The Struggle for Equality: LGBT Rights Activism in Sub-Saharan Africa

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1. INTRODUCTION

The culture in sub-Saharan countries is conservative in nature and communities uphold traditional values, where a union between a man and woman is emphasised as the only acceptable relationship status; any deviation from this norm is not often tolerated. The unwillingness to accept same-sex conduct or homosexuality stems from profound prejudice and is considered to be un-African.[1] The advance of conservatism entrenched in the region can be attributed to British colonial laws introduced by colonial legislators and jurists who believed that native cultures did not adequately punish perverse sexual behaviour and that the indigenous people needed re-education in sexual morality.[2] More than fifty percent of countries in Africa still criminalise same-sex acts between consenting adults.[3] The existence of laws that proscribe same-sex relationships and homosexuality,[4] contribute to persecutory environments and, in

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[1] Mbaru, Tabengwa and Vance, 'Cultural discourse in Africa and the promise of human rights based on non-normative sexuality and/or gender expression: exploring the intersections, challenges and opportunities in Uganda' in Nicol, et al., (eds) *Envisioning Global LGBT Human Rights: (Neo)Colonialism, Neoliberalism, Resistance and Hope* (Institute of Commonwealth Studies, 2018) at 178.

[2] Human Rights Watch, *This Alien Legacy: The Origins of "Sodomy" Laws in British Colonialism*, 17 December 2008, available at: www.hrw.org/report/2008/12/17/alien-legacy/origins-sodomy-laws-british-colonialism [last accessed 17 November 2019].

[3] Bond, 'Gender and Non-normative sex in Sub-Saharan Africa (2016) 23 Michigan Journal of Gender and Law 65 at 145.; International Lesbian, Gay, Bisexual, Trans and Intersex Association, *State-Sponsored Homophobia*, Update December 2019, available at: https://ilga.org/state-sponsored-homophobia-December-2019-decade-update [last accessed 5 March 2020]

[4] In Nigeria, the Same Sex (Prohibition) Act 2013 signed into law in January 2014 contains extremely punitive measures for anyone who enters into a same-sex marriage or civil union; prohibits anyone from forming,

effect, they provide society with justification for the proliferation of prejudice, hatred and violence against sexual minorities.[5] This article examines the existence of discriminatory laws against LGBT people and the efforts by activists in former British colonies to challenge them. For the purpose of comparison of trends, the article will focus on Botswana, Kenya, South Africa and Uganda.

2. SEXUALITY IN SUB- SAHARAN AFRICA: THE DISCOURSE

There are two distinct narratives that dominate the discussion of same-sex orientation in the Sub-Saharan African context. Firstly, that same-sex conduct existed in various societies with historical and anthropological studies asserting that prior to colonialism, same-sex relationships and marriages took place with a variety of motives and practices involved.[6] Epprecht's study, for example, looked at the history of homosexuality in sub-Saharan Africa and contends that homosexual experimentation was common among adolescent boys, and that it was a normal part of the sexual learning process. Homosexual acts among adolescent boys were normally carried out in the bush while they were herding cattle, and society expected these experiments at the age of puberty. Homosexual orientation and transgender identities were not necessarily considered offensive to society but rather a respected attribute if they were said to have been caused by certain types of spirit possession. Even in cases that involved otherwise heterosexual males beyond the years of acceptable experimentation, same-sex sexual acts were not automatically taken as serious breaches of morality, although social attitudes

operating or supporting gay clubs, societies and organisations; and criminalises any public show of same-sex amorous relationship.

[5] Amnesty International, *Making Love a Crime: Criminalization of Same-Sex Conduct in Sub-Saharan Africa,* April 2013, available at: https://www.amnestyusa.org/reports/making-love-a-crime-criminalization-of-same-sex-conduct-in-sub-saharan-africa/ [last accessed 11 April 2020].

[6] Murray and Roscoe, *Boy-Wives and Female Husbands* (Palgrave Macmillan, 1998) at 267.

towards the practice varied.[7] Subsequently, Western evangelicals challenged the continents indigenous practices when they systematically introduced intolerance to same-sex relationships.[8] The second narrative is that 'homosexuality is against African norms and traditions'[9] and that it was introduced by Arab slave traders or Europeans,[10] therefore to recognise LGBT rights would be 'another form of Western cultural infiltration and imperialism'.[11]

Consensual same-sex sexual conduct is criminalised in several Penal Codes and legislation classifying the behaviour as 'unnatural offences' and 'against the order of nature.'[12] These provisions replicate the offences in England and Wales prior to the decriminalisation of consensual homosexual conduct in 1967,[13] and to that extent there is little doubt that the continued criminalisation in former British colonies is a result of colonialism, notwithstanding the second narrative above. The criminalisation is often justified as necessary for protecting morality and cultural beliefs,[14] therefore individuals are stigmatised and/or subjected to discriminatory behaviour based on their actual or perceived sexual orientation and gender identity. The laws and their harmful effects continue to violate the rights of LGBT people and perpetuate stigma and hostility.

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[7] Epprecht, *Hungochani: The History of a Dissident Sexuality in Southern Africa* (McGill-Queen's University Press, 2004) at 263 – 4.
[8] Epprecht, *Sexuality and Social Justice in Africa: Rethinking Homophobia and Forging Resistance* (Zed Books Ltd, 2013) at 125.
[9] Statement of former President Daniel Arap Moi reported in 'Being Gay in Kenya', 22 February 2006, available at: www.news24.com/Africa/Features/Being-gay-in-Kenya-20060222 [last accessed 13 March 2019].
[10] Murray and Roscoe, supra n 6 at 9.
[11] Essien and Aderinto, 'Cutting the Head of the Roaring Monster: Homosexuality and Repression in Africa' (2009) 30 African Study Monograph 121-135.
[12] See, for example, s.162 Kenya Penal Code 1948; s.164 – 167 Botswana Penal Code 1964; s.73 Criminal Law 1996 of Zimbabwe; s.214 – 217 The Nigeria Criminal Code Act of 1990 which exists alongside the Same Sex (Prohibition) Act 2013 at supra n 4.
[13] Human Rights Watch, supra n 2 at 7.
[14] United Nations Human Rights Council, *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23.

The criminalisation of same-sex conduct renders LGBT people vulnerable at the hands of ordinary citizens and contributes to a climate of impunity for crimes committed by members of the public. In 2015, in a report based on Kenya, Human Rights Watch reported that in some instances the police refused to investigate cases where sexual minorities had suffered violence, and victims often did not report incidents because they believed that the authorities would not assist them or would arrest them.[15] This situation is not unique to Kenya as there have been similar reports in several other countries across sub-Saharan Africa.[16] The relationship between Christianity and politics is a closely linked one and politicians and church leaders have made it clear how same-sex practices are not consonant with the values of African culture, therefore denouncing the recognition of LGBT rights. Despite the laws and social attitudes that continue to perpetuate discrimination on the basis of sexual orientation and gender identity, LGBT rights activists are forging resistance in the hopes of achieving recognition and equal protection under the law.

3. TURNING THE TIDE: UTILISING POLITICAL STRUCTURES AND LEGAL INSTITUTIONS

Advocates for LGBT rights have used an array of tactics to challenge discrimination. The strategies employed may involve, but are not limited to, legal, political and social campaigns. In sub-Saharan Africa, the LGBT movement has grown exponentially with organisations embracing litigation and law reform strategies to point out injustices and grievances of LGBT people. Beyond the boundaries of the court room, the law also has the potential to shape social response and judicial decisions are important because they send broader symbolic messages to

[15] Human Rights Watch, *The Issue is Violence Attacks on LGBT People on Kenya`s Coast*, 28 September 2015, available at: www.hrw.org/report/2015/09/28/issue-violence/attacks-lgbt-people-kenyas-coast [last accessed 5 January 2019].

[16] Human Rights Watch, *No Choice but to Deny Who I am,* 8 January 2018, available at: www.hrw.org/report/2018/01/08/no-choice-deny-who-i-am/violence-and-discrimination-against-lgbt-people-ghana [last accessed 28 April 2019].

society about what is acceptable.[17] Legal challenges allow LGBT activists to highlight the inconsistencies and contradictions of the laws, but to also demand reform that is responsive to marginalised communities. The concept of public visibility matters to social movements as it provides them with social and political relevance, enhancing the activists ability to communicate their agenda and an opportunity to state their grievances.[18] LGBT rights activists make strategic choices not only to attract attention in the mainstream media, but to also control public presentations of their movements and organisations.[19] Therefore, when sexual minorities reveal their non-normative sexualities they seek to overcome the isolation imposed by the ideological, political and social heteronormative mechanisms that force them to remain silent about their sexual desires.[20]

Over the years, there have been several legal victories and defeats in African courts that have highlighted the friction between the law, social change and resistance to granting recognition to LGBT people. The cases have demonstrated a willingness by the judiciary in some states to declare the unconstitutionality of discriminatory laws. The use of the litigation strategy or legal mobilisation enables individuals or advocacy groups to pursue cases in court that challenge core assumptions about the extent of a minority groups rights.[21] Scholars have proposed several theoretical understandings that account for the underlying causes of legal mobilisation.

[17] Bernstein, Marshall and Barclay, 'The Challenge of Law: Sexual Orientation, Gender Identity, and Social Movements' in Mary Bernstein, Anna-Maria Marshall and Scott Barclay (eds) *Queer Mobilizations: LGBT Activists Confront the Law* (New York University Press, 2009) at 7.
[18] Currier, *Out in Africa: LGBT Organizing in Namibia and South Africa* (University of Minnesota Press, 2012) at 1.
[19] Currier, supra n 18 at 4.
[20] Kosofsky Sedgwick, *Epistemology of the Closet* (University of California Press, 2008) at Chapter 1.
[21] Bernstein, Marshall and Barclay, supra n 17 at 1.

A. The Political Opportunity Structure

The political opportunity perspective contends that social movements often emerge in response to circumstances in the broader environment.[22] The primary focus of this perspective is that advocacy groups are the beneficiaries of increasing political vulnerability, which may stimulate or increase mobilisation efforts, and create opportunities for them to manipulate the political system for their benefit. For example, in South Africa, the grass roots resistance to apartheid and the reaction of the outside world posed a sustained challenge to the regime which, when faced with a myriad of internal and external pressure, eventually submitted, and in its place a democratic state emerged. This pivotal result, and the drafting of a new Constitution, gave the advocacy groups an opportunity to raise LGBT rights into legal and political consciousness by lobbying political figures involved in the drafting of the new Constitution.

The political opportunities are limited in countries where political leaders not only push for the introduction of discriminatory laws, but also encourage anti-LGBT rights rhetoric which permeates in speeches, press statements and all manner of public policy. For instance, Uganda's hugely popular Anti-Homosexuality Act 2014 ('AHA') was promised 'as a Christmas present' to its supporters.[23] In Malawi, following the unexpected death of President Bingu wu Mutharika in 2012, Vice-President Joyce Banda took over power and in her first public speech called for the repeal of Malawi's ban on homosexuality.[24] From the outset, this act was pioneering as Banda's predecessor publicly opposed same-sex relations, referring to

[22] McAdam, 'Culture and social movements' in Larana, Johnston and Gusfield (eds), *New Social Movements: from ideology to Identity* (Temple University Press, 1994) at 39.
[23] BBC News, 'Uganda to pass ant-gay law as Christmas gift', 13 November 2012, available at: www.bbc.co.uk/news/world-africa-20318436 [last accessed 28 April 2019].
[24] BBC News, 'Malawi to overturn homosexual ban, Joyce Banda says', 18 May 2012, available at: www.bbc.co.uk/news/world-africa-18118350 [last accessed 28 April 2019].

them as 'a crime against our culture, our religion and our laws.'[25] The statement was also significant as Malawi would have been the first nation since South Africa to decriminalise homosexuality. However, despite her hopes for reform, following intense public pressure and lobbying from religious leaders, Banda backtracked stating 'anyone who has listened to the debate in Malawi realises that Malawians are not ready to deal with that right now'.[26]

In January 2019, the Angolan National Assembly voted by a majority of 155 to 1 to abolish the provision in the Penal Code prohibiting consensual same-sex relations. The most important factor that contributed to decriminalisation was the change in political leadership in September 2017. This brought with it the political impetus to address an issue that has not enjoyed popular support. One of the great strengths of the political opportunity perspective is the notion that the political configuration of the state shapes the opportunities afforded to movements; shifts in that configuration can create or diminish opportunities for action. Essentially, adverse circumstances exist in one political system and more favourable ones in another one; or within a single system, circumstances become more or unfavourable over time.[27]

B. The Availability of Master Frames

In addition to maximising political opportunities, McAdam argues that in order for a social movement to achieve legal recognition, there needs to be an availability of 'master protest frames' which allow sexual minority groups to 'tap highly resonant ideational strains in mainstream society…as a way of galvanizing activism.'[28] According to De Vos, in South Africa, the most powerful master frame available to the gay and lesbian movement was the

[25]The Telegraph, 'Malawi president pardons gay couple after UN Pressure', available at: www.telegraph.co.uk/news/worldnews/africaandindianocean/malawi/7782886/Malawi-president-pardons-gay-couple-after-UN-pressure.html [last accessed 28 April 2019].
[26] Mawerenga, *The Homosexuality Debate in Malawi* (Mzuni Press, 2018) at 73.
[27] Andersen, *Out of the Closets and into the Courts: Legal Opportunity Structure and Gay Rights Litigation* (The University of Michigan Press, 2006) at 7.
[28] McAdam, supra n 22 at 38.

anti-apartheid struggle. The movement was ultimately successful because its leaders were fortunate and wise enough to present their struggle as forming part of a broader struggle against oppression of the apartheid state. Gay men and lesbians could refer to this struggle and show that their struggle fitted the same frame; the struggle for human rights and the emancipation of the oppressed.[29]

C. The Legal Opportunity Structure

But what happens where LGBT rights groups do not have a master frame on which to attach themselves or where they encounter political opponents who are unwilling to consider their grievances? In situations such as this, they may seek to approach the judiciary as an avenue to achieving legal change. The concepts deployed in the courts such as rights, equality, and injustice, represent persuasive and powerful symbols for movements for social change. These legal arguments can offer LGBT rights activists a framework on the basis of which fundamental legal reform may be achieved.[30] The use of litigation places the law at the centre of fierce symbolic competitions where both pro-LGBT rights and anti-LGBT rights groups vie for the sympathies of the public and policymakers.[31]

Although the courts offer an alternative route to policy change, access to the legal system is not an unmitigated benefit as the courts may uniformly reject the claim, unanimously accept the claim, or be divided among themselves as to the merits and implications of the case.[32] As the perspective of the judiciary affects the progress and outcomes of legal mobilisation, the legal challenges brought by LGBT rights groups before sub-Saharan African courts have been met with mixed results with some courts recognising the rights of sexual

[29] De Vos, 'The 'inevitability' of same-sex marriage in South Africa`s post-apartheid state' (2007) *South African Journal on Human Rights* 432 at 436.
[30] Bernstein, Marshall and Barclay, supra n 17 at 1.
[31] Ibid. at 2.
[32] Andersen, supra n 27 at 10.

minorities, and other courts denying those same rights. According to studies that examined litigation strategies, the primary factor that influenced the success of a rights' group in court was its ability to mobilise organisational resources, such as, internal organisation facilitating coordination of litigation efforts; the skill in forming coalitions with allies; and adequate funding to support the litigation campaign.[33]

A challenge that LGBT rights activists face when seeking to rely on the litigation strategy is that they are not only constrained by the political environment which may oppose their recognition, but they must also substantiate their claims to ensure that they fall within existing 'constitutional, statutory, administrative, common, and case law'.[34] Therefore, they must frame their arguments in a manner which is most persuasive in the hopes of achieving the desired outcomes. In sub-Saharan African jurisprudence, the most frequently used arguments are that discriminatory and sodomy laws violate the right to freedom of association and assembly, the right to privacy and equality before the law.

4. LEGAL MOBILISATION

Before 1995, sub-Saharan Africa experienced gay and lesbian visibility only in South Africa when the LGBT rights movements emerged in the 1980s and gained momentum with the anti-apartheid struggle.[35] This section provides a historical overview of the LGBT movement in South Africa, taking into consideration the legal and political struggle for emancipation and the prohibition of discrimination based on sexual orientation. The history of LGBT rights movements in other sub-Saharan countries has been relatively short in comparison to South

[33] Ibid. at 5.
[34] Ibid. at 12.
[35] Palmberg 'Emerging Visibility of Gays and Lesbians in Southern Africa: Contrasting Contexts' In Barry, Duyvendak and Krouwel (eds) *Global Emergence Of Gay & Lesbian Politics* (Temple University Press, 1999) at Chapter 11.

Africa. However, in recent years, there has been an eruption of legal challenges with advocacy groups utilising the litigation strategy to achieve legal recognition and reform.

A. The South African Experience

Prior to the repeal of sodomy laws in South Africa, the common law criminalised same-sex male activities and prohibited sexual acts that were 'contrary to the order of nature'.[36] The law also prohibited any male from committing gross indecency whether in public, private or at a party.[37] In the 1960s, the apartheid regime discovered that private parties were being held by the gay community and following a raid at such a party, the governing National Party established stricter and more repressive laws[38] due to the concern that '..if unchecked, homosexuality would bring about the utter ruin of civilization in South Africa'.[39] The Immorality Amendment Act 1969 increased the regulation of sex between men in a number of ways but also amended the Immorality Act 1957 (later renamed by the Immorality Amendment Act 1988 to become the Sexual Offences Act 1957). The most significant amendment was set out in the 1957 Act which provided that 'a male person who commits with another male person at a party any act which is calculated to stimulate sexual passion or to give sexual gratification, shall be guilty of an offence'.[40]

The National Party's policy placed high values on heterosexual marriage, reproduction, and family life and established strict racial and social requirements to determine when procreative sexual activity would be considered legitimate in the eyes of the state.[41] Therefore, homosexuality was unacceptable as it compromised the sanctity of marriage and procreation,

[36] *R v Gough and Narroway* [1926] CPD 159 at para 161.
[37] Retief, 'Keeping Sodom out of the Laager: State Repression of Homosexuality in Apartheid South Africa', in Gevisser and Cameron (eds) *Defiant Desire: Gay and lesbian lives in South Africa* (Routledge, 1995) at 101-3.
[38] Currier, supra n 18 at 31.
[39] Retief, supra n 37 at 101.
[40] Section 20A.
[41] Leap, 'Language, Belonging and (Homo)sexual Citizenship in Cape Town, South Africa' in Leap and Boellstorff (eds) *Speaking in Queer Tongues: Globalisation and Gay Language* (University of Illinois, 2004) at 138.

and the law enabled intrusion into private lives, as well as prohibiting gay parties. It was not until the fall of the National Party's rule and the drafting of the first democratic Constitution began, that the LGBT advocacy groups advanced their agenda and took strategic steps that ensured the inclusion of sexual orientation as a protected category in the Constitution. This was a significant turning point for the LGBT rights movement in South Africa and laid the foundation for the expansion of rights to also include the recognition of same-sex marriage.

Prior to the 1980s there was little indication of an LGBT rights struggle in South Africa. In the 1960s there was a growing gay sub-culture and white lesbians and gay men dominated the movement's early years.[42] However, it struggled to maintain its visibility in the face of state repression of homosexuality. In 1966, the Legal Reform Movement was established to lobby for an end to police harassment of consenting adult relationships.[43] It sought reform of discriminatory laws against 'sodomy' and 'unnatural offences' between consensual adults. While the Legal Reform Movement placed sexual minority rights directly in the public arena for the first time in Africa, it failed to achieve legal reform in abolishing discriminatory laws, or the enactment of laws recognising same-sex relationships. The Movement also failed to instigate a national agenda for change, partly because it was made up of white middle-class members who were advocating for legal change and non-discrimination at a time when the black population was suffering injustices of the apartheid regime. Consequently, the plight of sexual minorities did not resonate or gain credibility with the wider black population.

The 1980s brought with it a heightened politicisation of the gay struggle, but there were divisions within gay movement organisations. The white, middle-class Gay Association of South Africa marginalised black members and maintained an apolitical stance by refusing to

[42] Currier, supra n 18 at 25.
[43] Epprecht, supra n 8 at 151.

take a stand against apartheid.[44] Consequently, this stance led to the demise of the organisation and activists adapted their strategies to more political approaches. The Lesbian and Gays against Oppression ('LAGO' later replaced by Organisation of Lesbian and Gay Activists 'OLGA') was formed in 1986 and was the first gay and lesbian organisation that aligned itself with the anti-apartheid struggle. This was followed by the Gay and Lesbian Organisation of the Witwatersrand in 1988 and, like LAGO, the organisation emphasised that the struggles against homophobia and racism were indivisible.[45] The emergence of anti-apartheid organisations such as OLGA, which was inclusive and multiracial in its structure, ushered in a new trend of visibility to the South African LGBT rights movement. This fostered a coalition between OLGA and the United Democratic Front, a broad-based political alliance aligned with the African National Congress (ANC). This enabled activists to convincingly argue the case for gay rights with the ANC, a key player in the negotiation process that led to the adoption of the 1993 Interim Constitution.[46]

The inclusion of the sexual orientation clause in the Interim Constitution was strategically a significant victory. Nonetheless, to ensure its inclusion in the final Constitution, members of the gay and lesbian community formed the National Coalition for Gay and Lesbian Equality ('NCGLE'). The key objectives of NCGLE were to ensure the retention of sexual orientation in the 1996 Constitution, and to manage the litigation strategy that aimed to secure full and equal enjoyment of legal rights and benefits.[47] The success in the retention of the sexual orientation clause is recognised as the product of an extensive lobbying campaign by NCGLE. De Vos contends that these efforts focused on the discrimination based on the criminal law and deliberately did not draw attention to the possibility that the retention of the

[44] Currier, supra n 18 at 34.
[45] De Vos, supra n 29 at 435.
[46] Ibid. at 437.
[47] Ibid. at 439.

clause could lead to the legalisation of same-sex marriage.[48] To adopt this approach would have been too radical, therefore NCGLE adopted a 'strategy of persuasion rather than confrontation'[49] so as to prevent a backlash of any kind. The lobbying efforts were specifically not aimed at confronting societal homophobia because of the strong possibility of a disastrous adverse reaction, but instead NCGLE presented a moderate and disciplined image of respectable LGBT rights activism targeted at political parties and state leaders.[50]

Building on the success of the inclusion of sexual orientation in the 1996 Constitution, NCGLE, which later became the Lesbian and Gay Equality Project, successfully pursued litigation in which the Court held the common law offence of sodomy was unconstitutional,[51] allowing same-sex partners to adopt children[52] and the right for same-sex couples to marry[53] as enshrined in the Civil Union Act 17 of 2006. Despite the progressive nature of the South African constitution and robust legislation, it continues to experience high levels of rape and homophobic crime with four out of ten LGBT people reporting that they knew someone who had been murdered for their sexual orientation or gender identity.[54]

B. Divergent Approaches on Registration in Botswana, Kenya and Uganda

When activists have sought to exercise the right to assembly and association as guaranteed by their respective constitutions,[55] they have faced resistance from state officials who have been

[48] De Vos, supra n 29 at 440.
[49] Oswin 'Producing Homonormativity in Neoliberal South Africa: Recognition, Redistribution, and the Equality Project' (2007) 37 *Signs* 649 at 652.
[50] Currier, supra n 18 at 41.
[51] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) at para 30.
[52] *Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC).
[53] *The Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC).
[54] International Lesbian, Gay, Bisexual, Trans and Intersex Association, *State-Sponsored Homophobia*, March 2019, available at: www.ilga.org/state-sponsored-homophobia-report [last accessed 10 November 2019] at page 93.
[55] Section 13 Constitution of Botswana 1966; Article 36 Constitution of Kenya 2010; Article 29 Constitution of the Republic of Uganda 1995.

reluctant to permit the registration of non-governmental organisations (NGO) which promote LGBT rights and advocate for law reform.

(i) Botswana

The Lesbian, Gays and Bisexuals of Botswana ('LEGABIBO'), was founded by DITSHWANELO, the Centre for Human Rights in 1998 as a project and was the first LGBT organisation in Botswana. However, due to lack of resources, the project was inactive until 2001 when it resurfaced under the Botswana Network on Ethics, Laws and HIV/AIDS.[56] Subsequently, in 2012, LEGABIBO made its first unsuccessful attempt to register as an organisation. In *Attorney General of Botswana v Thuto Rammoge and 19 others,*[57] the group initiated proceedings in the High Court against the Minister of Labour and Home Affairs who had upheld the decision of the Department of Civil and National Registration to refuse the registration of LEGABIBO. The Court overruled the decision of the Minister and ordered that LEGABIBO be registered, stating that section 3 of the Constitution provides that 'every person in Botswana is entitled to the fundamental rights and freedoms of the individual', and since persons of LEGABIBO are 'persons' albeit with different sexual orientation, it was difficult to imagine that they were not included in the phrase 'every person'. If non-heterosexuals were to be excluded from enjoying the fundamental right and freedoms, the Constitution would have expressed this in clearer terms.[58] Furthermore, the decision to refuse registration of LEGABIBO unjustifiably infringed on the right to freedom of association and assembly.[59]

Although the Attorney General appealed this decision, in March 2016, the Court of Appeal dismissed the case stating:[60]

[56] www.legabibo.wordpress.com/about/ [last accessed 23 April 2019].
[57] [2014] High Court Civil Case No. MAHGB-00175-13.
[58] Ibid. at para 32.
[59] Section 13 Constitution of Botswana 1966.
[60] *Attorney General of Botswana v Rammoge and 19 others* [2016] Civil Appeal No. CACGB-128-14 at para 60.

> Members of the gay, lesbian and transgender community, although no doubt a small minority, and unacceptable to some on religious or other grounds, form a part of the rich diversity of any nation and are fully entitled in Botswana, as in any other progressive state, to the constitutional protection of their dignity.

Throughout the four years of litigation, LEGABIBO took several key steps to effectively mobilise the LGBT community and supporters. LEGABIBO recognised that to succeed in its advocacy, it was necessary for the organisation to engage society and address traditional and community leadership on the experiences and needs of sexual minorities in their communities.[61] LEGABIBO implemented an innovative and extensive six phase strategy that involved: [62]

1) Analysing the legal situation in Botswana to determine whether the legal environment was conducive for litigation. This included exploring the registration options available and the arguments that could be raised in support.
2) Instructing advocates with experience in not only human rights litigation but also knowledge on LGBT issues.
3) Engagements and conversations with members of the community to communicate findings of the situational analysis and allow them the opportunity to volunteer as litigants.
4) Mobilising individuals, NGOs, allies, church leaders, researchers and doctors who would not only act as litigants in the matter, but also become members of LEGABIBO once the organisation was registered.

[61] McAllister, *LGBT Activism and 'Traditional Values': Promoting Dialogue Through Indigenous Cultural Values in Botswana*, available at: www.academia.edu/15348344/LGBT_Activism_and_Traditional_Values_Promoting_Dialogue_through_Indigenous_Cultural_Values_in_Botswana [last accessed 14 April 2020].
[62] LEGABIBO, *Lessons Learned, As the Court Pleases: An Assessment of Advocacy Strategies For Strategic Litigation*, available at: https://international.coc.nl/wp-content/uploads/2018/08/LL-47-LEGABIBO-Botswana.pdf [last accessed 17 February 2020].

5) Developing an advocacy strategy that focused on harnessing support from the public.
6) Building allies with organisations which offered legal, technical and financial support, which included building good relationships with the media.

Key to the strategy adopted by LEGABIBO was to communicate clear and consistent messages about their objectives, and to depict the LGBT community in a positive light in the hope of shifting public perception and possibly influencing the opinions of decision makers. Furthermore, it was important not to frame the case as a challenge on the laws that criminalise same-sex relations as prescribed in the Penal Code, but to use the incremental approach and focus on freedom of association.[63] Of significance, was the representation and visibility of the LGBT community during public engagements and court hearings where large numbers attended in support. By presenting a united front at each court hearing, this emphasised that the refusal to register LEGABIBO would deny many the freedom to associate. The success of *Rammoge* created an opportunity for dialogue and raising awareness, but it also created the space for activists in Botswana to 'assert and advocate for their basic human rights and freedoms'.[64] Furthermore, comments made by the judges in this case could be said to provide a platform for the recognition of LGBT people, not only in the context of Botswana but also more generally in the African continent.[65]

(ii) Kenya

The LGBT rights movement in Kenya is constantly reviewing its strategies to incorporate a multifaceted approach to achieve equality and non-discrimination under the law. In 2015, the

[63] Ibid. at 4.
[64] Esterhuizen and Guthrie, 'Towards Freedom of Association and Universality of Rights: The Botswana Court of Appeal Decision in Attorney General v Rammoge and 19 Others' in *Goal 16 of the Sustainable Development Goals: Perspectives from Judges and Lawyers in Southern Africa on Promoting Rule of Law and Equal Access to Justice* (South African Litigation Centre, 2016) at 172.
[65] Ibid. at 174.

Constitutional Division of the High Court of Kenya ruled in *Eric Gitari v Non-Governmental Organisations Co-ordination Board & 4 Others*[66] that lesbian, gay, bisexual, intersex, transgender and queer persons could formally register their organisations and welfare groups and that the justification of restricting rights on morality grounds was unacceptable. This case concerned the registration of National Gay and Lesbian Human Rights Commission ('NGLHRC') as an NGO with the Non-Governmental Organisation Board ('NGO Board').

In accordance with the requirements to register an NGO, the claimant sought to reserve with the NGO Board names for the Commission which included the words 'gay and lesbian'. The manner of registration of an organisation is a two-step process requiring approval of the proposed name from the Director of the NGO Board,[67] and, once such approval has been obtained, submission of an application for consideration by the NGO Board.[68] The Director rejected the application on the basis that the Commissions name was 'unacceptable' as the Penal Code[69] criminalised same-sex conduct, therefore, the registration would promote criminal activities. The NGO Board relied on Regulation 8(3)(b) of the NGO Regulation of 1992, which provides that an application can be rejected if 'such name is in the opinion of the director repugnant to or inconsistent with any law or is otherwise undesirable'.[70] The refusal to register the NGO was justified as necessary for the protection of Kenyan cultural values and that the promotion of prohibited same-sex acts would be prejudicial to public interest.[71] This position is very much reflective of the rhetoric on rejecting LGBT rights and reinforces that the State should promote morality.

[66] [2015] eKLR.
[67] Regulation 8 Non-Governmental Co-ordination Regulation 1992.
[68] Ibid.
[69] Sections 162, 163 and 165.
[70] Supra n 66 at para 12.
[71] Ibid. at para 34.

Similar to the decision in *Rammoge,* the High Court in Kenya declared that Article 36 of the 2010 Constitution entitles 'every person' the right to freedom of association, which includes all Kenyans despite their sexual orientation. In a unanimous decision, the Court ruled that gays and lesbians have the same fundamental rights as their fellow citizens and are therefore entitled to exercise their 'constitutionally guaranteed freedom to associate by being able to form an association'.[72] The NGO Board immediately appealed the ruling which was dismissed by the Court of Appeal in March 2019.[73] The NGO Board filed 11 grounds of appeal which can be condensed into two main arguments.[74] First, the petition before the High Court was premature as all available remedies had not been exhausted in terms of section 19(1) of the Non-Government Organization Co-ordination Act[75] ('NGOCA 1990') which provides an appeal mechanism to the Minister where an organisation is aggrieved by the decision of the NGO Board. Secondly, the High Court erred in law and fact by effectively reading into the constitution's non-discrimination clause the ground of sexual orientation, and therefore permitting the registration of NGLHRC.

In considering these matters, the Court of Appeal concluded that section 19 of NGOCA 1990 was clear and that an appeal only lies with the Minister when the NGO Board had made a decision, but since the decision to reject the application was made by the Director and not the NGO Board, there could be no appeal to the Minister.[76] Furthermore, there must be a legal reason for limiting the right of association, and as the Penal Code does not criminalise the state of being homosexual, only certain acts, the right of association applied to every person 'their sexual orientation notwithstanding'.[77]

[72] Ibid. at para 148.
[73] *Non-Governmental Organization Co-Ordination Board v Eric Gitari & 4 Others* (Civil Appeal No.145 of 2015).
[74] Ibid. Judgment of Nambuye, JA at page 9.
[75] No. 19 of 1990.
[76] Supra n 73 Judgment of Waki, JA at 14.
[77] Ibid. at 19.

In comparing the different approaches to legal mobilisation, while LEGABIBO has adopted a strength in numbers approach, preferring to associate with other like-minded groups, the NGLHRC on the other hand has pursued litigation with little to no involvement from other LGBT organisations or activists. For example, the LEGABIBO registration case comprised of twenty individual petitioners, whereas Eric Gitari of NGLHRC presented the case in his own interest. Although both cases were ultimately successful, the lack of coalition between organisations or individuals could possibly lead to the unnecessary duplication of cases presented before the courts, as seen in Kenya regarding the decriminalisation of consensual same-sex conduct.[78]

(iii) Uganda

Unlike Kenya and Botswana, the success of registering LGBT rights organisations has not extended to Uganda. In June 2018, the High Court dismissed an application by Sexual Minorities Uganda (SMUG) which sought to challenge the refusal by Uganda Registration Services Bureau (URSB) to register the organisation.[79] The refusal was based on the ground that the objective of SMUG is to advance LGBT rights contrary to section 145 of the Penal Code. Therefore, to permit the registration would directly or indirectly encourage or assist the commission of the offence, regardless of whether the offence is actually committed.[80] In August 2019, SMUG held an advocacy strategy meeting to appeal the decision of the High Court. In light of the Non-Governmental Organisations Act of 2016 which makes it mandatory for all organisations to register with the URSB,[81] but reserves the right to deny registration where the objectives of the organisation are in contravention of the law, NGOs such as SMUG

[78] *Eric Gitari v Attorney General* [2016] eKLR (Petition No.150 of 2016) and Petition No. 234 of 2016 (High Court of Kenya).

[79] *Frank Mugisha, Dennis Wamala and Ssenfuka Warry Joanita v Uganda Registration Services Bureau* Miscellaneous case no 96 of 2016.

[80]SMUG, 'Sexual Minorities Uganda Files Memorandum of Appeal', 24 June 2019, available at: www.sexualminoritiesuganda.com/sexual-minorities-uganda-files-memorandum-of-appeal-against-high-court-ruling-and-orders-of-honorable-lady-justice-patricia-basaza-wasswa/ [last accessed 15 November 2019]

[81] Section 31.

are susceptible to denial of registration on the misconception that their activities are in contravention of section 145 of the Penal Code. While this may not necessarily prevent SMUG from carrying out activities to improve the lives of sexual minorities, the refusal to register the organisation sends a broader message that Uganda is resistant to recognising LGBT rights in any form.

C. **Challenging the Criminalisation of Consensual Same-Sex Relations**

The decriminalisation of consensual same-sex relations has been the subject of litigation in Botswana, Kenya and South Africa. However, no case has been brought before the Ugandan courts. Instead, activists in Uganda have sought to prevent the further criminalisation of homosexuality.

In South Africa, following the successful retention of sexual orientation in the 1996 Constitution, the next objective for NCGLE was to challenge the common law and statutory provisions [82] which effectively criminalised homosexuality. NCGLE employed a narrow strategic agenda dominated by carefully crafted and controlled litigation, as it felt the lobbying process used in the sexual orientation campaign had placed it in a strong position to bring cases before the courts.[83] As part of its controlled litigation strategy, NCGLE brought together a range of organisations that supported its objectives and committed to embarking on court action using a collaborative approach. [84] The key aim for NCGLE was to establish a strong jurisprudential foundation on which to pursue further LGBT rights cases, but it was mindful to

[82] Sexual Offences Act No. 23 of 1957.
[83] De Vos, supra n 29 at 443.
[84] Louw, 'A Decade of Gay and Lesbian Equality Litigation' in du Plessis and Pete (eds) *Constitutional Democracy in South Africa 1994-2004* (LexisNexis Butterworths, 2004) at 66.

adopt a conservative and cautious approach and not to bring an application that 'would be so out of tune with public sentiment' such as pursuing same sex marriage.[85]

National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others,[86] was the first Constitutional Court judgment on alleged discrimination based on sexual orientation. The Constitutional Court confirmed an order of the High Court[87] declaring invalid and unconstitutional the common-law offence of sodomy and statutory provisions, which criminalised consensual same-sex relations. The Constitutional Court held that they violated the constitutional rights to equality, dignity and privacy. In delivering the Court's judgment, Ackermann J stated that gay men were a permanent minority in society and had suffered in the past from patterns of disadvantage. Furthermore, the discrimination gravely affected the rights and interests of gay men and deeply impaired their fundamental dignity.[88] In his separate concurring opinion, Sachs J indicated that morality could not serve as a justification to limit fundamental rights beyond what was permitted by the constitution:[89]

> A state that recognises difference does not mean a state without morality or one without a point of view…it is impartial in its dealings with people and groups but is not neutral in its value system. The Constitution certainly does not debar the state from enforcing morality. Indeed, the Bill of Rights is nothing if not a document founded on deep political morality. What is central to the character and functioning of the state, however, is that the dictates of the morality which it enforces, and the limits to which it may go, are to be found in the text and spirit of the Constitution itself.

[85] Ibid. at 67.
[86] 1999 (1) SA 6 (CC). The nine judges were unanimous.
[87] *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* 1998 6 BCLR 726 (W).
[88] Supra n 86 at para 26.
[89] Ibid. at para 136.

In Botswana, prior to the changes made by the Penal Code Amendment Act 1998 which removed gender-discriminatory terms from Botswana's legislation, section 164 and 167 of the Penal Code specifically prohibited same-sex sexual activity between males. Under these provisions, carnal knowledge against the order of nature and indecent practices whether in public or private were criminalised. Although the Penal Code does not provide a definition of 'carnal knowledge', this has been interpreted to mean sexual intercourse and although the provisions are gender neutral themselves, they had the practical effect of limiting sexual activity between consenting same-sex partners. The Constitution of Botswana provides at section 3 that without discrimination 'every person in Botswana is entitled to the fundamental rights and freedoms…whatever his or her race, place of origin, political opinions, colour, creed or sex'. [90]

Under section 15, the expression 'discriminatory' means affording different treatment to different people, attributable wholly or mainly to the characteristics described in section 3. This does not include sexual orientation or gender identity as a possible ground upon which an allegation of discrimination can be made. As such, it has been left to the courts to interpret whether the definition of what is discriminatory extends to sexual minorities. Although section 3 when read alongside section 15 does not specifically provide protection on the basis of sexual orientation, in *Attorney General v Dow,* after reviewing authorities from various jurisdictions, the Court of Appeal ruled that the list of protected grounds was illustrative, not exhaustive. Amissah P also stated:[91]

> the very nature of the constitution requires that a broad and generous approach be adopted in the interpretation of its provisions…and where rights and freedoms are

[90] Chapter II: Protection of Fundamental Rights and Freedoms of the Individual.
[91] [1997] BLR 119 at para 131.

conferred on persons by the constitution, derogations from such rights and freedoms should be narrowly or strictly construed.

The constitutionality of sections 164 to 167 of the Penal Code prohibiting same-sex sexual activity was unsuccessfully challenged in *Kanane v State.*[92] In 1995, two men were charged with committing an act of gross indecency and engaging in unnatural sexual acts. After acting on a tip-off, police raided Mr Norrie's residence and caught him engaged in sexual intercourse with Mr Kanane. Mr Norrie, an American citizen, pleaded guilty and left the country, Mr Kanane on the other hand pleaded not guilty and asserted that the sections of the Penal Code were in contravention of section 3 of the Constitution, in particular, the right to non-discrimination,[93] the right to privacy,[94] and the freedom of assembly and association.[95] Furthermore, it was contended that the alleged offences were committed in private between two consenting males. DITSHWANELO intervened to establish this as a test case for the decriminalisation of same-sex sexual activity and commenced a constitutional challenge in the High Court.

In a lengthy and detailed judgment, the High Court dismissed the case and declared that the sections of the Penal Code did not violate any of the provisions of the Constitution and were in accordance with them. The Court placed emphasis on the moral values of society and asserted that any conduct that threatened it ought to be prohibited under the criminal law.[96] In 2003, DITSHWANELO appealed this decision on the basis that the High Court had misinterpreted the provisions of the Constitution and asserted the same arguments. However,

[92] [2003] (2) BLR 67 (CA).
[93] Section 15 Constitution of Botswana 1966.
[94] Ibid. at section 9.
[95] Ibid. at section 13.
[96] Supra n 92 at page 78, Tebbutt JP outlined the judgment delivered in the High Court by Mwaikasu J.

the Court of Appeal ruled that Botswana society was not ready to accept homosexuality and that:[97]

> …from moving towards the liberalisation of sexual conduct by regarding homosexual practices as acceptable conduct, such indications as there are, show a hardening of a contrary attitude.

Essentially, the Court of Appeal concluded that there was no evidence of public support for the decriminalisation of consensual same-sex practices, and that gay men and women did not represent a group or class of persons that had been shown at that stage to require protection under the Constitution.[98]

While the ruling represented a setback for sexual minorities, this galvanised activists and led to the development of a more organised and visible movement. When engaging with advocacy, it is crucial to consider the timing of when to bring a case and whether it is likely to succeed. Had the mood in Botswana been properly assessed to establish whether the legal environment was conducive for litigation on same-sex issues, it is likely to have revealed that there was little appetite from the judiciary to advance LGBT rights, and that there was certainly no desire to decriminalise. Further, it can be argued that *Kanane v State* was poorly timed as DITSHWANELO sought to capitalise on an on-going criminal case and use this as a test case.

It was not until 2019 that the courts had a further opportunity to consider a challenge to the laws criminalising consensual same-sex relations. In the *Rammoge* case, apart from permitting the registration of LEGABIBO, the Court had also confirmed the lawfulness of advocating for a change in the laws that criminalise same-sex relationships and discriminate against people with a same-sex orientation.[99] No doubt encouraged by this statement, in a

[97] Ibid. at page 80.
[98] Ibid. at page 68.
[99] *Attorney General of Botswana v Thuto Rammoge,* supra n 57 at para 40.

ground-breaking decision, the High Court of Botswana ruled that provisions found in the Penal Code of Botswana violated the constitutional rights of LGBT people to dignity, liberty, privacy and equality.

In *LM v Attorney General of Botswana*, the applicant, a gay man, filed an application challenging the constitutionality of sections 164(a), 164(c), 165 and 167 of the Botswana Penal Code. The applicant sought an order that the continued criminalisation of private consensual same-sex sexual activity violates constitutional rights, including, the right to equal protection of the law and freedom from discrimination, [100] the right to liberty[101] and the right not to be subjected to inhuman or degrading treatment.[102] In August 2017, LEGABIBO approached the High Court of Botswana to be admitted to the proceedings as a friend of the Court so as to advance submissions on the practical effect and social impact of the Penal Code provisions. In its submissions, LEGABIBO asserted that decriminalisation is an important step toward achieving Botswana's values of inclusion, tolerance, celebration of diversity, respect for individual dignity and care for the most vulnerable and marginalised in society. Furthermore, LEGABIBO argued that the State had failed to prove that there is a justifiable limitation of fundamental rights, thus, the mere presence of the criminal provisions seriously exacerbates harm towards LGBT people.[103]

On 11th June 2019, in a unanimous decision, the High Court declared that sections 164 and 165 were unconstitutional as they contravened fundamental rights enshrined in the

[100] Section 3 Constitution of Botswana 1966.
[101] Ibid. at section 5.
[102] Ibid. at section 7.
[103] Fact Sheet: *LM v Attorney General of Botswana: Challenging Criminalisation of Same-sex Sexual Relationships,* Available at: www.southernafricalitigationcentre.org/wp-content/uploads/2018/05/Fact-Sheet-1.pdf [accessed 29 April 2019].

Constitution. Furthermore, sexual acts that take place in private would not amount to indecent practices under section 167.[104] The court questioned the purpose of the laws, stating:[105]

> What regulatory joy and solace is derived by the law, when it proscribes and criminalises such conduct of two consenting adults, expressing and professing love to each other, within their secluded sphere, bedroom, confines and/or precinct? Is this not a question of over-regulation of human conduct and expression, which has the effect of impairing and infringing upon constitutionally ordained, promised and entrenched fundamental human rights.

The Court added that 'personal autonomy on matters of sexual preference and choice must therefore be respected…any criminalisation of love or finding fulfilment in love dilutes compassion and tolerance'.[106] This case marks a pivotal point in Botswana's legal journey of recognising LGBT rights. It is particularly notable considering the 2003 decision of *Kanane* in which the Court of Appeal dismissed the case stating 'the time has not yet arrived to decriminalise homosexual practices between consenting adult males in private'.[107] The courts of Botswana have shown themselves to be champions of jurisprudence and set an example in sub-Saharan Africa on the important role the courts can and should play in upholding fundamental rights of all citizens. The decision marks a culmination of several years of public activism and a strategy to incrementally litigate controversial cases and build jurisprudence which acknowledges the rights of LGBT people.

While the recent decriminalisation of same-sex conduct in Botswana represents a step forward on the continent, a similar challenge to the courts in Kenya was unsuccessful. In

[104] *Letsweletse Motshidiemang v Attorney General; LEGABIBO (Amicus Curiae)* MAHGB- 000591-16, (High Court. 2019) at para 228.
[105] Ibid. at para 3.
[106] Ibid. at para 141.
[107] *Kanane v State,* supra n 92 at page 68.

EG & 7 others v Attorney General,[108] the NGLHRC initiated proceedings in 2016 to challenge the constitutionality of sections 162 (a), (c) and 165 of the Penal Code of Kenya. The judgment handed down on 24th of May 2019 disposes two consolidated Petitions, namely, Petition 150 and Petition 234 of 2016. The common thread in both Petitions was that the provisions of the Penal Code validate discrimination and violence towards individuals who do not conform to society's expectations of gender identity, expression or sexual orientation.

In opposing the case, it was contended by the Kenya Christian Professional Forum[109] inter alia that the petitioners sought to 'use judicial craft to legitimize gay liaisons and such other indecent offences and create a new breed of rights which do not exist in the Constitution'.[110] Furthermore, it was also noted that 'criminalization of homosexuality is within the confines of the law and that individual liberty is circumscribed where it offends common good and public policy and that the state has a duty to protect the morals and traditional values recognized by the community'.[111]

In both of these cases it was accepted that the fundamental rights and freedoms enshrined in the Constitution are not absolute and may be limited so as not to prejudice the rights and freedoms of others.[112] In Kenya, on the enforceability, practicability, reasonability and justification of the provisions, Counsel for the Attorney General submitted that the sections are reasonable to protect against sexual immorality and therefore, the right to privacy is justifiably limited under Article 24 of the Constitution.

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[108] The full name of this case is *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)* (High Court Petition 150 and 234 of 2016).

[109] An organisation that comprises Christian professionals from various denominations in Kenya. It states that its mission is to provide professional support in influencing the development of a legal and social environment that is supportive of biblical values in society. See www. kenyachristianprofessionals.wordpress.com/who-we-are/ [last accessed 20 April 2020].

[110] Supra n 108 at para 71.

[111] Ibid. at para 76.

[112] See Article 24 Constitution of Kenya 2010. Cf Section 3 the Constitution of Botswana 1966.

Counsel further submitted that the LGBT community is not a marginalised group as defined by Article 260 of the Constitution given that sexual orientation is by choice.[113]

In essence, Counsel for the Attorney General argued that the impugned provisions should be interpreted in a manner that upholds the social values and morals of Kenya; that it was not the intention of the Constitution 'to put Kenya among the front-runners of liberal democracy on sexual matters'; and that the court has a responsibility to 'preserve and strengthen positive African cultural values and to contribute to the moral wellbeing of society'.[114] When the new Constitution was drafted in 2010, the issue of same-sex relationships was raised, but there was no appetite to legalise them and as such, Article 45(2) of the Constitution only recognises heterosexual marriage. Therefore, the Court concluded that to permit consensual, private same-sex relations would lead to same sex couples living together and this would contradict the spirit of the Constitution.[115] In other words, had there been a desire by the people of Kenya to protect and recognise same sex relations, this would have been reflected in the drafting of the new Constitution in 2010.

In terms of the alleged discriminatory nature of the provisions, the Court determined that the touchstone is the intention of the legislature, and the safest guide to follow is the plain meaning of the language in the statute. [116] Therefore, as section 162 refers to 'any person' committing the offence, on a literal reading of the statute, the provisions do not target any particular group of people. Similarly, while section 165 refers to 'any male person', the court concluded that the plain reading of the provision refers to males in general and not those with a particular sexual orientation.

[113] *EG & 7 others v Attorney General,* supra n 108 at para 184.
[114] Ibid. at para 182 - 183.
[115] Ibid. at para 396.
[116] Ibid. at para 254.

The position in Uganda is well known,[117] but for the purposes of this article it is worth providing a summary of some of the key aspects. The Ugandan Penal Code Act of 1950 provides that any person who 'has carnal knowledge of any person against the order of nature',[118] or 'permits a male person to have carnal knowledge of him or her' commits an offence and is liable to imprisonment for life.[119] Furthermore, the Act prescribes a punishment of seven years of imprisonment for any 'attempt to commit unnatural offences'[120] or engaging in any act of gross indecency with another person whether in public or in private.[121] Although these provisions do not expressly mention homosexuality, they are broadly interpreted to include same-sex relations.

In August 2014, a mere five months after the Parliament of Uganda adopted the Anti-Homosexuality Act ('AHA'), the Constitutional Court of Uganda – in a unanimous judgment – nullified the AHA on the grounds that Parliament had passed the law without the requisite quorum as provided for by the country's constitution. This was one of the most memorable moments in the history of LGBT organising in Uganda, as the AHA in the hands of anti-gay groups, was the ultimate weapon for subjugating pro-gay arguments and sentiments.[122] The AHA contained a number of draconian provisions such as prohibiting homosexuality, which was subject to life imprisonment (substituted for the death penalty),[123] other related offences

[117] For example, Jjuuko and Mutesi, 'The multifaceted struggle against the Anti-Homosexuality Act in Uganda' in Nicol, et al., (eds) *Envisioning Global LGBT Human Rights: (Neo)Colonialism, Neoliberalism, Resistance and Hope* (Institute of Commonwealth Studies, 2018).
[118] Section 145 (a).
[119] Section 145 (c).
[120] Section 146.
[121] Section 148.
[122] Jjuuko and Mutesi, supra n 117 at 270.
[123] See Part II sections 2 – 6.

including aiding and abetting homosexuality,[124] promoting homosexuality[125] and the prohibition of same-sex marriage.[126]

The new law exacerbated an already dangerous environment for LGBT Ugandans, yet activists were able to use its existence to expose the violations suffered by LGBT people, and with it increase organisational efforts to instigate proceedings for the nullification of the AHA. A crucial part of the strategy for defeating the AHA centred around litigation. In order to succeed in defeating the AHA, the Civil Society Coalition on Human Rights and Constitutional Law ('Coalition') adopted a highly coordinated strategy that involved recruiting experienced lawyers who would spearhead the case of *Oloka-Onyango and 9 others v Attorney General.*[127] In preparing the case, the legal team sought the views of professors of law, legal practitioners and key activists on the first draft of the petition. The Coalition also submitted the draft to more than 20 lawyers from jurisdictions all over the world including South Africa, the USA, Canada and the UK. The solidarity with international players was very successful as they, inter alia, provided funding for the Coalition to run its campaigns, put pressure on the Ugandan leadership and portrayed the struggle against the AHA as one of international concern.[128] The Coalition decided to focus on the lack of the requisite quorum for passing the AHA, and not the criminalisation of same-sex conduct as it would alienate some petitioners who were interested in the wider implications of the AHA beyond same-sex relations. Furthermore, the Coalition resolved that decriminalisation would form part of an incremental approach which must be done strategically, for a bad precedent may close the judicial avenue for a long time.[129] The

[124] Section 7.
[125] Section 13.
[126] Section 12.
[127] (Constitutional Petition No.08 of 2014) [2014] UGCC 14.
[128] Jjuuko, 'International Solidarity and its Role in the Fight Against Uganda's Anti-Homosexuality Bill' in Lalor, Mills, Sanchez and Haste (eds) *Gender, Sexuality and Social Justice: What's Law Got to Do with it* (IDS Institute of Development Studies, 2016) at 129.
[129] Jjuuko and Mutesi, supra n 117 at 381- 408.

Constitutional Court held that the Attorney General had failed to adduce evidence that the requisite quorum had been observed, and therefore, the AHA was null and void. The nullification of the AHA was a significant victory and highlights not only the resilience of Uganda's activists, but also the need for a well-coordinated, and harmonised strategy that goes beyond filing a petition with the court.

Legal challenges are perhaps the most direct route to decriminalisation. However, decisions by activists about whether, when and how to pursue litigation is crucial to prevent a backlash from the community, legislature and executive in the form of damaging political pronouncements and the enactment of even stricter legislation. Some activists do not believe that decriminalisation campaigns should be the advocacy goal as this may exacerbate homophobia, and instead the focus should be on social change.[130] Therefore, it is important that activists analyse the political and/or social situation; the levels of discriminatory attitudes in the jurisdiction, along with efforts that have already been made to advance LGBT rights. It is also necessary for activist groups and individuals to assess their own strengths and weaknesses to design the advocacy strategies around those strengths, but to also determine if they need to build coalitions to increase their resources and support network.

5. CONCLUSION

In any given country, the focus of the advocacy used must be determined by local activists, based on their assessments of the local context and strategic planning. The right to equality remains a crucial objective to be realised in most of the countries in sub-Saharan Africa. Equality in this context is not a complex term, it simply requires that all people be treated

[130] Amnesty International, *Speaking Out: Advocacy Experiences and Tools of LGBTI Activists in Sub-Saharan Africa*, February 2014, available at: https://www.amnesty.org/en/documents/afr01/001/2014/en/ [last accessed 1 March 2020].

equally before the law, without discrimination. Yet, the implementation of equality has so far proven a difficult task. In sub-Saharan Africa, discrimination based on sexual orientation and gender identity is so prominent that it requires protection by the judicial system. The role of the courts as guardians of fundamental rights should include the protection of sexual minorities and vulnerable groups. Therefore, where the courts are faced with the task of interpreting constitutional provisions, they must factor in modern democratic systems and the evolving nature of rights to liberty and equality. While there are retrogressive laws that seek to dominate and suppress the fundamental rights of LGBT people, the courts have and continue to play a crucial role in the promotion and protection of their rights.

The work of LGBT organisations and individuals have been fundamentally crucial to disrupting the discourses surrounding sexual orientation and gender identity, in the hopes of reforming discriminatory laws. The power of the litigation strategy cannot be understated as legal decisions have been responsible for producing significant social changes and securing socio-political reform in sub-Saharan Africa. For the LGBT community, the litigation strategy presents the courts with an opportunity to consider weighty issues and to recognise LGBT rights, but this may rely on a culmination of various processes. Despite the challenges discussed above, it is evident that LGBT rights activists have incrementally achieved some success and have made attempts at eroding the regulation of non-heterosexual sexuality. While the latest developments demonstrate that some changes have occurred, there are still many obstacles to overcome.