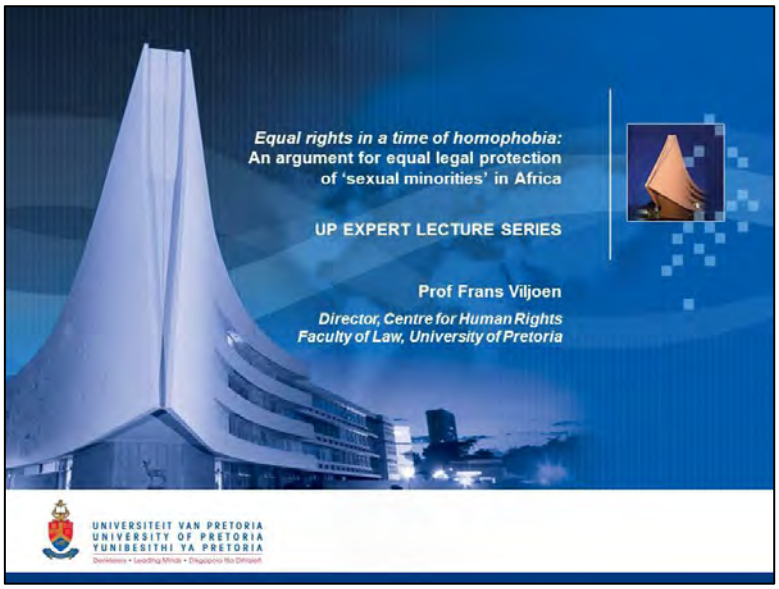
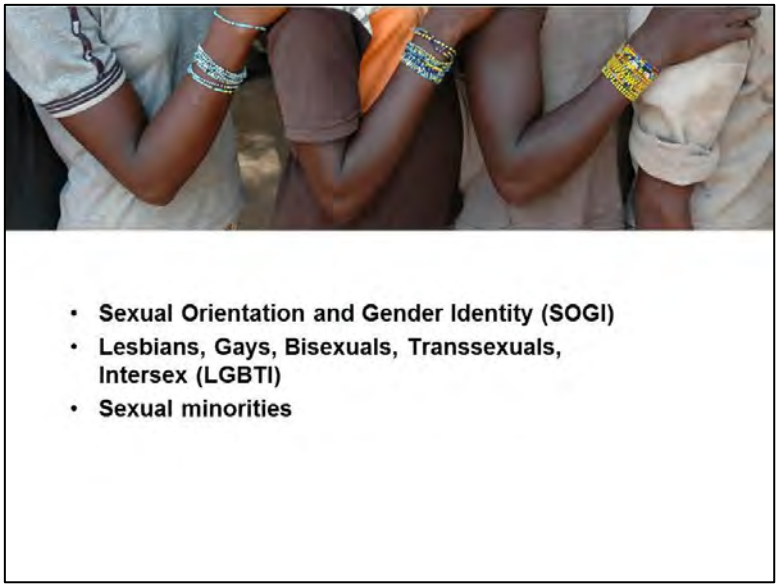


Expert lecture: Equal rights in a time of homophobia: An argument for equal legal protection of 'sexual minorities' in Africa

Introduction

The title of this lecture invokes the novel *Love in the time of cholera*, by Gabriel Márquez, a story of love, unfulfilled for nearly a lifetime, eventually consummated on a river boat sailing under the yellow flag denoting cholera, thus banishing the lovers to indefinite exile.

In most of Africa, prejudice, discrimination and violence against people on the basis of their sexual orientation

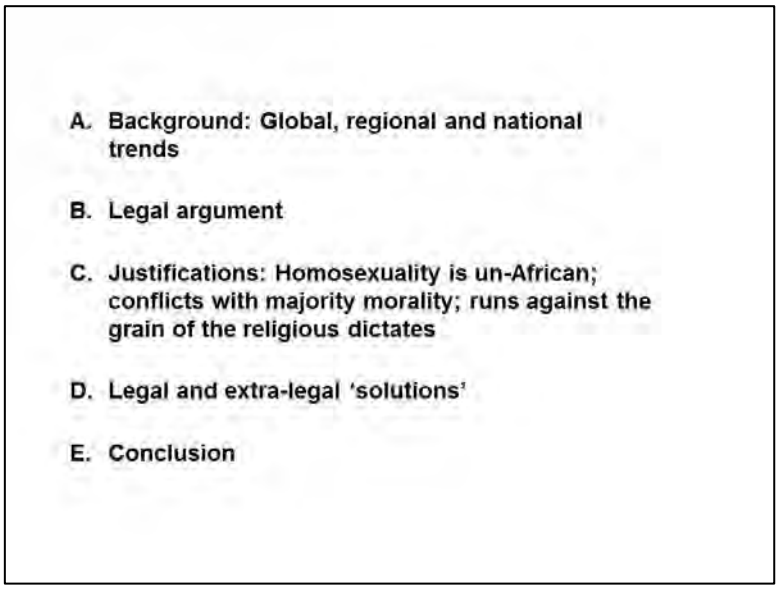


(gays, lesbians and bisexuals), their gender identity (transgendered persons) and their sexual identity (intersex persons) (SOGI) is the norm. Lesbian, gay, bisexual, transgender and intersex (LGBTI) persons (members of sexual minorities) suffer affronts to their dignity and live in fear of violence. There is no place for them in countries flying the flag of homophobia.

Homophobia is range of negative attitudes, ranging from antipathy and contempt to revulsion and hatred, towards LGBTI persons or those perceived to belong to this 'category'. It may but need not be based on irrational fear, like other phobias, because it can also be inspired by religion or cultural

beliefs. While it is an internal attitude, it is externalised as hate speech, acts of violence, or in repressive legislation. Because the triggers differ from person to person, and the context from country to country, there is no single manifestation of 'homophobia', making it perhaps more appropriate to refer to 'homophobias'.

The premise of this lecture is a simple one: The law has an important role in ensuring a dignified life, a life of love and inter-personal connection, to sexual minorities, wherever they are. In summarised form, the argument is: First, it should be recognised that sexual minorities are entitled to the equal protection of the law. Second, because of the pervasive influence of laws criminalising same-sex acts or conduct between consenting adults - both men and women - in private (referred to with the perhaps unfortunate shorthand 'anti-sodomy laws'), these laws should be abolished. My argument does not advance the right to same-sex marriage, for the main reason that this is not currently a central claim of sexual minorities on the continent (outside South Africa).



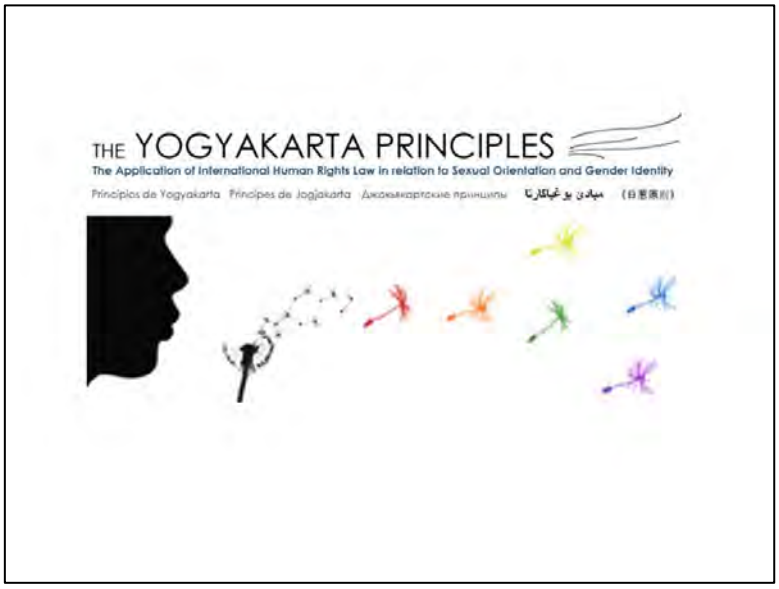
Making a legal argument without engaging in the many forceful counter-narratives permeating our societies would be facile and unproductive. The legal argument is therefore followed by an examination of three of the major justifications for not affording equal protection to the LGBT community: Homosexuality is un-African; it conflicts with majority morality; and it runs against the grain of religious dictates. In addressing these justifications, I leave the comfort zone of human rights law by taking a multi-disciplinary turn to history, anthropology and religious studies. I then consider some extra-legal 'strategies', and offer some concluding thoughts. However, before proceeding to the legal argument and counter-argument, let us consider the most recent global, regional and national background to this issue.

A Background: Global, regional and national trends

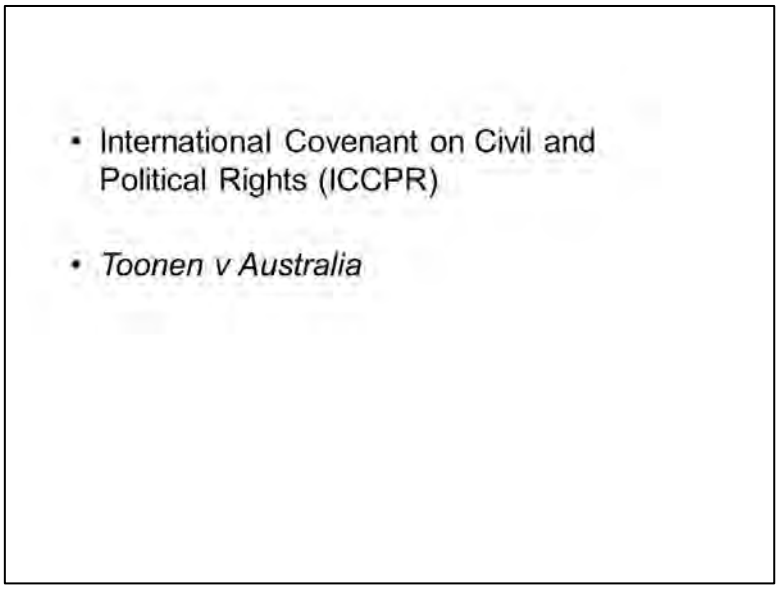
Homosexuality has over the last two decades or so become a prominent subject of discussion across the globe. In much of the world, on the one hand, there is a strong trend towards greater liberalisation. In Africa, on the other hand, there is a countervailing trend, which could be characterised as one of intolerance, rejection and a lack of recognition – in brief, a culture inspired by and reflecting homophobia.

This duality is revealed at the three levels at which states function – the global level under the UN umbrella; the regional, under the auspices of regional organisations; and the national level. I now examine each of these three layers, with a focus on state conduct in the twenty-first century.

Global level



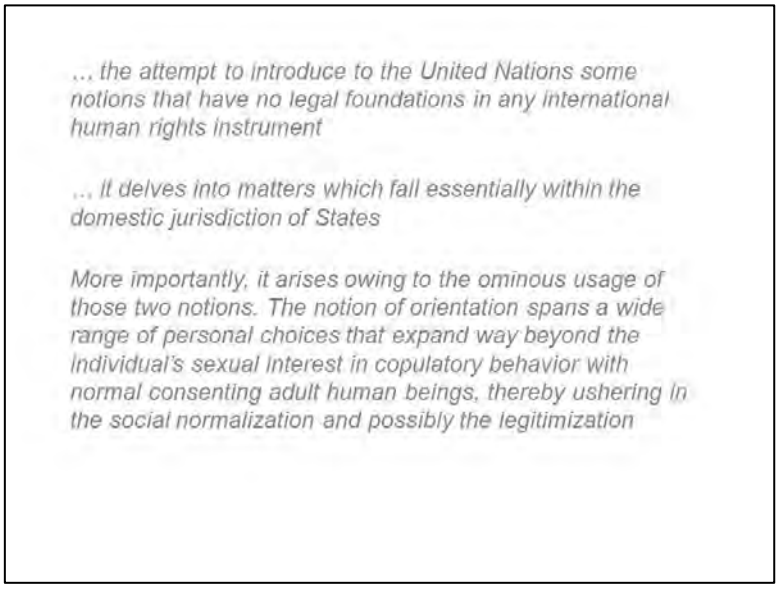
There is no binding UN human rights treaty devoted to the rights of LGBTI persons, or making reference to sexual orientation or gender identity. The closest the international community came is the non-binding Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, adopted – mostly by non-state representatives – in 2006. However, numerous human rights bodies, consisting of independent experts, have – unsurprisingly – held the view that LGBTI persons are rights-holders under these treaties. By way of illustration,



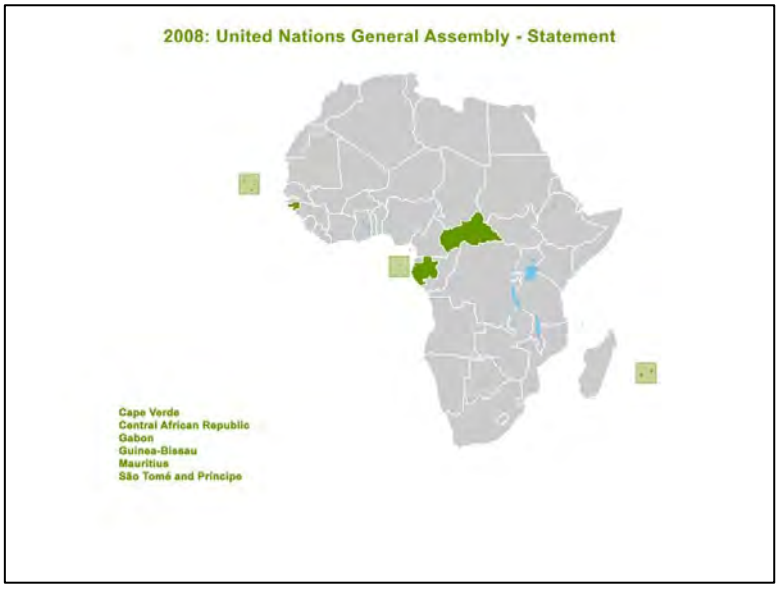
the Human Rights Committee, which monitors the implementation of one of the core UN human rights treaties, the International Covenant on Civil and Political Rights (ICCPR), in the case of *Toonen v Australia*,[1] held that the existence of an anti-sodomy law in one of Australia's federal states, Tasmania, violated the rights to equality and privacy of those affected by the law's very existence.

Even if bodies of independent experts interpret human rights treaties in an inclusive way, it is primarily at the political level where decisive normative advances, which unequivocally set new standards, should take place. The foremost forum for such debates is the UN Human Rights Council. In 2008, uncertain if a resolution on the topic of SOGI would pass at the Council, a group of states

used another political forum, the General Assembly, to issue a statement on this topic. This statement was endorsed by 66 states.



A counter-group of 57 states, spearheaded by the Organisation of Islamic Co-operation (OIC), issued an opposing statement. In this statement, spearheaded by Syria, these states expressed their serious concern about (i) the lack of a legal basis rendering SOGI a protected ground; (ii) the erosion of the principle of non-interference in states' domestic affairs; and (iii) the potential misuse of the term 'sexual orientation' to normalise pedophilia.



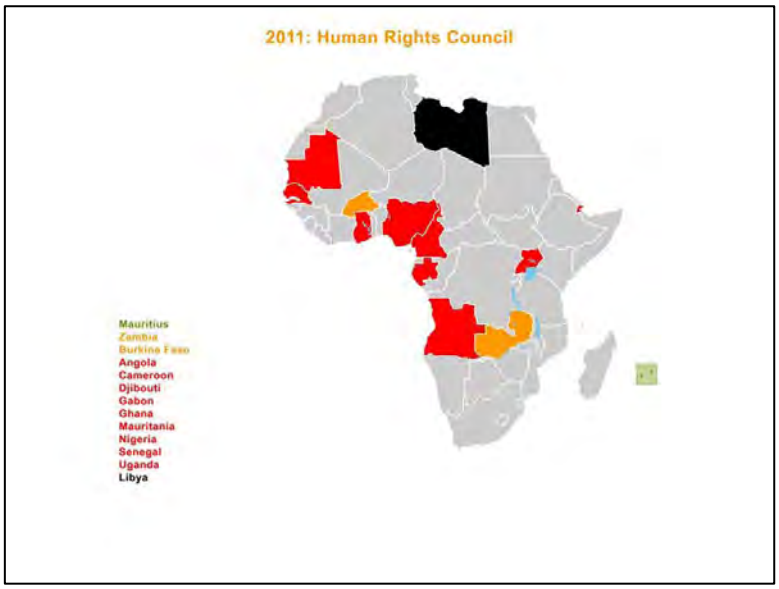
Only six African states lent their support to be initial statement,

while 31 joined the opposing statement. South Africa - surprisingly, given its domestic SOGI protection - did not align itself with any of the two groups.

In March 2011, 85 countries joined a similar statement, this time made at the UN Human Rights Council on Ending Acts of Violence and Related Human Rights Violations Based on SOGI.

Only five out of these 85 states were from Africa, South Africa included this time.

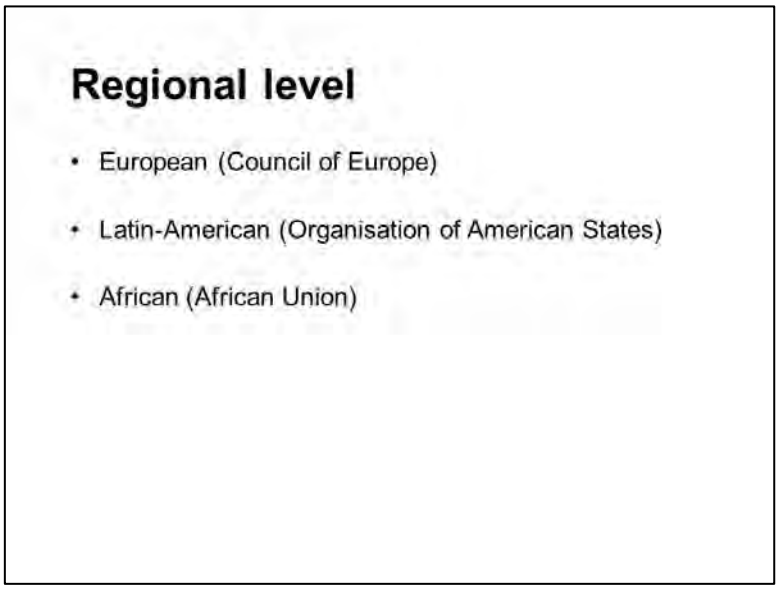
In June 2011, South Africa introduced a first resolution on SOGI for adoption by the Council. This resolution was passed, but of the 13 African members of the Council, only one voted in favour of the South Africa-initiated resolution, eight against, and two abstained.



Its adoption paved the way for the first official United Nations report on the issue prepared by the Office of the High Commissioner for Human Rights. The report's findings formed the basis of a panel discussion that took place at the Council in March 2012 – the first time a United Nations intergovernmental body had held a formal debate on the subject.

Since then, a number of meetings took place in various regions (but not in Africa), to raise awareness of SOGI issues, to identify human rights needs, challenges and priorities, and to discuss next steps and follow-up by the UN. A concluding conference to pool regional insight and collectively strategise took place in Oslo in April this year (2013), co-hosted by Norway and South Africa.

Regional level



At the regional level, the oldest regional human rights system, the European system, has since enlargement in the 1990s been extended to 47 member states. One of the requirements of joining the Council of Europe was the abolition of anti-sodomy laws criminalising consensual sex between adults of the same sex. The Council's main human rights body, the European Court of Human Rights, has since 2000 dealt with an ever-increasing array of cases related to SOGI. In more recently joined member states, the Court played a prominent role in holding that banning gay pride marches (which still happened in Russia and Poland) violated the Convention.[2]

Not only the Human Rights Court, but other Council of Europe institutions - the Committee of Minsters and Parliamentary Assembly - have also put SOGI squarely on their agenda. A new institution, the LGBT Issues Unit, was created in 2011.

In Latin America, dramatic developments have also taken place in the last few years. The General Assembly of the Organisation of American States (OAS) in 2008 for the first time adopted a resolution on SOGI, and in the subsequent four years gradually extended the scope of issues covered, including a call for the decriminalisation of anti-sodomy laws where they still existed (which is mostly in the Caribbean).[3]

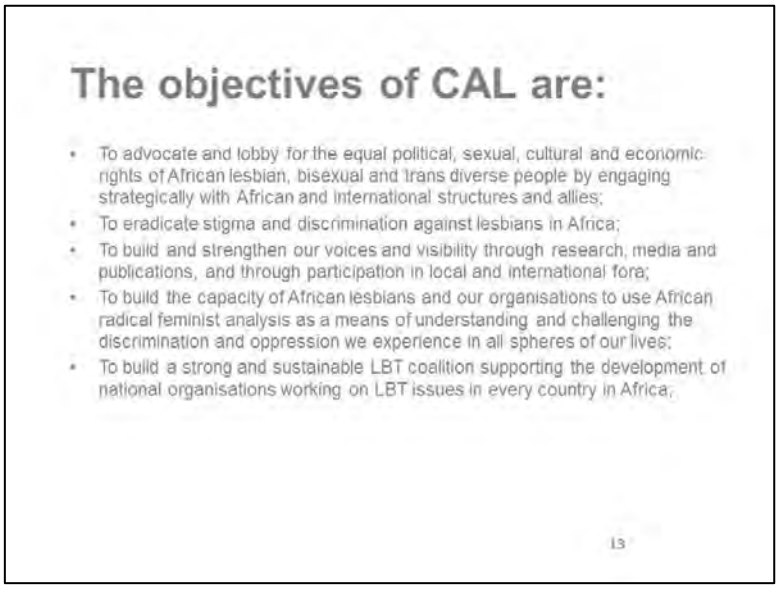
Although it has for many years not dealt with the SOGI issues, the Inter-American Commission on Human Rights recently established a Unit for LGBTI rights. The other human rights body in the region, the Inter-American Court of Human Rights, in February this year (2013), in the case of *Karen Atala v Chile*,[4] ruled that a decision of the Chilean Supreme Court which stripped Karen Atala, a lesbian mother and judge, of the custody of her three daughters on the basis of her sexual orientation, violated the American Convention.

African region

In stark contrast, the African Union (AU) has been largely silent on SOGI. Like the Organisation of African Unity (OAU) before it, the AU has as yet not pronounced itself on sexual orientation or gender identity as such. It has made only veiled references to the issue, in line with concern expressed at the UN.[5]

In the absence of the OAU/AU taking any explicit stand on this issue, it was left to the African Commission on Human and Peoples' Rights (African Commission), the AU's primary human rights body, to deal with the issue in the absence of any political position on the topic. For many years the African Commission dealt with the matter pragmatically, raising concerns about sexual minority rights when they were pertinent.[6] The Commission as a collective did not explicitly condone or approve the inclusion of sexual minorities within the ambit of the African Charter on Human and Peoples' Rights (African Charter).

When the matter was brought to a head with the application for observer status of the Coalition of African Lesbians (CAL) in 2010, the African Commission refused the application.[7] The two inter-related legal reasons provided for the refusal are that



(i) CAL's objectives are not consonant with the AU Constitutive Act and African Charter; and (ii) the Charter does not explicitly recognise the rights to non-discrimination on grounds of sexual

orientation or gender identity, or the rights of LGBTI persons. However, these reasons are unconvincing.

Aimed at the advancement of gender equality and social justice, and the protection of the rights of particularly vulnerable individuals, CAL's objectives meet the criterion of having objectives and activities 'in consonance with' the fundamental principles and objectives in the African Union's Constitutive Act and the African Charter.

As for the lack of explicit 'recognition' of sexual minorities, the African Charter has generally been interpreted as a living instrument, and not as a captive of the original textual strictures. For example, even though the Charter does not mention the concept 'indigenous persons', the African Commission recognised this concept in the absence of any reference to the word or concept 'indigenous' in the Charter. This stands as an unequivocal example that the protection of the Charter is not denied to groups merely because the Charter does not explicitly recognise that group by name.

Further contradiction of the African Commission's reasons for the CAL refusal is found in the Commission's own practice of allowing 'mainstream' non-governmental organisations (NGOs) (often INGOs) with observer status to raise, during public sessions, issues pertaining to the protection of the rights of LGBTIs. Allowing them to speak on these issues implies that the Commission has accepted that the protection of sexual minority rights is part and parcel of its mandate under the African Charter. Tellingly, the Commission in 2009 has already granted observer status to Alternatives-Cameroun,

an NGO that has an explicit mandate to work on the right to health and other rights of men who have sex with men and other sexual minorities. Refusing CAL observer status is thus inconsistent with the African Commission's own practice.

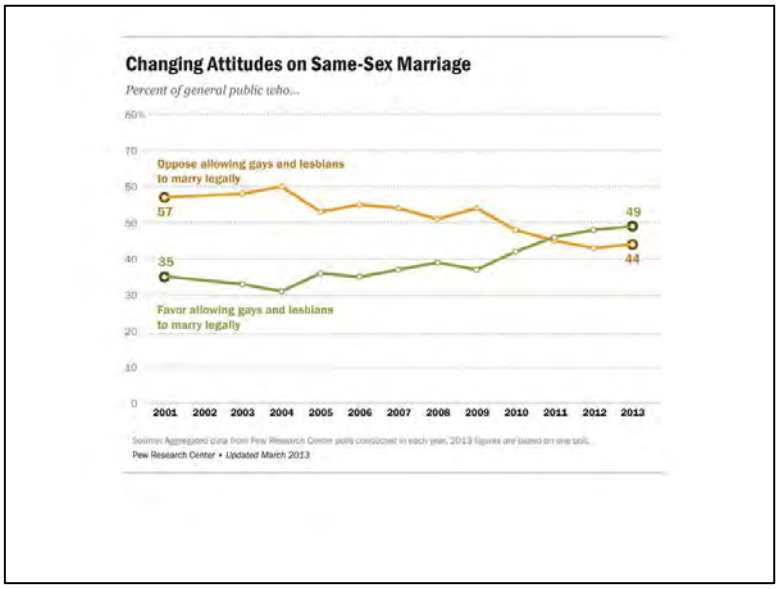
The very rationale of a regional human rights system is to provide a level of protection that is difficult or impossible to attain at the national level. The regional system should provide a safety net, normative guidance towards a common consensus, and a forum to articulate concerns – especially when no such space exists at the national level, which is the case for many of the constituent members of CAL.

National level

In most of the Europe and Latin America, decriminalisation of sodomy is now the norm. More significant, though, have been the decisions to abolish anti-sodomy laws in other regions of the world, exemplified by India and Fiji.[8] In an historic judgment delivered in July 2009, the Delhi High

Court overturned the 150 year-old section 377 of the Penal Code, thus legalising consensual homosexual activities between adults.[9] The Delhi High Court found that section 377 violated the right to equal protection before the law in the Indian Constitution. Although some appeals were filed against this decision, it is of great significance that the Indian Attorney-General decided not to file any appeal.

Because of its wide-reaching influence as cultural hegemon, also in Africa, the experience in the USA is relevant to us. In a significant departure, the US Supreme Court in 2003 declared anti-sodomy laws unconstitutional, in *Lawrence v Texas*,[10] thus reversing its 1986 decision in *Bowers v Hardwick*.[11] One of the factors affecting this reversal was the diminishing prevalence of such laws in states across the USA, changing attitudes towards same-sex marriages.[12]



The 13 years since the advent of the new millennium has also seen a steady increase in the institutionalised recognition of gay marriages.

Starting in 2000, the number has now grown to 17 states (three of them at the sub-national level only). Of these states, three are in Latin America, and one in Africa.

National level: Africa

These advances are in clear contrast to developments in Africa over the last few years. Most prominent among these are Uganda and Nigeria.

Since the introduction of a private members' bill in the Ugandan Parliament,

the Anti-Homosexuality Bill, in 2009, much attention has been paid to the potential effect of this Bill. Keep in mind that at its introduction (and still today), 'carnal knowledge against the order of nature' was (and is) already prohibited for both men and women. Note further that the maximum penalty for this offence was in 2000 increased from 14 years' to life imprisonment. And consider that the Ugandan Constitution was amended in 2005 to outlaw same-sex marriages, what, then, was the mischief at which the 2009 Bill was taking aim? In its original form, the Bill introduced the death penalty for aggravated homosexuality. In its re-introduced guise, in 2012, this aspect has been removed, but other features remained, such as the following:

- Anyone who promotes homosexuality, for example by broadcasting materials pertaining to homosexuality, or funding an activity related to homosexuality, is liable upon conviction to seven years' imprisonment.
- Anyone in a position of social authority (such as a school teacher), who is aware of the commission of any offence under the Act, but does not report it within 24 hours, is liable upon conviction to three years' imprisonment.
- The Act applies to offences under the Act committed by Ugandans outside the territory of Uganda.
- Any international treaty that conflicts with the Act is invalid.

After disappearing for some time from the legislative agenda, this Bill reappeared and is currently still under consideration.

In Nigeria, as in Uganda, anti-sodomy legislation has existed since colonial times, and conviction of this offence has long been punishable with 14 years' imprisonment. In addition, in 12 northern states, Islamic Shari'a law has since 2000 allowed for punishment in the form of death by stoning.

With little comparable international fanfare, the Nigerian House of Representatives some two weeks ago, on 30 May 2013, adopted a law prohibiting same-sex marriages,

and allowing for punishment for all those involved in such ceremonies. However, it is in three other respects that this Act breaks new homophobic turf. First, it for the first time criminalises homosexual identity, that is, being gay, as opposed to punishing acts or conduct, in that it prohibits any 'public show of same-sex amorous relationship directly or indirectly'. Second, it aims to silence the voice of all LGBTI organisations by prohibiting the 'registration of gay clubs, societies and organisations, their sustenance, processions and meetings'. Third, it extends the law's grasp beyond the LGBTI communities by stipulating that anyone who 'supports the registration of gay clubs, societies and organisations, processions or meetings in Nigeria commits an offence' and may be punished to 10 years' imprisonment. In other words, if President Jonathan signs this into law, not only same-sex acts and same-sex marriages, but just being gay and even being pro-gay will be criminal, and will carry penalties ranging from 10 years to death.

In two other countries, Kenya and Zimbabwe, attempts to entrench the equal protection of sexual minorities as part of recent constitution-drafting processes were not only unsuccessful, but generated a contrary position, namely, the adoption of constitutional prohibition of same-sex marriage. It seems very likely that a similar provision insulating same-sex marriage will be one of the outcomes of the current constitutional review process in Zambia.

Reasons for discrepancy

A number of factors peculiar to the period after the start of the new millennium account for the African aberration from global trends outlined above.

State behaviour at the global level underscores an alignment between SOGI votes and geopolitical positioning in international relations, more broadly. SOGI issues are seen to be driven by a 'Western' political agenda of cultural imperialism. This perception of 'Western' bias has been exacerbated by threats from Western donor countries, such as the United States and the United Kingdom, that donor aid would be withdrawn from states pursuing homophobic policies.

The geopolitical context forms a backdrop to a number of contributory factors at the national level. The first of these is the backlash following greater visibility of LGBTI activity and activism in Africa since 2000.

It is precisely when LGBTI activism emerges and becomes more prominent that homophobia follows in full force. Those who come out first debunk the myth that homosexuality is un-African. Through the undeniable evidence of their real-lived experience, as our neighbours and acquaintances, and by transgressing the approach of 'don't ask don't tell', they become the targets of the wrath of the disappointed and embarrassed.

A second factor is the 'Americanisation of homosexuality'

which, through a process of socio-cultural globalisation dominated by the US media, produced the notion of a uniform 'global gay identity'.[13]

Also in Africa, SOGI activism has as a consequence been heavily influenced by this idealised notion of what it means to be gay. Adverse African reaction to the perceived imposition of a homogenised gay identity has since 2000 to a large extent been exacerbated by the inclusion of same-sex marriage as a core component of this notion of 'global gay identity'. While same-sex marriage has in the US emerged as the endpoint of almost century-long gay activism, there has up to very recently hardly been any comparable activism in Africa. The superimposition of a discourse that links homosexuality and same-sex marriage by the hip is clearly a-contextual and presents a red flag that spurs on homophobia in societies where gay persons do not even enjoy the most basic of human rights.

The upsurge of particular brands of religion in Africa is a third factor to consider. The last few decades have seen a steady growth of religion in the global South, to the extent that one can talk of a 'Southernisation' of religion.[14] This general growth has been overladen by a dramatic rise in Renewalist (or Evangelical, Pentecostal, Charismatic) Christianity in these regions, including in Africa. The percentage of Africans who place themselves in these categories increased from some 5 per cent in 1970 to more than 15 per cent by 2005.[15] This expansion of evangelical religions in Africa coincided with the loss of territory of the US evangelical movement on social issues such as homosexuality. Renewalists are more likely to interpret the Bible literally, and to hold more conservative views on social issues - including homosexuality - than other Christians. Over the last decade, in particular, there have been concerted attempts by the American Christian Right to export American cultural wars and fight proxy battles featuring homosexuality on African soil.

One such country is Uganda. An illustration that US Renewalist forces are actively involved in this country appears from the facts of a recently-instituted court case, filed by Sexual Minorities Uganda against one such Evangelist, Scott Lively,

in US federal courts (US District Court of Massachusetts, Springfield).[16] Lively, an evangelical minister and extreme anti-gay activist, is accused of committing or conspiring to commit crimes against humanity, in the form of persecution, under the US Alien Tort Claims Act. The main allegation is that Lively, together with religious counterparts in Uganda, drove a campaign of homophobia which resulted in grave hardship and even death of LGBTI Ugandans. A case is also made to show Lively's influence on the Anti-Homosexuality Bill, on the basis that he was a prominent speaker at a very well-publicised event, the Family Life Network's 'Seminar on Exposing the Homosexuals' Agenda', held in March 2009 in Kampala. On 20 April 2009, less than two months later, the Bill was introduced.

These factors converge from time to time, in specific country settings, to feed a sense of 'moral panic' in which homosexuality becomes an issue around which the nation is united. This term, first used by Stanley Cohen,[17] refers to 'a condition, episode, person or group of persons [who] become defined as a threat to societal values and interests'. The panic is often fuelled ('amplified') by the media, to serve its own agenda of profiteering from populism. Such moral panic led to the Red Scare and 'gay with hunt' during the McCarthy period in 1950 America.

Although the reasons for the adoption of the Nigerian legislation remains, at least to me, unclear, the circumstances under which this law, the Same-Sex Marriage (Prohibition) Act, was first introduced in 2006, illustrate the workings of moral panic.

In December 2005, the bi-annual International Conference on AIDS and Sexually-Transmitted Infections in Africa (ICASA) took place in Abuja, Nigeria. Discussions on the health concerns of men who have sex with men (MSM) allowed SOGI issues – and LGBTI persons – to emerge into public prominence as never before in Nigeria. In the view of many, ICASA 2005 heralded the coming out of the closet of African sexual minorities in Nigeria.[18]

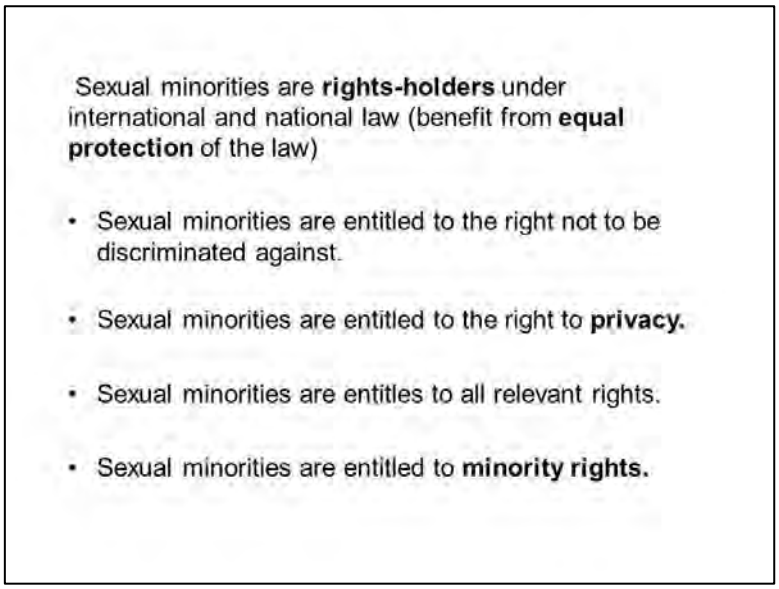
The South African Constitutional Court's decision in the *Fourie* case,[19] decided on 1 December 2005, in which the Court found that the common law definition restricting marriage to heterosexual couples was unconstitutional, also played a part. The assumption that, in a shrinking world, news of the South African Constitutional Court's decision would have reached Nigerian shores, to the great consternation of many, is borne out by references in the press at that time to the decision and to 'homosexual activism sponsored by organisations in South Africa'.[20]

Looming moral panic is amplified if it becomes the basis of political action, in particular when the potential for moral panic is exploited to gain political mileage. In the Nigeria of the day, fixing public attention on the 'threat' posed to Nigerian society by gay marriage served two purposes. First, it unified Nigerians in the face of violence that broke out between Northern Muslims and Christians, claiming the death of hundreds, following the publication of the now infamous Danish cartoons. Second, it was a drum on which to sound support for President Obasanjo's third term bid beyond May 2007.[21] At least some thought that rallying political support on an unquestionably popular issue may have been used as a means to reverse the tide of growing criticism against the 'third term'. Clearly, a simple causal line would be difficult to draw conclusively between these two circumstances and the introduction of the Bill, but they do provide a sense of the societal context, and suggest some reasons why Nigeria in 2006 became the first African site for a need breed of exceedingly homophobic legislation. The fact that the third term train was not allowed to leave the station may also be a factor in explanations why the law seemingly died a silent death later in 2007 (until it was revived in 2011).

B The legal argument

The next step is to formulate an argument based on international and national law. A legal - as opposed to a moral, ethical or public health - argument has the benefit that states are, as a matter of legal principle, under an obligation. It is the language of 'obligation' that opens the door to accountability and redress. To be sure, legal obligation does not by itself convert paper rights into actual guarantees in practice. However, even if legal obligation is not a sufficient, it is in my argument a necessary condition to curb homophobia on our continent.

The legal argument is modest – it argues that African states have to grant to sexual minorities the equal protection of the law



under the UN, the AU and domestic law, and that they have to decriminalise sodomy. The argument is not for marriage recognition, but for basic legal protection, something lacking and misunderstood in Africa. At the UN level, all but two AU member states are state parties to the ICCPR.[22] Although the Human Rights Committee has not yet dealt with any communication against an African state in which the protection of an LGBTI person was at stake, African state parties are expected to align their domestic law with the Committee's decisions. At the regional level, all AU member states have accepted the African Charter as binding. The global wave towards democratisation of the early 1990s left constitutional democracies in its wake across the African continent. Most of the constitutions of these countries allow for enforceable human rights, supported by the principle of judicial review.

The first step in this argument is that sexual minorities are rights-holders under international and national law - this is the essence of equal protection under the law. Because rights are granted in terms of the inclusive language of 'every individual', 'everyone', and 'every person' in both the ICCPR and African Charter, it is linguistically impermissible to restrict rights to a smaller segment of the population. Not only language but also logic dictates this conclusion. It is, for example, unthinkable in even the most repressive state that a court would not entertain allegations of torture just because the alleged victim of torture is gay or lesbian.

One's inescapable first impression from the identification of 'every person' as rights-bearers in most of the African constitutions is that everyone benefits equally from the rights under these constitutions. In those constitutions where marriage is constitutionally restricted to persons of different sexes, such as those of Kenya, Uganda and probably also Nigeria, in the near future, the inference may be drawn that if the *right to marry* is explicitly restricted to *heterosexual persons*, it follows that *all other rights are not*. Clearly, then, everyone in the LGBTI family is a rights-bearer under each of these constitutions.

Once it is established that sexual minorities are entitled, at least as a matter of principle, to invoke at least some rights, attention shifts to the potential use of particular rights. First in the row is the right not to be discriminated against. This right is included in the ICCPR, the African Charter and all national constitutions in Africa. Under each of these legal regimes, discrimination is prohibited on a number of 'listed grounds'. Ideally, these grounds should include 'sexual orientation' or 'gender identity'. This is, however, only the case in the South African Constitution. In the other legal tests, sexual minorities will either have to rely on an understanding of 'sex' that includes 'sexual orientation', or get a foothold through the open-ended nature of the list.

Article 26 of the ICCPR grants to all persons the equal protection of the law, and prohibits discrimination on a number of listed grounds, including 'sex'. In *Toonen v Australia,* the Committee

in 1992 concluded that the criminalisation of consensual same-sex acts by adults in private violated this provision.

The African Commission has not had the opportunity to deal head-on with an argument about equality based on SOGI status. The single possible communication, *Courson v Zimbabwe*,[23] was withdrawn before the Commission could take a decision. However, in the finding on one of its communications, the Commission affirms that the aim of the non-discrimination principle under article 2 of the African Charter is to 'ensure equality of treatment for individuals irrespective of' a number of grounds, including 'sexual orientation'. This reference to sexual orientation is, however, made in passing, and does not provide a precedent as far as the facts of the case go.[24]

The right to privacy is the second leg. This right is provided for in the ICCPR, and under the constitutions of all African states,[25] making the omission of this right from the African Charter much less significant. It should be added that the Human Rights Committee also based its finding in *Toonen* on the right to privacy.

Privacy and equal protection may also be invoked in conjunction with another. On numerous occasions, for example the recent reports of Kenya, Zambia, Botswana, at the end of examining periodic state reports, the Human Rights Committee has issued Concluding Observations confirming the position in *Toonen*.[26]

The examination of Malawi's state report in 2012 concluded not only in a call for decriminalisation, but also discouraged state officials from using language encouraging hatred homophobic language. Signifying a substantial step on the road to acceptance, the government of Malawi referred this matter to its Law Commission for review of the relevant legislation by way of a 'thorough and consultative' process.[27]

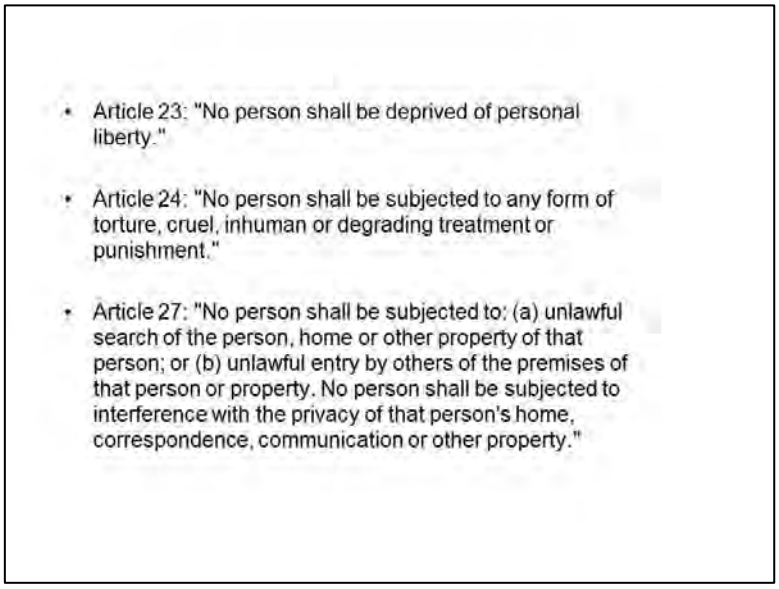
Depending on the particular circumstances that require the protective shield of the law, many other rights may come into play. If the matter is the refusal of a governmental body to register an LGBTI organisation, the right of freedom of association may be at stake; if it is a refusal to provide HIV anti-retrovirals (ARVs), the right to health care.

Paradoxically, Uganda illustrates exactly this point, in that legal redress has been achieved for the most flagrant violations of LGBTI persons' rights in this country's courts. A protracted legal battle concerning Victor Juliet Mukasa,

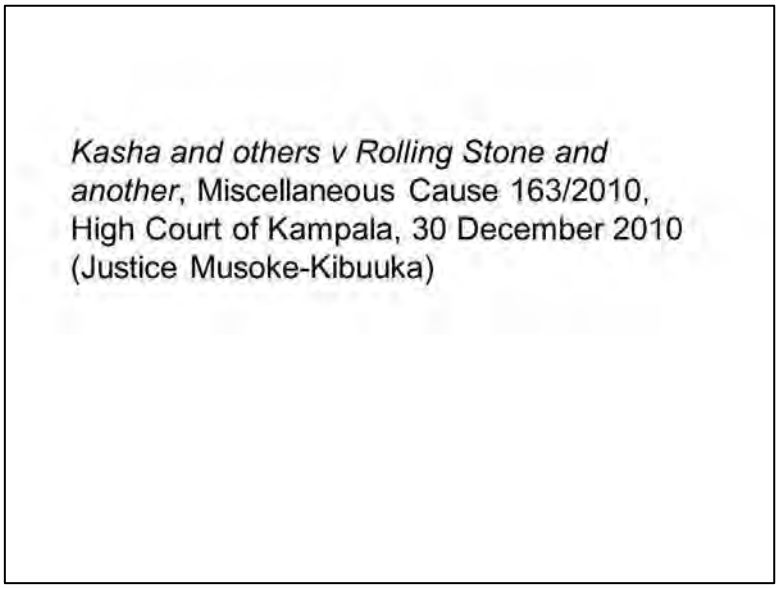
> *Victor Juliet Mukasa and Yvonne Oyo v Attorney General*, Miscellaneous Cause 247/06, High Court of Kampala (Civil Division), 22 December 2008 (Justice Arach-Amoko)

the Chairperson of Sexual Minorities Uganda (SMUG), ended in a favourable judgment, acknowledging state liability for the harassment and victimisation by police of LGBTI human rights defenders, when the Uganda High Court in December 2008 ruled that articles 23, 24 and 27 of the

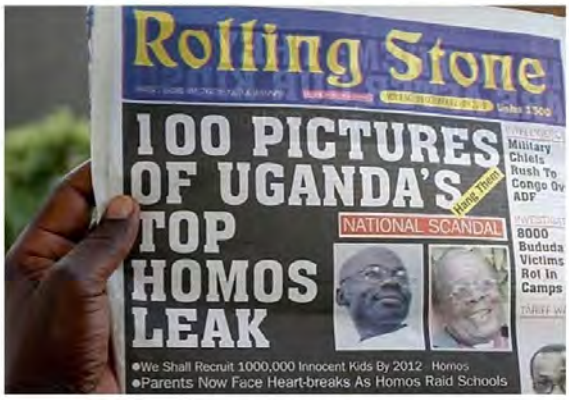
Ugandan Constitution (dealing with the rights to personal liberty, and the prohibition against inhuman treatment and unlawful search) apply to all people, regardless of their SOGI status.



In another case, *Kasha and Others v Rolling Stone and Another,*



the Ugandan High Court on 30 December 2010 ruled that the publication of photos, names and addresses of 'homosexuals', under the heading 'Hang them; they are after our kids!!!!!'



in the tabloid *Rolling Stone*, constitutes a violation of the affected persons' dignity and privacy under the Ugandan Constitution.


HANG THEM; THEY ARE AFTER OUR KIDS!!

Pictures Of Uganda's Top 100 Homos Leak

In its judgment, the Court emphasises that the case is not about 'homosexuality *per se*', but rather about 'fundamental rights and freedoms'. The Court's judgment was of little benefit to David Kato, a Ugandan human rights activist and one of those named in the *Rolling Stone* article, who was killed at his home on 26 January 2011.

Another avenue to explore is that of minority rights. Although there is no internationally-agreed definition as to which groups constitute minorities, international law has traditionally accorded minority status on the basis of ethnicity, race, language, religion and culture. These grounds are considered stable categories of cohesiveness. Extending them to include 'sexual orientation' and 'gender identity' would require an argument about the nature of the shared characteristics and the rationale for minority protection.

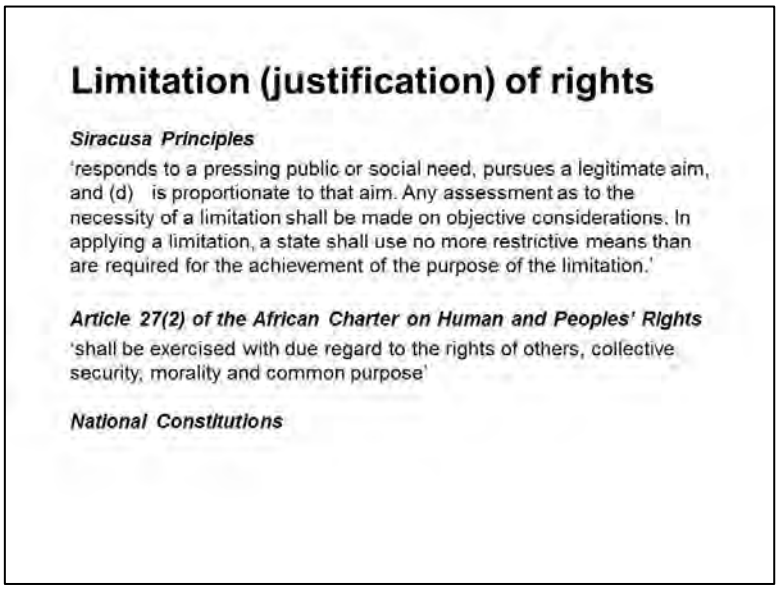
The question may well be posed whether minority protection is a suitable vehicle for LGBTI claims. Clearly, the different letters forming parts of the acronym represent a great variety of sexualities. Even within each of these 'groupings', there is great divergence.

However, in the sense that the existence of anti-sodomy or similar laws negatively affects most LGBTI persons, such laws may be viewed as affecting them as a 'group'. As long as such laws exist, they reduce the enjoyment of full citizenship and stigmatise all the members of the affected group. In one of its findings,[28] the European Court of Human Rights held that the bias 'on the part of a heterosexual majority against a homosexual minority' was similar to the 'negative attitudes towards those of a different race, origin or colour', thus recognising that individual homosexual orientation is shared by a distinct group and its members thus constitute a protected minority group.

Other sexual minority claims may perhaps best be viewed as individual rights, invoked in solidarity with a collective of similarly-situated individuals with similar concerns. Most of these claims are likely to be presented in an individual frame, dealing with equal protection of the law, equality, respect for privacy, the right to speak and associate freely - and not primarily in pursuit of an affirmation of collective interests. Focusing on the claims for vindicating individual rights also deflects the often-heard criticism that LGBTI rights advocate for special rights or privileges.

Despite these complexities, the term 'sexual minority' is used here, as it is more broadly in the African discourse, not to fit a predetermined legal category, but as a term denoting solidarity and as a strategic option so as not to invite knee-jerk reactions to words or phrases that have come to ring pejoratively in many African ears ('gay', 'lesbian', 'homosexual') or invite explanation ('LGBTI').

Limitation

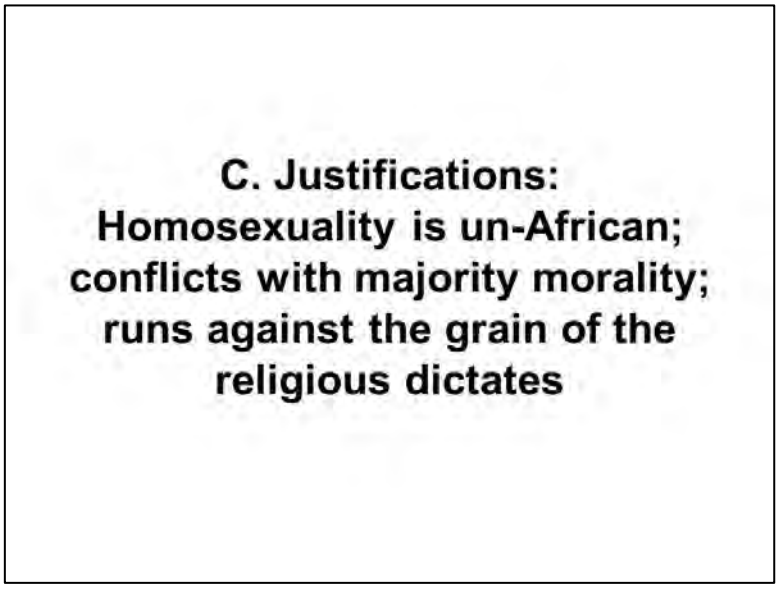


The fact that sexual minorities are entitled to the equal protection of the law does not detract from the fact that their rights, like the rights of everyone else, may - under certain conditions - be limited. International law prescribed the parameters within which such a limitation is allowed. The Siracusa Principles, developed in 1984 to guide states in potentially limiting rights under the ICCPR, requires the application of a proportionality test: Rights may only be limited if the purpose of the limitation is justifiable in a democratic society; if the importance of the limitation outweighs the negative effect it has on human rights. The African Commission has adopted a similar test by adjusting article 27(2) of the African Charter for this purpose. This article provides that individual rights under the Charter 'shall be exercised with due regard to the rights of others, collective security, morality and common purpose'. In its interpretation of this provision, the Commission infused its reading of article 27(2) with the values underlying a democratic society, requiring limitations to meet the test of proportionality. A similar two-phased approach to constitutional adjudication is also prescribed in most African constitutions, exemplified by section 36 of the South African Constitution.

Accepting as a starting point that 'sexual minorities' are also rights-holders under the African Charter therefore does not mean that the notions of culture and religion become irrelevant. These factors or grounds may still be invoked as part of the limitations or 'justification' exercise.

It is to these justifications that the discussion now turns. A starting point in this analysis shared by all legal frameworks is that the burden of justifying a limitation lies with the state relying on that limitation.

C Justifications



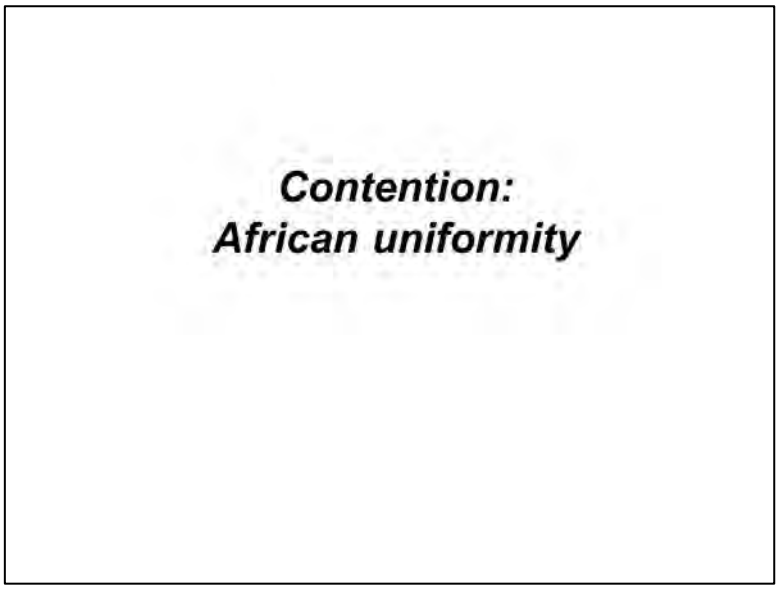
First justification: Homosexuality is un-African

In order to meet the un-African justification head-on, one should first understand what is meant by the term. Different users use the term 'un-African' and argue differently. I will try to dissect and group these understandings, and address each of them in turn.

First contention: Africa is different from the rest of the world (African exceptionalism)

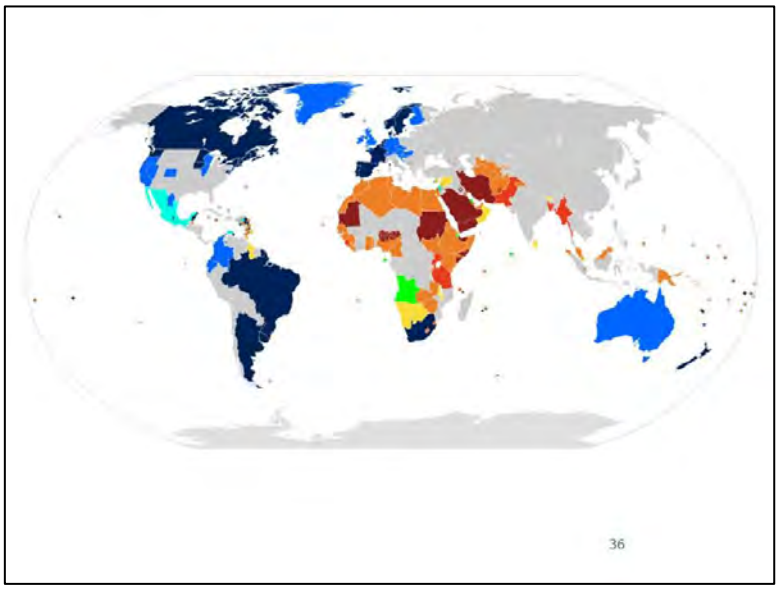
As a descriptive contention, the term 'un-African' may denote that Africa is somehow exceptional from other parts of the world. In other words, homosexuality is not African, but is associated with the rest of the world. Such a contention is clearly not tenable, irrespective of the yardstick one applies. Using the map of the globe as yardstick, African states are not alone in denying basic rights and in maintaining anti-sodomy laws. In fact, it would be much more accurate to speak of homosexuality, in this sense, as being 'un-Afro-Arab', thus recognising the group solidarity on this issue. If the yardstick is not states, but people, the conclusion is also that African exclusivity claims make no sense. Homophobia and its manifestations of hate speech and hate crimes are by no means the preserve of Africans. Media reports confirm that homophobia is alive and well in the USA and is experiencing an upsurge in France. Homosexuality is therefore not un-African in the sense of giving Africa(ns) some exclusive claim thereto.

Second contention: Africa is uniform (African uniformity)



As a descriptor, 'un-African' also assumes African solidarity or uniformity. A closer analysis not only refutes the notion of a uniform 'African' position, but also shows that differences within the continent are largely aligned according to colonial heritage.

Of the 75 states in the world with anti-sodomy laws in place, 37 are in Africa.[29]



If one considers these states (the magenta-coloured states, where the death penalty may be imposed; the dark orange states, where life imprisonment may be imposed; the light orange states where more than 10 years' imprisonment is the possible sentence; and the yellow states, where less than 10 years may be imposed), four groups of states emerge.

The first group is comprised of Arab states. Due to the close link between law and religion in these states, century-old Qur'anic dictates resulted in rigid criminalisation and harsh penalties. Comparatively brief periods of French colonial rule, mostly lasting less than 40 odd years during the first part of the twentieth century, did little to reverse this position.

Countries previously colonised by the Portuguese form the second group. These colonies have all inherited the 1886 Penal Code of Portugal, which allowed for the imposition of 'security measures on people who habitually practise acts against the order of nature'. However, there is little evidence of this provision being applied in any of these colonies. The reason may be two-fold. On the one hand, the fact that this part of the Penal Code was abolished in Portugal in 1945 probably

played a role in colonial attitudes after that date. On the other hand, the colonial experience of Portugal has been minimalist, and lacked the institutional arrangements and other trappings of other colonial models. Colonial law had only limited applicability to local people (the *indigena*), and had a much more limited penetration into lives of the *indigena* than in British colonies. In any event, some time after independence three of these states (Guinea Bissau, Cape Verde and São Tome e Principe) have omitted this provision when they adopted new criminal codes.

The third group of states are the 'francophone' states. To understand the very limited extent to which any of these states criminalised consensual same-sex relations, one has to keep in mind that the French abolished anti-sodomy laws after the French Revolution in 1789, and it was never made part of subsequent criminal codes. Legislative silence therefore also prevailed in the French colonies, and into post-colonial 'French Africa', with the exception of a few states that legislated on this matter. Most prominent among these is Cameroon and Senegal. The introduction of section 347*bis* of the Cameroon Criminal Code has to be understood in the light of Cameroon's hybrid legal colonial background, and the fact that the amendment came about by an authoritarian decree, in the same year (1972) in which President Ahidjo pushed through an unpopular unitary Constitution.

This leaves the ex-British colonies to constitute the fourth and last group. Most of these states maintain anti-sodomy laws modelled on the British example.

English anti-sodomy laws have their origin in the 1533 Vice of Buggery, which was a codification into an Act of the English Parliament of an earlier Canon law provision. Anal intercourse between men was thus made a criminal, capital offence in England. The context of the adoption is instructive. The codification may be understood in the context of the break between English King Henry VIII

Henry VIII (1509-1547)

and the Catholic Church, resulting in the need to place under secular control all matters - including the 'sin' of 'buggery' - previously under the Church's jurisdiction. The codification also has to be read against the background of Henry's tainted moral stature, as it followed the Pope's refused to approve Henry's divorce in 1532. To some, this sequence of events inspired the need, on Henry's part, to draw a firm line in the - by then precariously shifting - sands of sexual morality, in order to bolster his moral stature.

It was the 1533 Act, as amended later, that served first as the blueprint of the Indian Penal Code,

Thomas Macauly
Drafter, Indian Penal Code

which entered into force in 1860, and thereafter, via the Queensland Penal Code, of the criminal codes of most of the British colonies in Africa. Section 377 of the Indian Penal Code (titles 'unnatural offences') reads as follows:

1866 Indian Penal Code (Section 377):
Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animals, shall be punished with imprisonment for life, or with imprisonment for a term which may extend to 10 years, and shall also be liable to fine.

Queensland Penal Code 1899:
Any person who
a) has canal knowledge of any person against the order of nature; or
b) has carnal knowledge of an animal; or
c) permits a male person to have carnal knowledge of him or her against the order of nature,
d) is guilty of a felony and is liable to imprisonment for fourteen years

Ugandan Penal Code 1950 (Section 145):
Any person who
a) has carnal knowledge of any person against the order of nature; [or]
b) has carnal knowledge of an animal; or
c) permits a male person to have carnal knowledge of him or her against the order of nature,
d) commits an offence and is liable to imprisonment for life.

Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment for a term which may extend to 10 years, and shall also be liable to a fine.

As you can see, there are great similarities between the Indian and Queensland Penal Codes, and an almost exact copy has made its way from Queensland to Uganda.[30] The only difference is the harsher form of punishment, which came later. In fact, bringing to bear contemporary anxieties (and UP policies), this would be a serious instances of plagiarism. This formulation also served as a model for the colonial impositions in at least Nigeria (in the colony's first Penal Code of 1904), Kenya, Gambia, Tanzania and Malawi.

The supreme irony is that the UK abolished this very same law in England and Wales in 1967, just as the post-colonial period started, and these states gained their independence - and legal autonomy.

Having regard to the four categories of states identified here, the conclusion is inescapable that the regulation of same-sex conduct in present-day Africa is contingent upon a historical

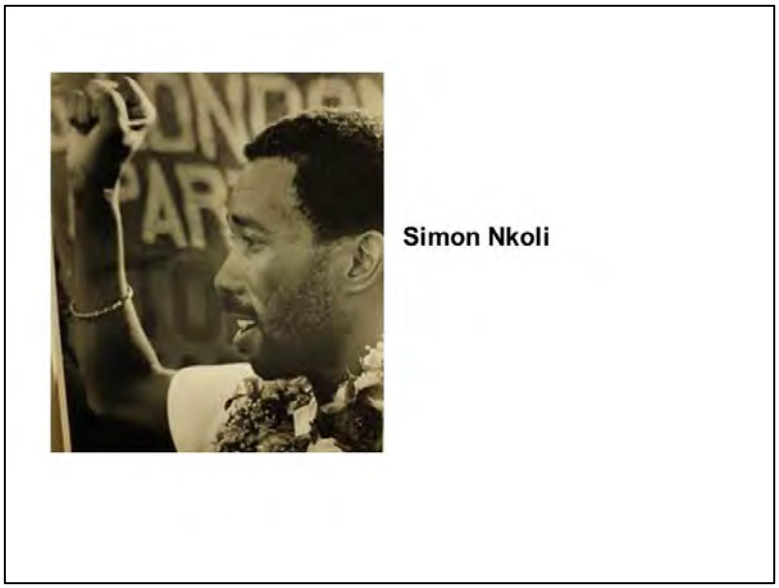
coincidence (being colonised by the British, French or the Portuguese). The Indian Attorney-General, explaining why he did not opt for an appeal against the *Naz* case mentioned earlier, stated that section 377 of the Indian Penal Code had been 'imposed upon Indian society due to the moral views of the British rulers'. Evidence of the un-African basis of anti-sodomy laws is much more convincing than evidence that homosexuality is un-African.

Third contention: There are no homosexuals in Africa (homosexual absence)

A further descriptive understanding of 'un-African' can be that it denotes that homosexuality does not exist in Africa, as a matter of present reality. Obviously, this understanding is easy to counter and requires no reliance on anthropological studies.

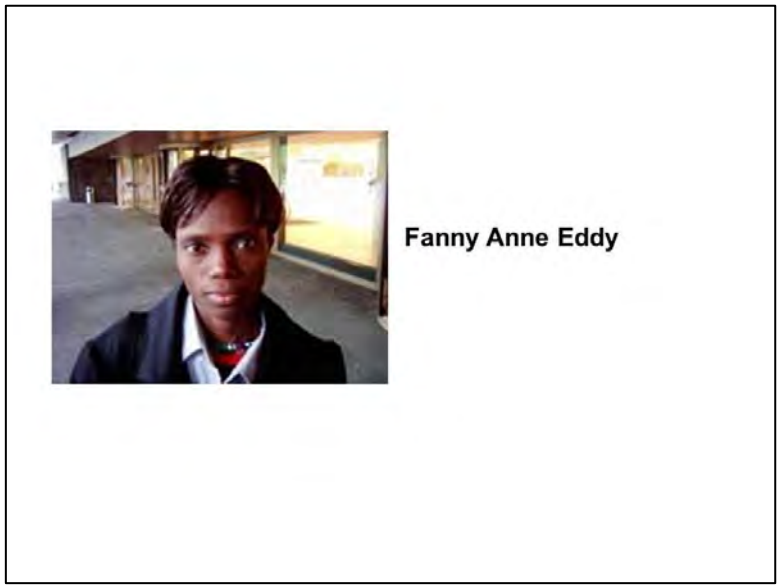
This understanding denies LGBTI persons the right to speak as Africans. It comes down to the question: Who gets to say who is African and what is un-African? Who defines the debate and gets to speak? Clearly, if gay Africans take the podium, they will 'craft narratives of African identity that includes the fact that they are homosexual'.

It is hardly possible for any African to claim he or she does not know or see sexual minorities around them. Even if they are absent in any particular community, they have risen to continental prominence. Some of the most prominent openly-LGBTI Africans include Simon Nkoli (South African gay activist);



Victor Mukasa (Ugandan trans-activist);

Fanny Ann Eddy (lesbian activist, Sierra Leone, murdered in 2004);



Joel Nana (Cameroonian HIV campaigner, founder of AMSHER);

Joel Nana

and David Kato (Ugandan teacher and gay activist, murdered in 2011).

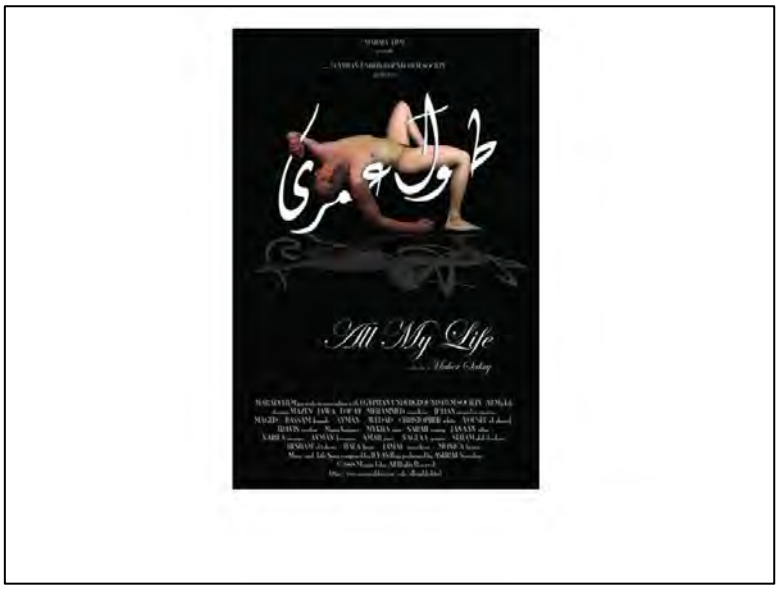
David Kato

A more collectively-minded response to the claim of non-existent African homosexuality is to list the names of LGBTI organisations that exist across the continent, even in countries where anti-sodomy laws are still in place. These include, just in our neighbouring states: LeGaBiBo (Botswana);

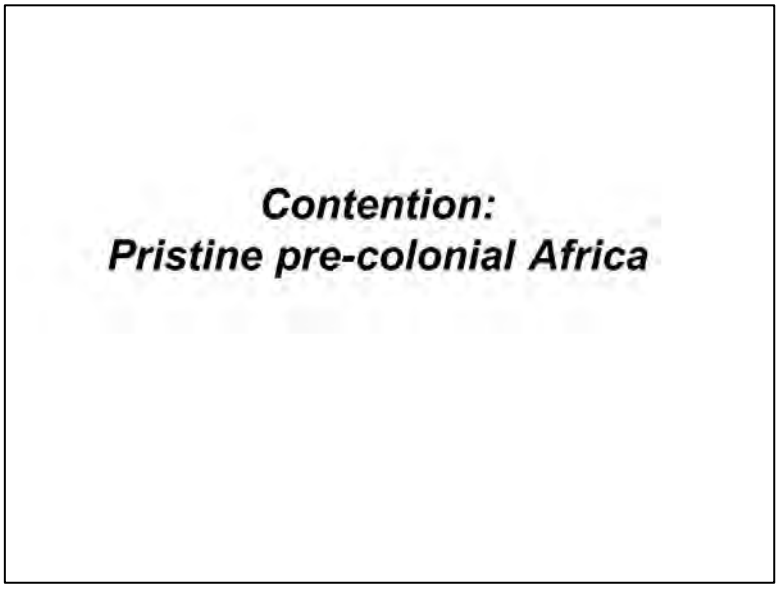
Gay and Lesbians of Zimbabwe (GALZ); Sister Namibia and the Rainbow Project (Namibia); the Mozambican Association for Sexual Minority Rights (LAMBDA); Gays and Lesbians Association of Swaziland (Galeswa) (re-launched in 2006); and Matrix Support Group (Lesotho), which organised the first Lesotho gay pride march earlier this year.

The homophobic reaction of political and religious leaders, calling for the denial of full citizenship or even encouraging harm to sexual minorities within their countries, paradoxically recognises the presence - and existence - of these very communities as part of the African landscape. Irrefutable evidence is provided in the court record. Two illustrative cases: (i) the conviction in 1997 of Canaan Banana, Mugabe's predecessor and the first President of Zimbabwe, on 11 counts of sodomy and indecent assault;[31] (ii) the trial and conviction of 21 of the 'Cairo 52' men of 'habitual practice of debauchery'

and 'contempt for religion' related to a social gathering on a boat-restaurant anchored on the Nile, the Queen Boat – which also inspired an Egyptian movie 'All my life', thus making the narrative part of popular culture.[32]



Fourth contention: There were no homosexuals in pre-colonial Africa/in Africa before European influence (pristine pre-colonial Africa)



A further and pervasive view is that homosexuality is 'un-African' because it did not exist in pre-colonial Africa – here I refer to sub-Saharan Africa. Although it is beyond the scope of this paper to present a comprehensive overview of anthropological data and evidence for the presence of indigenous (pre-Europeanisation and colonial) homosexualities in Africa, I attempt to meet the crux of this argument. The task of anyone trying to do this has been made significantly easier by the publication of the volume of essays by SO Murray and W Roscoe (eds) *Boy wives and female husbands: Studies of African homosexualities* New York Palgrave (2001).

Murray and W Roscoe (eds) (2001)
Boy wives and female husbands: Studies of African homosexualities
New York: Palgrave

This text, which comprises many examples from all around the continent in its 358 pages, supports an intuitive assumption that it is more likely than not that an innate part of human experience and sexuality would be so highly relative that homosexuality was so time- or place-bound that it did not occur in pre-colonial Africa.

Undoubtedly, some serious difficulties present themselves. Because there is little written or other documentary evidence on which to rely, most of the evidence is based on anthropological studies and historical accounts by Europeans. The vagaries presented by the 'translation' of both language and experience, and the possibility of biased world views loom large.

The many recorded instances of 'homosexuality' in pre-colonial Africa have to be located and understood in their historical and socio-cultural contexts. Some of the recorded instances of same-sex expression, for example, relate to spiritual rituals; others only make sense in a cultural context of continuous warfare.

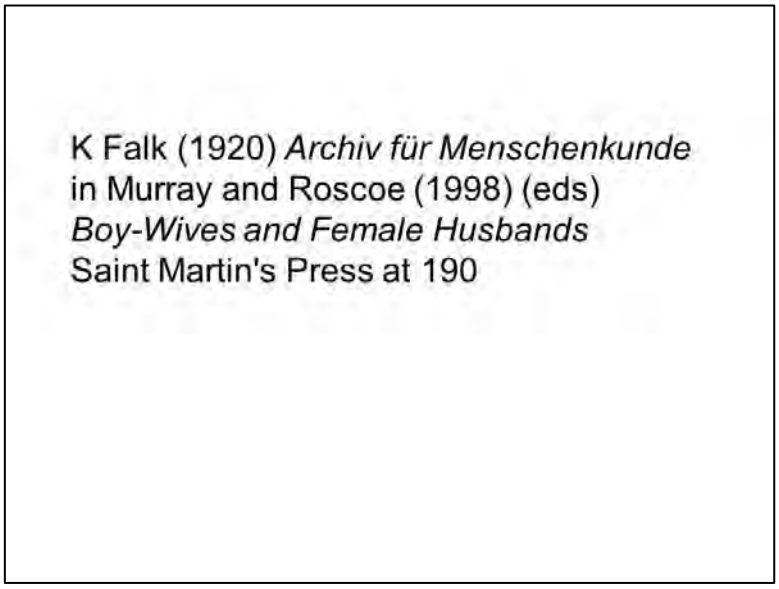
But, even if these *caveats* are taken to heart, enough examples remain that suggest same-sex desire pure and simple. Let me give a few examples:

The British social anthropologist, Evans-Pritchard,

Sources, with particular reference to the Southern Sudan' (1971) 11 *Cahiers d'études africaines* 129–179

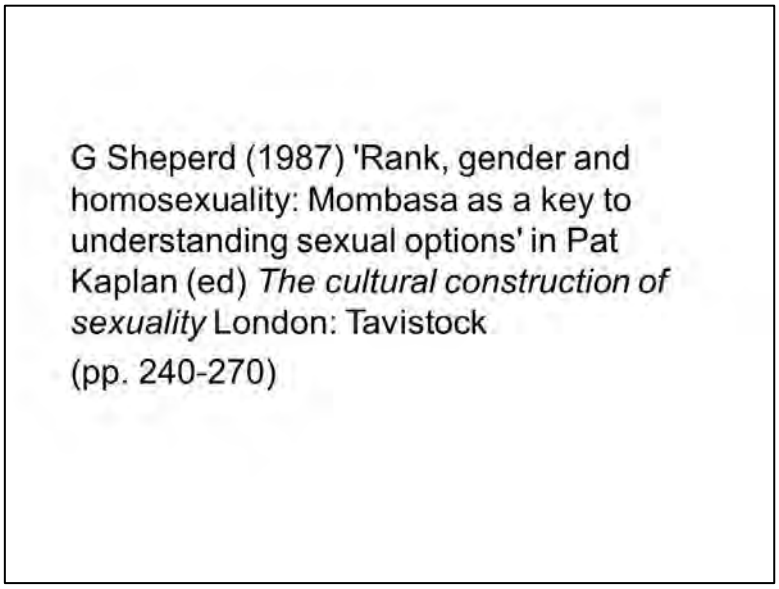
… homosexuality is indigenous. Azande do not regard it as at all improper, indeed as very sensible for a man to sleep with boys when women are not available or are taboo … In the past this was a regular practice at court. Some princes may even have preferred boys to women, when both were available.

after a lifetime of research among the Azande of Sudan, concluded that 'homosexuality is indigenous. Azande do not regard it as at all improper, indeed as very sensible for a man to sleep with boys when women are not available or are taboo … In the past this was a regular practice at court. Some princes may even have preferred boys to women, when both were available.'
After a long period of residence in what is now Namibia, Kurt Falk,



a German anthropologist, reported homosexuality as well as various forms of same-sex marriage among Naman (Khoisan) speakers. He maintains that homosexuality was 'fairly common' among both male and female Khoisan speakers.

English social anthropologist Gill Shepherd



reports in detail about the presence of lesbians in Mombasa, Kenya, which she describes as a long-standing social phenomenon.

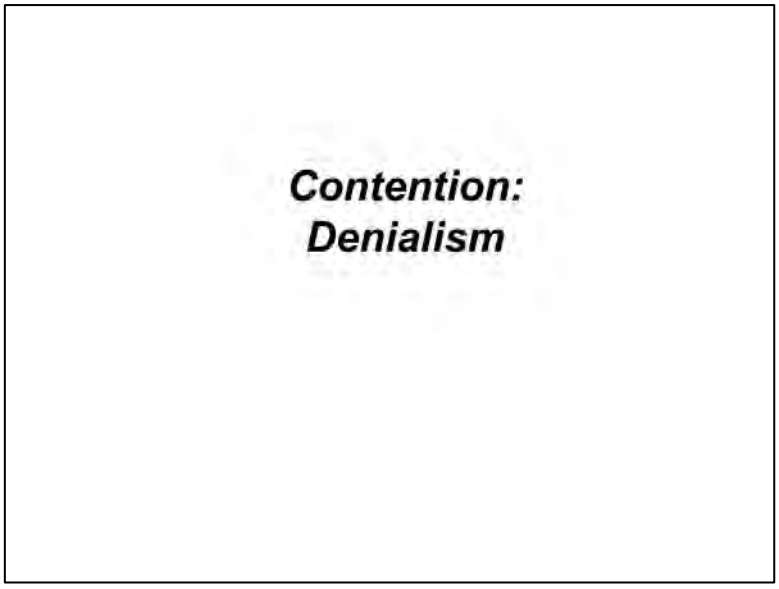
In the Congo, Belgian missionary Father Gustaav Hulstaert

tells us that there were relationships of 'husband and wife' between Nkundo women. These relationships are described as arising from 'intense and intimate love between two women' and from the fact that 'wives of polygamists find it difficult to satisfy their passions in a natural way', leading to these practices often occurring between co-wives of the same man.

Two firm conclusions seem justified on the basis of this evidence. One: There is little support for the notion that same-sex sexuality did not exist in traditional African societies. Any claim to the contrary suffers from being over-inclusive. Two: There is little evidence of homophobia as we know it today in traditional African societies.

Perhaps you remain unconvinced that the available evidence allows 'homosexuality' to be associated more with tradition than with modernity within the discourse of anti- and post-colonialism. Even then, to insist uncritically on one particular reconstruction of tradition, and to argue for its perpetuation merely because it was once so, is based on an unjustifiably monolithic view of 'African culture' and a fatal blind spot for the inevitability of cultural evolution. To put it bluntly: Even if 'homosexuality' is an 'import' of modernity, so are designer jeans, the wrist watch and the electric guitar. It is not only that cultures do evolve, but that they should evolve, in response to continuously being the subject of and being subjected to moral criticism and revision.

Fifth contention: There just should not be any homosexuality in Africa



A last possible understanding is that 'un-African' is used prescriptively rather than descriptively; used as an exhortation and not an empirical claim; directed to the future rather than the present or the past.

The argument seems to be that even if homosexuality existed, or exists, it should not exist and should not be tolerated in Africa. This 'understanding' hovers between denialism, wishful thinking and romanticising an idea of an Africa in which the nucleus family is perpetually in place; where patriarchy remains unchallenged; and diversity does not exist.

Second justification: Majority morality

Our methodologies to establish popular opinion may differ, but the outcome is bound to be the same: A majority of Africans disapprove of homosexuality and - in particular - any open manifestation of same-sex sexuality. In a study undertaken by Pew in 2010, the range of disapproval in 14 selected African states varied between 98 per cent and 69 per cent.

The question is: What weight should the strength of these views hold in dealing with the rights of homosexuals?

In many African countries, the debate about legislating morality is now where it was in the UK during the 1960s, when the Hart-Devlin debate

played itself out in reaction to the Wolfenden Report which in 1957 recommended that English anti-sodomy laws be abolished.[33]

Devlin argued that the law should enforce shared morality because the society would disintegrate (or be seriously undermined) if the moral code is no longer adhered to. Hart's retort was that this normative claim rests on a highly-disputable generalisation for which there was no empirical support. Hart's retort is linked to the proposition put forward by John Stuart Mills that only *concrete and demonstrable* harm to society justifies coercive regulation by way of the criminal law. Just like Devlin was not able to offer an empirical basis for his claim, proponents of the thesis favouring consensual same-sex relations in contemporary Africa have also not provided arguments based on empirical evidence or projections. As Hart pointed out, European countries have not socially or morally 'disintegrated' after decriminalising homosexual conduct. Closer to home, on (South) African soil, such an argument also does not hold up to closer scrutiny. Neither the legalisation of consensual same-sex conduct nor allowing for same-sex civil union marriages can in any meaningful way be said to have affected the fabric of South African society. The failure to advance an argument that goes beyond generalising fear-mongering is evident from the Ugandan Anti-Homosexuality Bill, which proclaims the aim of the Bill to be the 'strengthening' of the

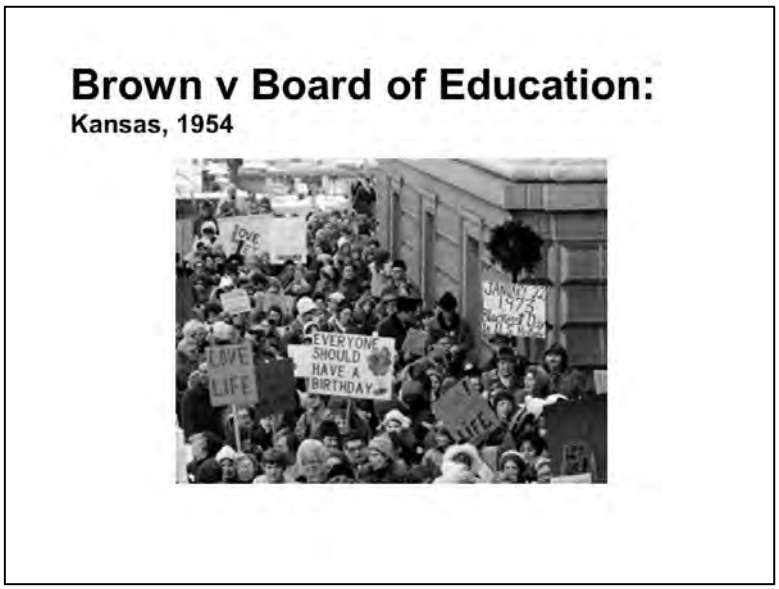
'nation's capacity to deal with emerging internal and external threats to the traditional heterosexual family'. By not explaining the nature and extent of this 'threat', the inference is that the institution of the family in Uganda is so fragile that it would *by necessity* be 'threatened' if any form of consensual homosexual intimacy is allowed. What is the empirical basis for this fragility? Only proof of the actual cost to society should be able to outweigh the undeniable cost of enforcing morality to individual autonomy and self-fulfilment.

Devlin also argues that the majority has the right to enforce its morality because upholding the shared morality is valuable in itself. To this, the most obvious retort is that 'traditional' moral values are often based on sheer prejudice, a lack of information or understanding, and manipulation of emotions by the media our opportunistic leaders. The fact that a majority holds a particular view does not in itself make this view morally compelling. To quote Justice Albie Sachs, in the *Fourie* case, the 'ubiquity of a prejudice cannot support its legitimacy'.[34]

It is not only the legislature, but also the judiciary that is confronted with majority morality. In a constitutional democracy, the courts have the role of upholding the Constitution as societal compact, which by virtue of the non-discrimination principle includes the protection of individual rights unless such protection would lead to significant harm to the very tenets on which the society is based. Majority views can and do often treat minorities outside the mainstream harshly, as the South African case of *Hoffmann v South African Airways* shows.[35] As Ngcobo J acknowledged, '[p]eople living with HIV constitute a minority. Society has responded to their plight with intense prejudice.' It was therefore required of the Court to declare as unconstitutional an instance of this societal prejudice, namely, the refusal by SA Airways to employ a person living with HIV as steward.

As the recent arguments before the US Supreme Court (on the issue of same-sex marriage) demonstrates, one of the forceful counter-narratives about an activist role of the courts in the field of morality is the 'backlash narrative', which suggests that turning to courts to vindicate rights is too often counter-productive, because decisions not aligned with majority's views are difficult to enforce and cause societal resistance. In addition, it is argued that by giving binding pronouncements, judicial decisions stifle legitimate debate and therefore close the political space for democratic deliberation.

Without fully canvassing this complex issue, my retort is to refer to two seminal US cases. It is true that *Brown v Board of Education*,[36] which in 1954 effectively de-segregated American schools, was met with immediate resistance from Southern racists and experienced problems of implementation then, and has since been eroded.



However, the case also clearly illustrates that without federal intervention to protect the rights of historically-marginalised minorities, their rights will continue to be rejected by groups intent on

discriminating. Equally, *Roe v Wade*[37] did not meet with uniform approval, and to this day is undermined and resisted by many in the US. But it is equally clear that without this decision, a very divergent picture would have presented itself, with many states in the US still denying women any legal right to abortion. The judiciary sometimes has to lead the way even in the face of opposition, particularly in support of the evolution towards greater adherence to constitutional values. That such a process is on-going in Africa is clear from the greater tolerance for and understanding by states and societies of issues as wide-ranging as national diversity, gender equality, the environment, and juvenile justice.

Third justification: Religious dictates

Invoking Christianity or Islam - and not traditional African religions - to justify homophobia does not sit well with the argument that homosexuality is un-African. It seems incompatible to advance the argument that homosexuality was not part of a traditional African life-world untainted by external influences, and at the same time to argue that homosexuality is unacceptable to Africans *on the basis of these very external influences*, in the form of 'imported' religions.

Christianity and Islamic have in common a very strong reliance on textual analysis. However, because these texts have been written many centuries ago, have been left open-ended, and teem with metaphors and hyperboles, interpretations are bound to differ. For example, a brief perusal of theological literature revealed to me the extent of interpretive variance of the events leading to the destruction of Sodom. Two narratives emerge: One view holds that the moral of the Sodom story is that homosexuality is a sin. The other view insists that the sin punished was that of inhospitality to strangers. According to this view, the homosexual rape was the means through which the inhabitants of Sodom violated the norm of hospitality. As one author remarks, to interpret the Sodom narrative in Genesis as being *about homosexuality* is like reading a report of an axe murder as being *about an axe*.[38] In any event, the events had very little to do with homosexual identity, as it emerged in the nineteenth century and is understood today, and hardly set any form of precedent in respect of private conduct between consenting adults.

While it would be disingenuous not to accept that the vast majority of *African theologians* agree that homosexuality - or at the very least the open expression thereof - is sinful, the point here is that there is - at least some - disagreement among African religious scholars about the meaning of these texts, and the correct position of the religious position. There is no dissenting voice more vocal than that of the first black South African Archbishop of Cape Town and 1984 Nobel Prize winner, Desmond Tutu.

Desmond Tutu

For Tutu, the issue of homophobia is inextricably linked to South Africa's apartheid past. Injustice to all minorities is abhorrent and not founded on Scripture. Just like race, sexual orientation cannot be a ground for justifying inequality.

Slowly emerging, and only tentatively chiselling away from the monolithic African view on this issue, is a new breed of African women theologians The trendsetter among them, Ghanaian Mercy Oduyoye, by criticising the 'perception of marriage as serving primarily procreation', was able to weave a thread connecting the case of the rights of homosexuals and women. She also clearly distanced herself from the 'demonisation of homosexuals'.[39] Other (female) theologians (Isabel Phiri, Musa Dube in Botswana, and Kenyan Esther Mombo)

have also associated their issue of overriding concern, namely, gender inequality, with the issue of equal protection of homosexuals.

Most African states subscribe to secularism and constitutional – and not religious – supremacy. At least 23 African constitutions expressly draw a dividing line between the realms of the sacred and the secular; in many others, the people as proclaimed as source of supreme authority. The South African Constitutional Court in *Fourie* explained: 'It is one thing for the Court to acknowledge the important role that religion plays in our public life. It is quite another to use religious doctrine as a source for interpreting the Constitution. It would be out of order to employ the religious sentiments of some as a guide to the constitutional rights of others.'[40] This is so especially if there is no single consensus about which religious views should be followed, not only because of a plurality of religions, but also as there may be differences between those adhering to the same religion.

Constitutional supremacy is not in conflict with the acceptance of religion as part of history and society, as is exemplified by adherence in a number of preambles to 'Almighty God'. Again, Nigeria presents an example, in declaring the country to be a 'sovereign nation under God'. From a legal point of view, the important issue is that a preamble, likened to a throat-clearing exercise, has no specific binding legal force.

However, when the Constitution – even only in the Preamble – embraces one *particular* religion, the blurring between church and state becomes much more controversial, as in the case of Zambia. Zambia in no way professes to be secular.[41] A preambular declaration to its Constitution affirms that Zambia is 'a Christian nation'. However, even in this instance, it is arguable that the legal force of the Preamble as a matter of strict interpretation makes it subservient to the supremacy of the law, affirmed in the more binding provisions of the Constitution itself.

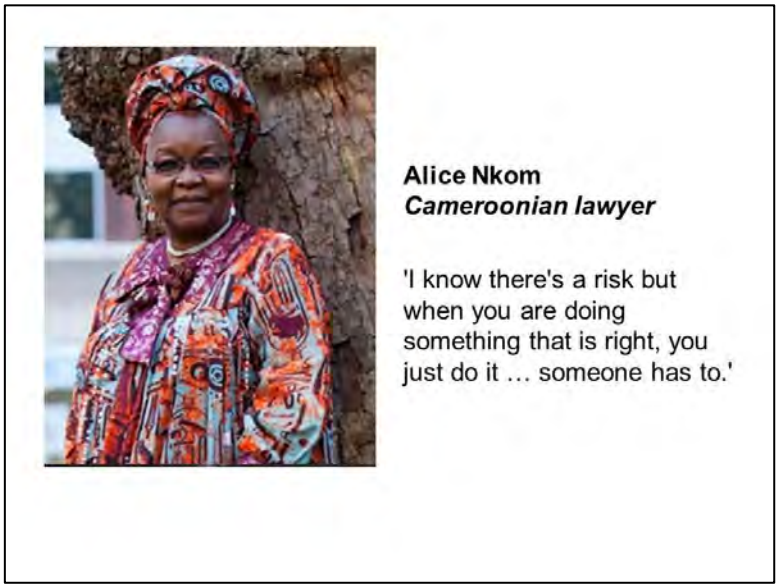
Arguing that the notion that Africans traditionally integrated religion in both their private and public world views should trump the principle of secularism buys into an unacceptable notion of African

exceptionality. Human experience shows that all people hold views, whether informed by religion or by their own encounters, education, disappointments or joys. In a pluralist constitutional democracy, it is the constitutional compact agreed through inclusive processes that ultimately counts, and not the extent to which views are informed by one aspect of life, namely, religion. Clearly, constitution and religion may – and often do – overlap, but this overlap does not result from the force of religion as such, but from the extent of its constitutional inclusion. Sadly, the secular state is often the last bulwark against tyranny of hypocrisy.

D Extra-legal strategies

Assuming that a convincing legal argument for equal legal protection has been made, there is no guarantee of a receptive audience. This section therefore looks *at* some extra-legal strategies to bolster their salience.

Rights vindication will - at the least in the short term - depend on African judiciaries rather than on legislatures. However, judges do not act on their own initiative, but are only able to react to suitable cases placed before them. It is therefore imperative that sexual minorities know that their rights are protected, and that lawyers are able and willing to bring these cases to court. In homophobic contexts, it is often quite difficult to find lawyers who are willing to take up the cases of sexual minorities due to fear of stigma, threats or even violence. It is therefore incumbent upon law schools to train a new generation of lawyers who are not only conversant with the arguments, but also prepared to shoulder the burden of doing the right thing. As the example of Alice Nkom shows,



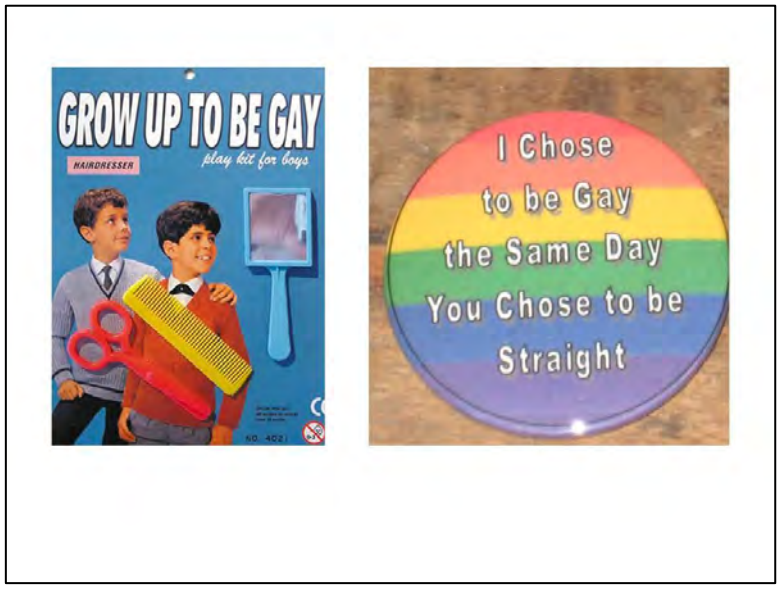
even those who have been educated some time ago - and the law associations to which they belong - have a role to play. Advocate Nkom is a Cameroonian lawyer who has over many years represented members of sexual minorities in the courts of that country, despite death threats and attempts to have her struck from the professional register, because, in her words, it is the 'right thing'.

Lawyers should learn from and may find reassurance in relying on the precedents presented by other African countries. The judgments of the Ugandan courts are pertinent examples. These findings should be disseminated widely on the continent, at least among lawyers. But even the European human rights system, for all its obvious contextual differences, provides a lesson to us: patience pays. Those of us so deeply disappointed by the African Commission's stance thus far should not lose sight of the lengthy evolution of this issue in its European counterpart. The progressive position today masks a 25-year evolution, from the first unsuccessful submission in 1955 alleging that the German anti-sodomy law violated the European Convention, through many other

failed submissions, to the 1981 decision of the European Court of Human Rights finding that a similar law in Northern Ireland, even if not enforced, placed the UK in breach of the Convention.[42]

Another lesson from Europe is not to expect too much from regional institutions. Positions at this level tend to follow rather than lead national trends. It was only after a core group of states had decriminalised same-sex acts that the European institutions enforced these trends on a regional basis. The same trend is emerging in relation to same-sex marriages. Activism at the African Commission has not taken bold steps, and the approach to focus on the equal protection of sexual minorities from acts of violence as a threshold issue on which to re-engage the Commission seems wise. A change in the composition of the Commission, following the replacement of the Chairperson of the Commission, who made no secret of her anti-gay stance, with one of the four Africans who attended the Yogyakarta meeting may yet see this modest strategy bearing fruit and being replaced with bolder expectations.[43]

At the national level, part of an incrementalist approach may be to depart from a premise of strategic essentialism, by arguing, for example, that sexual orientation is an innate or immutable characteristic. Although adopting this stance may do a grave injustice to the complex nurture-nature debate

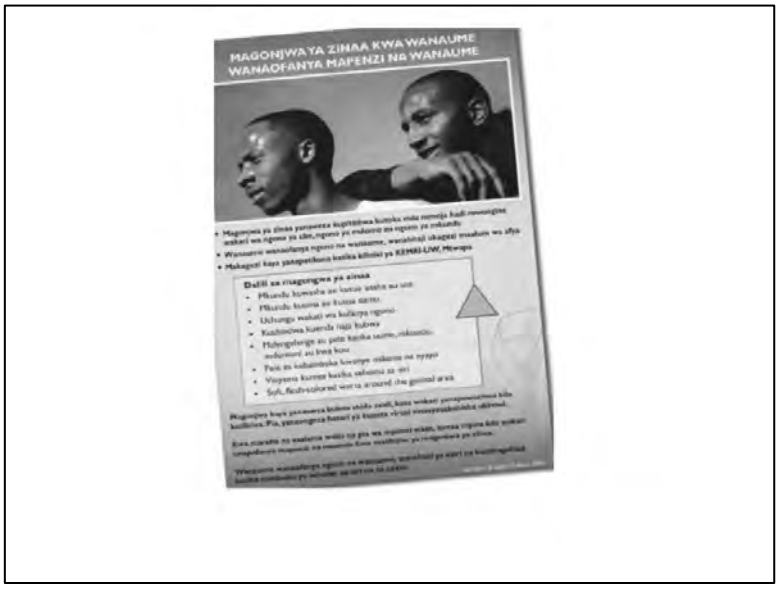


as to the 'reasons' for homosexuality, it may be the best way to square up against the obsessive fear about LGBTI advocacy and 'proselytisation'. It is the fear of 'mass conversion to homosexuality' that underlies the statement in the preface to the Ugandan Anti-Homosexuality Bill that it departs from the premise that 'same-sex attraction is not an innate and immutable characteristic'.

Whatever legal strategy is chosen, it should be accompanied by social activism. It was important that the challenge against sodomy laws in South Africa was not brought by individuals but by the national Coalition for Gay and Lesbian Equality, a forum for gay and lesbian activism, deeply involved in post-1994 law reform around LGBT rights. The successful implementation of the *Treatment Action Campaign* case, in which the government was ordered to provide ARVs (Nevirapine) to all pregnant women living with HIV, can in large part be ascribed to the supporting presence of a highly-visible and vocal social movement. The *Naz* case in India provides another example of collective action and social activism between a broad alliance (the 'Voices Against 377') of LGBT and non-LGBT groups.

Social activism will only emanate from greater awareness and understanding not only of sexual minority issues, but of sexuality, in general. There is an acute need for greater openness and a national conversation about sexuality issues, of which SOGI should be but a clearly-articulated part. In this, widespread and informed media coverage and scholarship about sexuality, in general, and same-sex, specifically, are pivotal.

These campaigns have to focus on indigenising sexual minority issues. This could take the form of using local languages,



and building on and further exploring terminologies. But it should also build on local practices, experiences and understandings, to create African-rooted homosexualities, through what Cameroonian sociologist Charles Guebogou calls '*métissage*' of hybridisation. Allowing myself to be served by one stereotype about sexual minorities, let me ask: Who is better placed to give content to a creative and playful Africanised homosexuality? Botswana pop star Shanti Lo

Santi Lo

provides a lead – her transgender (male to female) identity is a well-known fact but never expressly stated, presenting a localised 'gay' identity that is culturally integrated, authentically grounded and socially accepted.[44]

South Africa's first widely-publicised 'traditional gay wedding', on 13 April 2013, provides another example"

African civil society operates in a space shrinking at an alarming pace. It is more important than ever before that LGBTI organisations should form alliances and be mainstreamed. Many advances for gay men, in particular in Africa, have come though the public health route. When states recognised the disproportionate risk to HIV of men who have sex with men (MSM), they started including MSM into their HIV prevention and promotional programmes. The MSM discourse opened manoeuvring space for gay men, and sexual minorities more broadly. LGBTI organisations should increasingly branch out to link sexual minority concerns with and seek out inter-sectionalities with gender, poverty, socio-economic vulnerability, marginality, and nationality status to build solidarity networks of anti-subordination, seeking responses to oppression on all fronts.

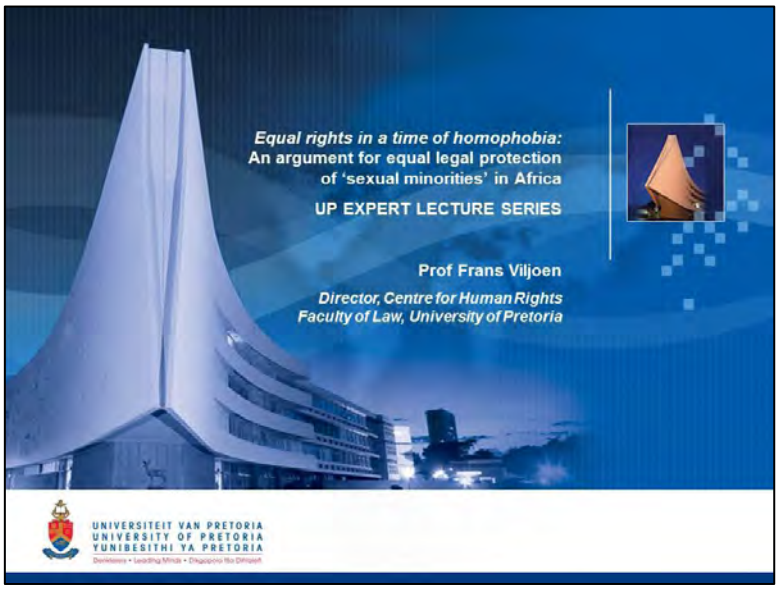
E Conclusion

I have not mentioned South Africa much. But: Even if homophobia is no longer state-sponsored here, its manifestations are no less painful to victims of sexual and other forms of violence, hate speech and social exclusion. Efforts to create an environment conducive to equal citizenship

should continue, for example, by the adoption of hate crimes legislation covering SOGI. With one foot planted (geographically) in predominantly homophobic Africa, and the other (constitutionally) in the global sphere of 'Friends of SOGI', South Africa is in an excellent position to play the role of bridge builder between the two opposing worlds. It is clear that it has, after some ambiguity about this role, taken up the cudgel.

The regional SOGI meetings held earlier this year culminated in the Oslo event, which was co-hosted by South Africa and Norway. This process created an air of expectation that the Human Rights Council would adopt a decision to establish a Special Rapporteur on SOGI at its present session. However, when Norway read the statement on Monday (10 June 2013), there was only reference to a 'relevant mechanism' at the 'appropriate time'. It is understood that South Africa's resistance is the primary explanation for the watered-down statement and the extension in timeframes. South Africa's view is that the process should proceed more cautiously, with greater attempts at engaging the AU, the Arab group, the OIC and the African Council of Churches. This position speaks to South Africa's failure, thus far, to deliver on its role as potential global broker on the issue. The slowing of pace also underscores the risk that global advances may be held back by African states.

Finding convincing arguments to see the lowering of the flag of homophobia, which is flying proudly over so much of the continent, is now as acute as it has ever been. Persuading states to recognise the right to equal protection, as I have tried tonight, may be one step in this direction.



[1] Communication 488/1992, 4 April 1994.

[2] *Baczkowski v Poland* no 1543/06, 3 May 2007; *Alekseyev v Russia* no 4916/07; 25924/08, 14599/09 21 October 2010.

[3] Resolution AG/RES. 2435 (XXXVIII-O/08) on "Human Rights, Sexual Orientation, and Gender Identity" by the General Assembly of the Organization of American States during its 38th session in 3 June 2008.[3] OAS Doc AG/RES 2504 (XXXIXO/09), AG/RES. 2600 (XL-O/10), 8 June 2010; OAS Doc AG/RES 2653 (XLI-O/11), 7 June 2011; AG/RES. 2721 (XLII-O/12), "Human Rights, Sexual Orientation, and Gender Identity".

[4] Inter-American Court of Human Rights, *Atala and daughters v Chile*, Judgment (Merits, Reparations and Costs), 24 February 2012.

[5] AU Assembly 15th ordinary session, 25-27 July 2010 Kampala Uganda, *Decision on the Promotion of Cooperation, Dialogue and respect for Diversity in the field of human rights*, AU Doc. Assembly/AU/17(XV) Add.9, para 4. AU Doc Assembly/AU/ Decl.1(XVI), Declaration on the theme of the Summit: "Towards greater unity and integration through shared values".

[6] See on the African Commission and SOGI, R Murray and F Viljoen 'Towards non-discrimination on the basis of sexual orientation: The normative basis and procedural possibilities before the African Commission on Human and Peoples' Rights and the African Union' (2007) 29 *Human Rights Quarterly* 86—111.

[7] On the CAL case, see F Viljoen, *International human rights law in Africa* (2012) 266-7.

[8] *Nadan v The State* [2005] FJHC 1; Haa0085 & 0086.2005 (26 August 2005), High Court if Fiji, at Suva, Appellate Jurisdiction.

[9] High Court Delhi, *Naz Foundation v Government of NCT of Delhi and others*, 2 July 2009.

[10] 539 US 558 (2003).

[11] 478 US 186, 106 S Ct 2841, 92 L Ed 2d 140 (1986).

[12] Aggregated data from Pew Research Center, as at march 2003, see the Pew Forum on Religion and Public Life, http://www.pewforum.org/Topics/Issues/Gay-Marriage-and-Homosexuality/

[13] See eg N Hoad 'Behind the white man's burden and the white man's disease: Tracking lesbian and gay human rights in southern Africa' (1999) 5 *GLQ: A Journal of Lesbian and Gay Studies* 559-84.

[14] J Anderson 'Conservative Christianity, the global South and the battle over sexual orientation' (2011) 32 *Third World Quarterly* 1589 1591.

[15] Pew Forum on Religion and Public Life (2006) *Spirit and power: A ten-country survey of Pentecostals* (technical report).

[16] US District Court District of Massachusetts, Springfield Division, *Sexual Minorities Uganda v Scott Lively*, Civil Action 3:12-CV-30051 (MAP).

[17] In his book *Folk devils and moral panics,* first published in 1972.

[18] See eg http://nigerianhealthjournal.com/?p=96.

[19] *Department of Home Affairs and another v Fourie and others*, Case CCT 60/04, 1 December 2005.

[20] See eg http://www.virtueonline.org/portal/modules/news/print.php?storyid=3719.

[21] According to the Minister of Justice, Chief Bayo Ojo, the law was pushed by President Olusegun Obasanjo following demonstrations for same sex marriage during the international conference on HIV/AIDS (ICASA) in 2005.

[22] Comoros and Sao Tome e Principe.

[23] Communication 136/94, *William Courson v Zimbabwe* (2000) AHRLR 335 (ACHPR 1995) (8th Annual Activity Report).

[24] Communication 245/02, *Zimbabwe Human Rights NGO Forum v Zimbabwe*(2006) AHRLR 128 (ACHPR 2006) (21st Activity Report)(*Zimbabwean Political Violence* case) para 169. This observation is made *obiter*, as the case did not turn on the issue of sexual orientation.

[25] C Heyns and W Kaguongo 'Constitutional human rights law in Africa' (2006) 22 *South African Journal on Human Rights* 673.

[26] UN Doc CCPR/CO/83/KEN, 29 April 2005; UN Doc CCPR/C/ZMB/CO/3, 9 August 2007; UN Doc CCPR/C/BWA/CO/1, 24 April 2008, paras 24 and 22, respectively.

[27] 'Concluding observations of the Human Rights Committee: Malawi', United Nations Human Rights Committee, 103rd Session, CCPR/C/MWI/CO/1, paragraph 7, page 3, 18 June 2012.

[28] European Court of Human Rights, *L and V v Austria*, Applications nos. 39392/98 and 39829/98.

[29] See map: http://en.wikipedia.org/wiki/LGBT_rights_by_country_or_territory.

[30] See also Human Rights Watch (2008) *This alien legacy*.

[31] *Banana v State* [2000] 4 LRC 621; [2000] (8) BHRC 345.

[32] See UN Doc CCPR/CO/76/EGY, 28 November 2002.

[33] G Bassham 'Legislating morality: Scoring the Hart-Devlin debate after fifty years (2012) *Ratio Juris* 117.

[34] Para 113.

[35] Para 28.

[36] 347 US 483 (1954).

[37] 410 US 113 (1973).

[38] J Michaelson (2011) *God vs gay? The religious case for equality* 68–69.

[39] AS Van Klinken and MR Gunda 'Taking up the cudgels against gay rights? Trends and trajectories in African Christian theologies on homosexuality' (2012) 59 *Journal of Homosexuality* 114 at 129 – 132

[40] Para 92.

[41] AS Van Klinken 'Gay rights, the devil and the end times: public religion and the enchantmnet of the homsexuality debate in Zambia' (2013) Religion 1-22.

[42] P Johnson 'Homosexuality and the African Charter on Humannd Peoples' Rights: What can be learned from the history of the European Convention on Human Rights?' (2013) 40 *Journal of Law and Society* 249 252-3.

[43] Four African experts were represented among the 29 persons at the drafting table: Edwin Cameron, Justice of the Supreme Court of South Africa; Sanji Monageng, at the time Justice of the High Court of The Gambia and presently Chairperson of the African Commission; and the Chair (Maina Kaia) and a member (Lawrence Mute) of the Kenya National Commission on Human Rights. Mute has recently been elected to the African Commission.

[44] J McAllister "twaranising global gayness: the 'unAfrican' argumnet, Western gay media imagery, local responses and gay culture in Botswana' (2013) *Culture, Health and Sexuality: An International Journal for Research, Intervention and Care* 1 10-1.