed strong popular support could not justify the fact that it had been passed contrary to the rules of Parliament. Similarly, in the *Victor Mukasa* case,<sup>24</sup> the High Court could not deny the fact that the fundamental rights of the applicants were violated. The fact that the applicants belonged to unpopular sexual minority groups who are not deserving of human rights in the eyes of the majority population could not detract from the fact that their constitutional rights were grossly infringed. In such cases, the courts remain the only bastion between tyranny of the majority and the protection of minorities. This is what makes SL an important weapon for LGB activists in Common Law African countries where the majority is largely homophobic, or at least where homophobia is the societally-accepted and politically correct thing to be. Even in countries that have been thought to have largely made progress towards social change, the political opportunity structure theory suggests that politicians would not want to risk their votes by supporting such a minority group. The political and legal opportunity structure, in terms of which activists are to use the available political conditions and opportunities to advance their causes, suggest that times of political transition create ideal opportunity for approaching the courts to affirm the rights and values which politicians may be too afraid to speak up about. This is why it took victories in almost every provincial court in Canada before the executive tabled

<sup>23</sup> *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December).

<sup>24</sup> *Victor Mukasa & Yvonne Oyoo v Attorney General* (2008) AHRLR 248 (High Court of Uganda) 22 November 2008.

the Same-Sex Marriages Bill. Even then, it had to first seek the opinion of the Canadian Supreme Court before the law was tabled.

In South Africa, the fact that every single legal change had to be fought for in a court of law shows that SL is critical to achieve legal change, and indeed in Botswana, Kenya and even Uganda, every single legal change, apart from the inclusion of sexual orientation in the Employment Act of Botswana, has been achieved through litigation. Allowing the courts to make such ‘unpopular’ decisions helps politicians to shield themselves in case there is a backlash and therefore makes unelected judges, who ideally should not fear to rule against public opinion, important in the process of creating the necessary legal change. The power of SL to mobilise allies, to galvanise advocacy efforts, and to attract media attention makes it important to achieve those radiating effects that Galanter discusses.<sup>25</sup> The mere fact that a case is in court is enough to start a conversation and, whether it succeeds or fails, something gives somewhere. Backlash and counter-mobilisation, however much they seem like a bad thing, should be expected as part of the struggle. In many cases, it creates strong reactions and responses to counter-mobilisation by LGB persons and allies, leading to the forces of change eventually winning. The experience in the USA after *Baehr v Lewin* shows that such an outcome is very much possible.

Finally, activists have to accept the fact that whereas there is a need to fully control all the factors surrounding SL, they can never be able to achieve this. The exogenous factors are largely beyond the control of activists and may change in different directions even if attempts to control them were made. Activists thus have to be open to different ways in which the litigation may flow. Even the endogenous factors cannot be fully controlled since there are at least two parties to every case. What the other party will do can only be anticipated but not fully controlled or predicated. For example, in the *AHA* case in Uganda, the fact that the court would hear and dispose of the case in less than three months after it was filed was never anticipated. This affected the *HRAPF* case at the East African Court of Justice since it has been filed in the expectation that the Ugandan Constitutional Court would take, at the very least, two years before rendering its decision. Therefore, there is need to be ready for all that may arise, and be able to respond adequately. In this regard, SL is like a game of *mweso*, where one can only

<sup>25</sup> Galanter n 7 above, 125-26.

anticipate the other side's game but never fully predict the other side's game. All that matters is the readiness and ability to adjust and change.

By way of conclusion, it is quite clear that LGB SL is something that at least for the foreseeable future is here to stay in Common Law Africa. Many activists in other Common Law countries are currently engaged in LGB-related cases such as Nigeria, Malawi, Zimbabwe and Zambia.<sup>26</sup> Countries like Mauritius are also gearing up for it.<sup>27</sup> It is a very popular strategy and one that works, at least in achieving legal change. Its potential to stimulate social change in favour of LGB persons is also huge. As such, it is a proven strategy that works, and all that needs to be done is to ensure that it is done with the conditions of the particular country in mind and the different political, legal and social economic set-ups of the country considered.

At the same time, it is necessary to remember that what works in one country may not work in another. Activists in every country should have the space, the time and the resources to do LGB SL as befits their country. There is no one-size-fits-all. Being African, and Common Law countries, is not enough. It is important to draw lessons from elsewhere but what is much more important is taking these lessons, learning from them and then doing what fits within local circumstances.

#### 7.4 Areas for further research

The ambition of this study is restricted to identifying the conditions under which LGB SL can create social change in situations of lesbophobia, homophobia and transphobia. As such there is more research that needs to be done in the following areas, which the study does not address:

- i) Establishing the drivers for the popularity of LGB SL as a strategy over the past 20 years. There is clearly an increase in the rate at which LGB SL is being undertaken and this is clearly linked to the global and

<sup>26</sup> For example in Nigeria *Teriah Joseph Ebah v Federal Government of Nigeria*, Suit FHC/ABJ/CS/197/2014; in Malawi *R v Steven monjeza Soko and Another*; in Zimbabwe *Banana v State* [2000] 4 LRC 621 (Zimbabwe Supreme Court) and in Zambia *The People v Paul Kasonkoomona* [2015] HPA/53/2014.

<sup>27</sup> The author was part of a decriminalisation legal strategising meeting for Mauritius in November 2015.

international attention to LGB rights. It is also about the increased democratisation, which allows for public interest litigation. Nevertheless, why now and why LGB rights is still a question that remains to be explored.

- ii) Exploring the role of LGB SL in the Common Law countries beyond those selected. Many countries in Common Law Africa are not engaged in LGB SL, despite its successes in countries like South Africa, Kenya, Botswana and Uganda. There is need to understand why this is so, and how the factors identified in this study would apply to those other countries.
- iii) Exploring the role of SL in bringing about social change in situations of active homophobia in civil law African countries. This study covers four Common Law African countries and the similarities, as well as nuances, identified in these four countries can be used as a roadmap in instituting SL in other Common Law African countries. The study, however, does not touch upon the role of SL in non-Common Law countries, and yet these are countries where LGB SL is yet to take root. It would therefore be necessary to undertake separate studies on how LGB SL can play a role in these countries too.
- iv) Scientifically determining the extent to which LGB SL contributed to the social change in countries like South Africa, Canada and the USA. It is clear that indeed LGB SL played a role, but it is also clear that mindsets were already in the process of changing and that SL might have taken advantage of this. Therefore, it would be important to scientifically demonstrate the real contribution of SL to achieving the social change.
- v) There is need to explore the extent to which SL has contributed to social change in favour of transgender and intersex persons. In Kenya, there have been a number of successful cases on transgender and intersex issues, as well as legal change and noted social acceptance. The same can be said for South Africa. Knowing whether the same factors as those that affect LGB SL affect SL in favour of transgender and intersex persons

would be a good addition to knowledge and would help activists in both areas of work to plan better.

- vi) Finally, there is need to continue studying how the litigation in the four study countries evolves. This is because LGB SL is ongoing in all the four countries with changing trends. Already it is quite clear that SL is on the downside in Uganda with the recent consecutive court loses, which followed major successes. In Kenya and Botswana, it is however on the rise, and South Africa is rejuvenating its efforts. It would thus be interesting to see how the trends turn out five or ten years from now, as well as the extent of social change in the different countries.



## APPENDICES

### APPENDIX 1: LIST OF INTERVIEWS

#### **i) Lawyers/Activists planning litigation**

- Solome Nakaweesi Kimbugwe, former Executive Director, Akina Mama wa Afrika (AMWA), the first host organisation for the CSCHRCL, Kampala, 20 July 2017
- Dr. Chris Dolan, Director, Refugee Law Project, School of Law, Makerere University and former chairperson of the Steering Committee of the Civil Society Coalition on Human Rights and Constitutional Law (CSCHRCL), Kampala, 22 July 2017
- Lorna Dias, Jackson Otieno, Kelvin N. Washiko, Yvonne Oduor, and Brian Macharia, all of Gay and Lesbian Coalition of Kenya (GALCK), Nairobi, 26 July 2017 (Joint interview)
- Caine Youngman, Lesbians, Gays and Bisexuals of Botswana (LEGABIBO), Gaborone, 12 October 2017
- Anneke Meerkotter and Tashwill Esterhuizen, Southern African Litigation Centre, Johannesburg, 24 October 2017 (joint interview)
- Crystal Cambanis, partner Nicholls, Cambanis & Associates, Johannesburg, 8 February 2018
- Fridah Mutesi, former Legal Officer, Human Rights Awareness and Promotion Forum, chairs of the Legal Committee of the Civil Society Coalition on Human Rights and constitutional Law (CSCHRCL), 29 April 2018)

#### **ii) Lawyers who have handled cases in court**

- Ladislaus Rwakafuuzi, Kampala, 20 July 2017
- Colbert Ojambo, Nairobi, 27 July 2017

- Tshiamo Rantao, Gaborone, 10 October 2017
- Gilbert Marcus, Johannesburg, 24 October 2017

**iii) Activists who have been petitioners in strategic litigation cases**

- Frank Mugisha, Executive Director, Sexual Minorities Uganda, Kampala, 20 July 2017
- Eric Mawira Gitari, Nairobi, 27 July 2017
- Thuto Rammoge, Gaborone, 12 October 2017
- Anna-Marié de Vos, 24 November 2017, (phone interview))

**iv) LGBT NGO leaders and LGBT persons**

- Wanja Muguongo, Executive Director, UHAI-EASHRI, Nairobi, 26 July 2017
- Tabitha Saoyo Griffiths and Caroline Oduor of the KELIN, Nairobi, 28 July 2017 (joint interview)
- Bradley Fortuin and Botho Maruatone of Lesbians, Gays and Bisexuals of Botswana (LEGABIBO), Gaborone, 10 October 2017 (joint interview)
- Cindy Kelemi, Executive Director, Botswana Network on Law, Ethics and HIV/AIDS (BONELA), Gaborone, 10 October 2017
- Interview with Nicholas Opiyo, human rights lawyer, Executive Director, Chapter 4 Uganda, Kampala, 19 March 2018.
- Patricia Kimera, Head, Access to justice Division, Human Rights Awareness and Promotion Forum (HRAPF), Kampala, 24 April 2018
- Mpho Bentse, political activist and founder of the Simon Nkoli Memorial lecture, Washington DC, 3 August 2018

**v) LGBT persons who do not work for NGOs but who are attuned to changes**

- KB - Botswana, 11<sup>th</sup> October 2017
- VC- Nairobi, 26 July 2017
- KL- Nairobi, 26 July 2017
- KE- Kampala, 24 April 2018, Kampala

- PH- Kampala, 16 July 2018, Kampala
- PE - Johannesburg, 22 July 2018 (phone interview))
- FE - Washington DC, 3 August 2018

**vi) Judges who have handled cases on LGBT equality**

- Justice Isaac Lenoala, Supreme Court of Kenya, Nairobi, 26 July 2017
- Justice Monica Mbaru, High Court of Kenya, Nairobi, 26 July 2016
- Justice Edwin Cameron, Johannesburg, 24 October 2017
- Justice Lydia Mugambe, Kampala, 2018

**vii) Academics who have written about strategic litigation and constitutionalism in Africa as well as LGBT equality**

- Dr. Bonolo Ramadi Dinokopila, Head of Law Department, University of Botswana, Gaborone, 10 October 2017
- Prof. Charles Ngwenya, University of Pretoria, Pretoria, 27 February 2018.
- Prof. Christopher Mbazira, School of Law, Makerere University, 26 March 2018, Kampala
- Prof. David Bilchitz, Director of the South African Institute for Advanced Studies in Constitutional, Human Rights, Public and International Law, University of Johannesburg, 10 July 2018 (Skype Interview)

**viii) Lawyers/activists from non-African Common Law countries considered**

- Caleb Orozco, Director of UNIBAM, Belize, 17 July 2018 (Phone Interview)
- Sunil Babu Pant, former leader of the Blue Diamond Society, 16 July 2018, London (skype Interview)
- Douglas Elliot- lawyer, 29 July 2018 Canada- (Skype interview)
- Prof Paul Smith, Washington DC, 2 August 2018.

## APPENDIX II: INFORMED CONSENT FORM

### WRITTEN CONSENT FORM FOR KEY RESPONDENTS IN THE STUDY ON USING STRATEGIC LITIGATION TO INFLUENCE SOCIAL CHANGE IN SITUATIONS OF ACTIVE HOMOPHOBIA

**Study Title:** Using strategic litigation to influence social change in situations of active homophobia: Lessons for Common Law Africa

**Researcher:** Adrian Jjuuko

**Purpose:** Academic Research for an LLD of the Faculty of Law, University of Pretoria

Researcher's contacts: Adrian Jjuuko, LLD Student, Centre for Human Rights, Faculty of Law, University of Pretoria, 0002 Pretoria, South Africa, Tel: +256782169505 Email: [juukoa@gmail.com](mailto:juukoa@gmail.com)

IRB Approval No:

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I am asking you to participate in a research study on the role of strategic litigation in creating social change in situations of active homophobia. I am interested in the trends of strategic litigation on LGBT rights in Common Law counties in Africa and how this has led to social change.

Your participation is voluntary and you can refuse to participate at any moment, for any reason, without penalty. I understand that homosexuality is a very sensitive topic, and so feel free to refuse to answer any questions.

**Purpose of the study**

This study will help to contribute to knowledge on the conditions under which strategic litigation can lead to social change in situations where there is active homophobia. It is for a Doctorate in Law thesis under the Faculty of Law, University of Pretoria. This information is expected to be helpful to LGB activists and other persons undertaking strategic litigation in situations of hostility.

### **Number of Interviewees**

If you decide to participate in the study, you will be one of about 50 persons selected as key respondents from 4 countries in Africa and 4 countries outside of Africa.

### **Duration of the interview**

This interview will last approximately one to two hours.

### **What happens when you decide to participate**

When you decide to participate in this study, I will conduct an interview with you lasting 1-2 hours. I will ask about your experiences and opinions on strategic litigation on LGB issues. I will request to record the interview and, if you agree, I will do so.

All LGBT who are not publicly engaged in activism who participate will not have their names included in the study report. Every other person will be asked whether they want their names and titles or any other personal identifiers in the study. I will only reveal these details if you agree. The location of the interview will also be your choice.

There will be no financial benefits for participating in the study.

Please do not hesitate to contact me in case you have any questions.

### **Interviewee consent:**

I have read the above information and voluntarily accept to participate in this study.

\_\_\_\_\_  
Signature of participant

\_\_\_\_\_  
Date

---

Name of participant

---

Signature of person obtaining consent

---

Date

---

Printed name of person obtaining consent



## APPENDIX III: INTERVIEW GUIDE FOR LAWYERS/ACTIVISTS INVOLVED IN DESIGNING AND IMPLEMENTING STRATEGIC LITIGATION INITIATIVES

*[Please review and sign the interview consent form]*

### SECTION I: Interview Information

1. Interviewee's name and title:  
\_\_\_\_\_
2. May I take notes during the interview? Yes ..... No.....
3. May I tape-record this conversation? Yes ..... No.....
4. Location of interview: \_\_\_\_\_
5. Date of interview: \_\_\_\_\_
6. Duration of interview: \_\_\_\_\_
7. Interviewer's name: \_\_\_\_\_

### SECTION II: Role in designing strategic litigation initiatives

- i) Please describe your role in strategic litigation efforts in your country  
*Probe on what the role actually involves*

### SECTION III: The strategy used in strategic litigation

- i) Do you have a strategy that you follow when doing litigation?  
*Probe on whether it is a long-term written strategy or a flexible unwritten strategy, and on what the basis is for bring cases before courts*
- ii) Who was/is involved in designing the strategy?  
*Probe on whether more than one organisation is involved and whether LGB persons are involved, as well as the role of foreign actors*
- iii) What is the criteria used to decide on which cases to take to court?

*Probe to find out if cases are agreed upon as and when they happen or whether they are on the look out for facts that may fit within the strategy already drawn*

- iv) What are the aims of your strategic litigation- what do you expect to achieve in the short run and the long run?

*Probe to see if social change is one those aims*

- v) Do you only take cases when you expect to win, or do you also plan for losses, and if so, to what end?

#### **SECTION IV: Implementing the strategy**

- i) How are cases developed and planned before being filed- who is involved in the process?

*Probe to find out if LGB groups are involved or if it is just the lawyers*

- ii) How are the cases supported financially- where do you get the funds from?

*Probe to see if its own resources from members of the community or donor funds*

- iii) How do you get the LGB people involved in litigation?

- iv) How do you get the community to be aware of your cases in court?

- v) How do you get broader civil society involved in the cases?

*Probe for amicus curiae involvement or broader coalitions*

- vi) How do you decide on the lawyers to use- are they community lawyers, lawyers from organisations or lawyers in private practice- are they paid or do they volunteer?

- vii) How are the lawyers monitored in terms of the quality of background research and keeping the petitioners abreast of the complexities of the case?

- viii) How do you choose petitioners- is it victims or do you sometimes use people who do not identify as LGB for strategic reasons?

- ix) Do you plan for the security of petitioners before filing cases?

- x) How do you decide on the court in which to file your case- what determines the choice of court?

#### **SECTION V: The aftermath**

- i) When court judgments are received, do you publicise them- if so, how?

- ii) Do you receive feedback from the general community about the cases?

- iii) Have you received threats from anyone upon filing, during the case or after the judgment is delivered?
- iv) Are the decisions from the courts implemented by the state?  
*Probe and see if they are implemented in only the particular case or even subsequently when similar situations occur*
- v) Do you make any efforts to ensure implementation of the judgments?
- vi) What do you do in case of non-implementation?
- vii) Has the state ever directly responded in any way to the judgments, either to the community or to judges?
- viii) Has the community ever responded in any substantive way to a particular court judgment?

#### **SECTION VI: Way Forward**

- i) Do you think strategic litigation is worth the effort?
- ii) What other options would you have if strategic litigation was not an open option?
- iii) Are there any other strategies you would recommend instead of strategic litigation?
- iv) Are there other strategies that you use to make strategic litigation more effective?
- v) What would you advise anyone planning to undertake strategic litigation on LGBT issues?

#### **SECTION VII: Miscellaneous**

- i) Is there anything else you would want to say about strategic litigation?

**Thank you**

## APPENDIX IV: INTERVIEW GUIDE FOR LAWYERS WHO HAVE HANDLED LGBT STRATEGIC CASES IN COURT

*[Please review and sign the interview consent form]*

### SECTION I: Interview Information

1. Interviewee's name and title:  
\_\_\_\_\_
2. May I take notes during the interview? Yes ..... No.....
3. May I tape-record this conversation? Yes ..... No.....
4. Location of interview: \_\_\_\_\_
5. Date of interview: \_\_\_\_\_
6. Duration of interview: \_\_\_\_\_
7. Interviewer's name: \_\_\_\_\_

### SECTION II: Role in handling cases

- i) How many strategic litigation cases on LGB rights have you handled?
- ii) Please describe your role when handling strategic litigation cases  
*Probe on what the role actually involves- if lead lawyer, what that requires, or just one of the team, what that requires*
- iii) Do you handle the cases pro bono or you are paid, and if paid is it at commercial rates, more than commercial rates or at reduced cost, and why?
- iv) Why would you take on LGB cases when there is active homophobia and transphobia in the country- what motivates you?

### SECTION III: Knowledge about the strategy

- i) Are you aware of the strategy for strategic litigation in your country and its aims? If so, what it is about and what are the aims?

- ii) Would you take on a case even if you knew you were going to lose- and why would you do that?
- iii) Do you meet with your clients and the broader community to discuss the case? If so, how often and under what circumstances?

#### **SECTION IV: Preparations and handling of cases**

- i) How are the pleadings developed and who reviews them?
- ii) How often do you update your clients on the cases- is there such an obligation?
- iii) How knowledgeable are you about LGB issues, and what is the source of your knowledge?
- iv) Do you prefer particular judges over others, and if so, why?

#### **SECTION V: The aftermath**

- i) When court judgments are received, do you get involved in their publicising? If so, how?
- ii) How do the rest of the lawyers treat you because of the cases?
- iii) Do you receive feedback from the general community about the cases?
- iv) Have you received threats from anyone upon filing, during the case or after the judgment is delivered?
- v) Has any of the judgments you got in your favour been implemented?
- vi) Do you make any efforts to ensure implementation of the judgments?
- vii) What do you do in case of non-implementation?
- viii) Has the state ever directly responded in any way to the judgments, whether to the community or to judges?
- ix) Has the community ever responded in any substantive way to a particular court judgment?
- x) Have you ever been threatened by the state, other lawyers, or community members for getting involved in cases?
- xi) Have you lost other clients because you also handle LGB cases?
- xii) Do you think LGB cases are more risky for a lawyer than other cases?

#### **SECTION VI: Way Forward**

- i) Do you think the LGB community should be taking cases to court in light of the current conditions?

- ii) Are there any other strategies you would recommend instead of strategic litigation?
- iii) Are there any other strategies that you use to make strategic litigation more effective?
- iv) What would you advise lawyers planning to undertake strategic cases on LGBT issues?

**SECTION VII: Miscellaneous**

- i) Is there anything else you would want to say about strategic litigation?

**Thank you**



## APPENDIX V: INTERVIEW GUIDE FOR PETITIONERS IN STRATEGIC CASES

*[Please review and sign the interview consent form]*

### SECTION I: Interview Information

1. Interviewee's name and title:  
\_\_\_\_\_
2. May I take notes during the interview? Yes ..... No.....
3. May I tape-record this conversation? Yes ..... No.....
4. Location of interview: \_\_\_\_\_
5. Date of interview: \_\_\_\_\_
6. Duration of interview: \_\_\_\_\_
7. Interviewer's name: \_\_\_\_\_

### SECTION II: Role as a petitioner

- i) What exactly was your role as a petitioner/applicant?
- ii) Were you briefed on your role and on what to expect- and if so, by who?
- iii) Do you identify as LGB or as a supporter?
- iv) Were you paid to be a petitioner?
- v) Did you take on the role willingly?

### SECTION III: Knowledge about the strategy and motivation

- i) Are you aware of the strategy for strategic litigation in your country and its aims? If so, what is it about and what are the aims?
- ii) Why would you accept to be a petitioner with all the homophobia and transphobia in the country?

### SECTION IV: Involvement in Preparations and handling of cases

- i) Were you involved in planning for the case and the preparation of written submissions and affidavits?

- ii) Were you informed about the risks to yourself and your family as a result of your involvement in this case?
- iii) Were you supported during the process? And if so, how and by whom?
- iv) Did the lawyers update you and explain to you what was going on at every step of the litigation process?

#### **SECTION V: The aftermath**

- i) When the court judgment was delivered, did you get involved in its publicising? If so, how?
- ii) Did you get any personal monetary benefit from being a petitioner?
- iii) Were you treated differently because of your involvement in the case- by the LGBT community, by your family and by the general community?
- iv) Have you received threats from anyone upon filing, during the case or after the judgment was delivered?
- v) Has the state done what was ordered by the court?
- vi) In your view, what impact has the case had so far?
- ii) What will/would you do in case of non-implementation?

#### **SECTION VI: Way Forward**

- vi) Do you think taking the case to court was worth it?
- vii) Are there any other strategies you would recommend instead of strategic litigation?
- viii) Are there any other strategies that you would use to make strategic litigation more effective?
- ix) What would you advise anyone planning to be a petitioner in a LGB case in your country?

#### **SECTION VII: Miscellaneous**

- ii) Is there anything else you would want to say?

**Thank you**

## APPENDIX V: INTERVIEW GUIDE FOR JUDGES WHO ARE FAMILIAR WITH LGB CASES

*[Please review and sign the interview consent form]*

### SECTION I: Interview Information

1. Interviewee's name and title:  
\_\_\_\_\_
2. May I take notes during the interview? Yes ..... No.....
3. May I tape-record this conversation? Yes ..... No.....
4. Location of interview: \_\_\_\_\_
5. Date of interview: \_\_\_\_\_
6. Duration of interview: \_\_\_\_\_
7. Interviewer's name: \_\_\_\_\_

### SECTION II: Role in handling cases

- i) How many strategic litigation cases on LGB rights have you handled?
- ii) Were you a single judge or part of a panel of judges?  
*Probe on what the role actually involved- if on a panel, was the respondent lead judge, did he write lead judgment?*
- iii) Why do you think the case was allocated to you?
- iv) Could you refuse to hear the case if you wished to? And if so what would motivate you to hear such a controversial case?

### SECTION III: Knowledge about the strategy

- i) Why do you think the case was brought to court?  
*Probe whether he/she saw it as part of a broader strategy or simply as a way of seeking redress for an individual*

### SECTION IV: Hearing and deciding the case

- i) Did you have to do extra reading to understand the issues being raised?

- ii) Did you request for or get extra help from other judges who have handled such cases?
- iii) In your view, were the lawyers well prepared and did they put forward the right arguments?
- iv) How did the attention on the case in the courtroom and in the press affect you?

#### **SECTION IV: The aftermath**

- i) Did you feel you were being judged by the other judges or the community for your decision?
- ii) Did you get any threats or expressions of dissatisfaction from the state or fellow members of the judiciary after the judgment?
- iii) Has the judgment been implemented to your satisfaction?
- iv) What would you do if the petitioners came back demanding for enforcement orders from your court?
- v) Do you think LGB cases are more risky for a judge than other cases?

#### **SECTION V: Way Forward**

- i) Do you think it is the time for LGB people to bring cases seeking equality?
- ii) Are there any other strategies you would recommend instead of strategic litigation?
- iii) Are there any other strategies that you would advise lawyers or the LGB community to use to make strategic litigation more effective?

#### **SECTION VI: Miscellaneous**

- i) Is there anything else you would want to say?

**Thank you**

## APPENDIX VI: INTERVIEW GUIDE FOR NGOs AND INDIVIDUAL LGB PERSONS

*[Please review and sign the interview consent form]*

### SECTION I: Interview Information

Interviewee's name and title:

\_\_\_\_\_

May I take notes during the interview? Yes ..... No.....

May I tape-record this conversation? Yes ..... No.....

Location of interview: \_\_\_\_\_

Date of interview: \_\_\_\_\_

Duration of interview: \_\_\_\_\_

Interviewer's name: \_\_\_\_\_

### SECTION II: Knowledge about cases

- i) Are you aware of any decisions on LGB rights in your country?
- ii) Were you involved in the process of developing and filing these cases?
- iii) What did the courts decide?

### SECTION III: Knowledge about the strategy and motivation

- i) Are you aware of the strategy for strategic litigation in your country and its aims? If so, what is it about and what are the aims?
- ii) Do you think it was right to take that particular matter to court?
- iii) Were you given enough opportunity to express your views on the strategy?

### SECTION IV: Involvement in Preparations and handling of cases

- i) Were you involved in planning for the case?
- ii) Did you understand what the case was about?
- iii) Did you participate in the court proceedings?

- v) Did the lawyers update you and explain to you what was going on?

**SECTION V: The aftermath**

- i) When the court judgment was received, did you get involved in its publicising? If so, how?
- ii) Has the state done what was ordered by the court?
- iii) In your view, what impact has the case had so far?
- iv) Has the case made your work/life easier or more complicated? Explain.

**SECTION VI: Way Forward**

- i) Do you think taking the case to court was worth it?
- ii) Are there any other strategies you would recommend instead of strategic litigation?
- iii) Are there any other strategies that you use to make strategic litigation more effective?
- iv) Any advise to those planning strategic litigation on LGB issues?

**SECTION VII: Miscellaneous**

- ii) Is there anything else you would want to say?

**Thank you**



## APPENDIX VIII: INTERVIEW GUIDE FOR ACADEMICS

*[Please review and sign the interview consent form]*

### SECTION I: Interview Information

1. Interviewee's name and title:  
\_\_\_\_\_
2. May I take notes during the interview? Yes ..... No.....
3. May I tape-record this conversation? Yes ..... No.....
4. Location of interview: \_\_\_\_\_
5. Date of interview: \_\_\_\_\_
6. Duration of interview: \_\_\_\_\_
7. Interviewer's name: \_\_\_\_\_

### SECTION II: Role of strategic litigation

- i) Is strategic litigation as a strategy suitable for African countries in light of the current social-political circumstances?

### SECTION III: About the strategy

- i) What are your views about the litigation strategy adopted by LGB groups?

### SECTION IV: About arguments used in court

- i) Do human rights, equality and privacy arguments carry enough weight to get positive court judgments within the context of Africa?
- ii) What other arguments can lawyers use? And why?
- iii) Are the prayers made and the orders given sufficient to ensure meaningful implementation?
- iv) In your view, why do lawyers/judges hesitate from praying for/and making extensive orders in the pleadings/in judgments respectively?
- v) Do you think judges should decide such cases basing on public opinion or basing on constitutional principles?
- vi) What other issues affect the arguments made and decisions given?

- vii) Could the arguments and the decisions in the cases have been better?
- viii) Do you think LGB cases are more risky for a judge than other cases, and so judges have tread more carefully?

#### **SECTION V: Social Change**

- i) Do you think court judgments can influence social change?
- ii) Does it matter whether there is homophobia and transphobia and active hostility or not?
- iii) Do you think that court judgments mean much to the executive and the legislature especially on such controversial issues that do not enjoy popular support? Why?
- iv) Why is it easy for the executive not to implement court decisions on LGB rights?

#### **SECTION VI: Way Forward**

- i) Do you think it is the right time for LGBT people to bring cases seeking equality in common law countries in Africa and elsewhere?
- ii) Are there any other strategies you would recommend instead of strategic litigation for promoting LGBT equality?
- iii) Are there any other strategies that you would advise lawyers or the LGBT community to use to make strategic litigation more effective?

#### **SECTION VII: Miscellaneous**

- iii) Is there anything else you would want to say?

**Thank you**

## APPENDIX IX: INTERVIEW GUIDE FOR LAWYERS/ACTIVISTS INVOLVED IN STRATEGIC LITIGATION INITIATIVES IN OTHER COUNTRIES

*[Please review and sign the interview consent form]*

### SECTION I: Interview Information

1. Interviewee's name and title:  
\_\_\_\_\_
2. May I take notes during the interview? Yes ..... No.....
3. May I tape-record this conversation? Yes ..... No.....
4. Location of interview: \_\_\_\_\_
5. Date of interview: \_\_\_\_\_
6. Duration of interview: \_\_\_\_\_
7. Interviewer's name: \_\_\_\_\_

### SECTION II: Role in designing strategic litigation initiatives

- i) Please describe your role in strategic litigation efforts in your country  
*Probe on what the role actually involves*

### SECTION III: The strategy used in strategic litigation

- i) Do you have a strategy that you follow when doing litigation?  
*Probe on whether it is a long-term written strategy or a flexible unwritten strategy or what the basis is for bring cases before courts*
- ii) Who was/is involved in designing the strategy?  
*Probe on whether more than one organisation is involved and whether LGB persons are involved, as well as the role of foreign actors*
- iii) What is the criteria used to decide on which cases to go to court?  
*Probe to find out if cases are agreed upon as and when they happen or whether they are on the look out for facts that may fit within the strategy already drawn*
- i) What are the aims of your strategic litigation- what do you expect to achieve in the short run and the long run?  
*Probe to see if social change is one those aims*

- ii) Do you only take cases when you expect to win, or do you also plan for losses, and if so to what end?

#### **SECTION IV: Implementing the strategy**

- i) How are cases developed and planned before being filed- who is involved in the process?  
*Probe to find out if LGB groups are involved or whether it is just the lawyers*
- ii) How are the cases supported financially- where do you get the funds from?  
*Probe to see if its own resources from members of the community or donor funds*
- iii) How do you get LGB people involved in litigation?
- iv) How do you get the community to be aware of your cases in court?
- v) How do you get broader civil society involved in the cases?  
*Probe for amicus curiae involvement or broader coalitions*
- vi) How do you decide on the lawyers to use- are they community lawyers, lawyers from organisations or lawyers in private practice- are they paid or do they volunteer?
- vii) How are the lawyers monitored in terms of the quality of research and explaining to the petitioners?
- viii) How do you choose petitioners- is it victims or do you sometimes use people who do not identify as LGB for strategic reasons?
- ix) Do you plan for the security of petitioners before filing cases?
- x) How do you decide on the court in which to file your case- what determines the choice of court?

#### **SECTION V: The aftermath**

- i) When court judgments are received, do you publicise them- if so, how?
- ii) Do you receive feedback from the general community about the cases?
- iii) Have you received threats from anyone upon filing, during the case or after the judgment is delivered?
- iv) Are the decisions from the courts implemented by the state?  
*Probe and see if they are implemented in only the particular case or even subsequently when similar situations occur*
- v) Do you take any efforts to ensure implementation of the judgments?
- vi) What do you do in case of non-implementation?

- vii) Has the state ever directly responded in any way to the judgments, whether to the community or to judges?
- viii) Has the community ever responded in any substantive way to a particular court judgment?
- ix) Do you have real expectations that judgments will be respected?

#### **SECTION VI: Social change**

- i) Do you think court judgments can influence social change?
- ii) Does it matter whether there is active homophobia and transphobia or not?
- iii) Do you think that court judgments mean much to the executive and the legislature especially on such controversial issues that do not enjoy popular support? Why?
- iv) Is it good court judgments that lead to a change in public opinion or is it public opinion that leads to good judgments?

#### **SECTION VII: Way Forward**

- i) Do you think strategic litigation is worth the effort?
- ii) What other options would you have if strategic litigation was not an open option?
- iii) Are there other strategies that you use to make strategic litigation more effective?
- iv) What would you advise anyone planning to undertake strategic litigation on LGB issues?

#### **SECTION VIII: Miscellaneous**

- iii) there anything else you would want to say about strategic litigation?

**Thank you**

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