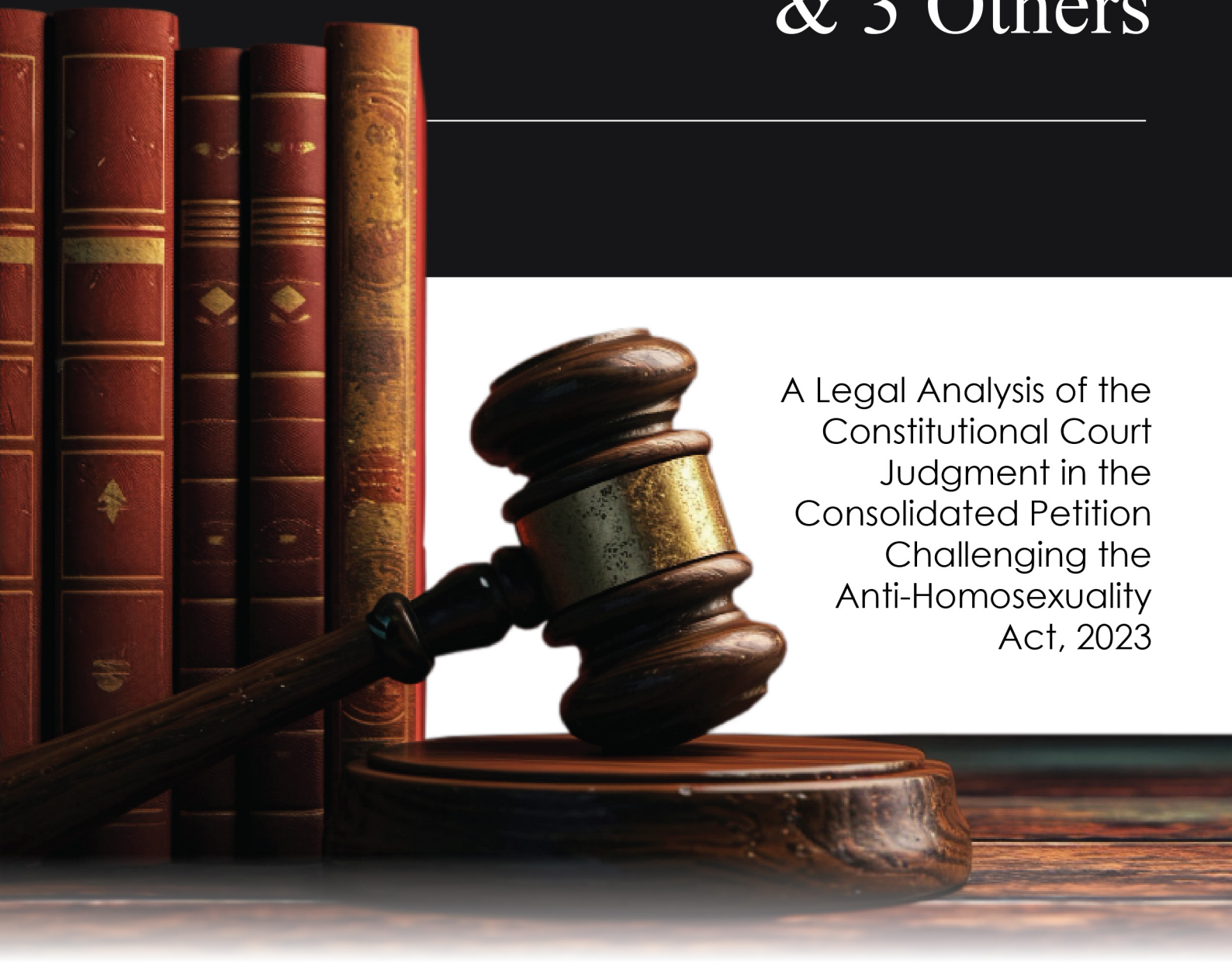
chapter four

Hon. Fox Odoi-Oywelowo & 21 Others v. Attorney General & 3 Others



A Legal Analysis of the Constitutional Court Judgment in the Consolidated Petition Challenging the Anti-Homosexuality Act, 2023

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Introduction

This publication provides an analysis of the judgement in **Hon. Fox Odoi-Oywelowo and 21 Others v. Attorney General and 3 others**, *Consolidated Constitutional Petitions No. 14, 15, 16 and 85 of 2023,* by the Constitutional Court of Uganda *(herein after referred to as the 'Court')* at Kampala delivered on the 3rd day of April, 2024. The petition challenged the enactment of the Anti-Homosexuality Act, 2023 *(hereinafter referred to as the "AHA")* on procedural and substantive grounds. The memo is structured to include an in-depth legal analysis of the decision of the Court according to the issues that were framed for determination.

The paper further analyses the Court's citation of **Dobbs v. Jackson Women's Health Organization No. 19-1392, 597 U.S. 215 (2022)** and **Navtej Singh Johar & Others v. Union of India & Another (2018) INSC 790** respectively. The analysis in this section responds to the specific ways the Court cited these cases, as well as the general use of these cases in the judgement.

Each section is broken down by the findings made by the Court ("Court Finding 1, 2, 3," etc.) followed by possible responses ("Response 1, 2, 3," etc.). These responses are meant to provide a breadth of options and ideas which Petitioners could utilise or consider if found persuasive. A summary of each section is also included in this Executive Summary and in the Table of Contents below.

Executive Summary

I. Principle of Legality

In the judgement's principle of legality section, the Court used an exceedingly strict understanding of vagueness and overbreadth to invalidate arguments raised by Petitioners regarding the AHA's ambiguity about the scope of conduct prohibited under the law. In interpreting Article 28(12) of the Ugandan Constitution, which requires offences to be defined with clarity, the Court stated that the Constitution does not bar mere uncertainty but applies where the statutory provision "can be given no sensible or ascertainable meaning and must therefore be regarded as meaningless."

The Court then relied on this standard to uphold provisions that are otherwise left undefined in the Act. The Court found that the terms "overt act" in Section 2 (4) of the AHA, and "encourage," "promote," "observe," and "normalise" in Section 11 (2) of the AHA were sufficiently defined for constitutional purposes. In so holding, the Court misinterpreted Uganda's Constitution and impermissibly left Ugandans unsure of the scope of conduct that is prohibited under the AHA.

II. Human Dignity

In the judgement's human dignity section, the Court found that the right to "cultural dignity" superseded any individual right to dignity or personal autonomy. "Cultural dignity" did not seem to be an established principle in existing law or the pleadings. Thus, the Court constructed this idea from a misinterpretation of several sources, detailed in Section II below. Importantly, the Court claimed that cultural dignity can often be in conflict with individual dignity, and that when this happens, cultural dignity must take priority. The Court went on to argue that Objective XXVI of the Ugandan Constitution further required that they prioritise the societal interests, and therefore advance principles that align with the morality of Ugandan culture.

The main response to the Court's cultural dignity finding is that they misunderstood the sources they cited, and that the advancement of cultural rights is not a legitimate reason to derogate individual rights.

The Court also used the human dignity section to make numerous other (seemingly disjointed) findings, including that the AHA is supported by the rights of the family, that the popularity of the AHA supported the idea that it is in line with the morals of the nation, and that homosexuality is not innate. Furthermore, the Court found that the lack of global unanimity regarding the protection of LGBTQ+ persons meant that they were not violating international treaties, that same-sex sexual activity involving consenting adults is not harmless because it can increase the spread of HIV, that criminal law is relative and based on harm to the community, that there was no evidence that the AHA was being used to harm or blackmail suspected LGBTQ+ people, and that mere inquiry into one's sexual orientation did not amount to inhuman treatment.

An analysis that distinguishes each of these individual findings is detailed in Section II below in the order they appear in this paper.

III. Right to Equality and Non-discrimination

The Court made six findings in the judgement's Equality and Non-Discrimination section: first, that interpreting the Ugandan Constitution to include the protection of sexual orientation would create an internal conflict within the Constitution. However, the provision of a public benefit like marriage is different from protection from discrimination.

Second, the Court found that discrimination on the basis of sexual orientation was deliberately omitted from the Ugandan Constitution. However, the sections they cited only establish this with respect to the decision not to allow same-sex marriage.

Third, the Court found that the values and norms of the Ugandan people must be read into the language of the Constitution, and therefore that the protection of LGBTQ+ people should not be read into the Constitution. However, values and norms should only be used to support rights, not eliminate them, and we find that there are no one homogenous set of Ugandan values.

Fourth through sixth, the Court found that the protections against non-discrimination in international law can be overridden by using a multi-part test, which was met in this case. However, they largely ignored most international law arguments. The test was not met in this case. The UK case cited is distinguishable and we shall endeavour to do so.

IV. Right to Privacy

The Court found that the AHA did not authorise unlawful entry into, search, or interference with a person's body, home or other property, correspondence, or communication, and that any limitations to the right to privacy were justified for the purpose of securing due recognition of the rights and freedoms of others, and of meeting the just requirements of morality, public order and the general welfare in a democratic society. However, the Court partially accepted part of the Petitioners' claims, striking down clauses relating to duties to report.

The main counterclaims to the Court's findings are that there is no way, in practice, to enforce the AHA without unlawfully interfering with a person's body, home, property, correspondence, or communication. Additionally, the Court erred in applying the standard for permissible limitations to the right to privacy, as this must only be done without discrimination and in conformity with the principles of human rights. Second, there is no single definition of the socio-cultural realities of Ugandan society. Finally, the Court relied on an overruled case in making the argument relating to privacy rights of an HIV+ person. The outdated case, *Mr. X v. Hospital Z (1998) 8 SCC 296*, from India, was subsequently overruled and re-reviewed in 2003 (see, *Mr. X vs. Hospital Z, (2003) 1 SCC 500*).

V. Freedoms of Expression, Thought, and Association

In the Court's consideration of the freedom of expression, thought, and association, the Court mainly found that the restrictions on speech and association implemented in the AHA pass the proportionality test, which sets out standards for the limitations of particular rights. The main response to

this finding is that the Court misapplied the proportionality test, did not adequately recognise the limitations/harms of the AHA, and used circular reasoning in support of its findings.

The Court also made two secondary findings. First, the Court found that freedom of religion was not implicated (which was one of the first findings made in this section of the Court's judgement). The Court rejected the religious freedom arguments on the grounds that the Petitioners did not appropriately attest to the proposed harms. Second, the Court found that the AHA did not infringe on academic freedoms. Our response to this finding in this paper highlights the extreme chilling effects of the AHA.

VI. Right to Profession, Occupation, and Business

The Court found that any restrictions to profession, occupation, and business are permissible limitations under regional and international law, and that many of the claims made by the Petitioners were responded to in the section related to privacy. Further, the Court found that there was no right to engage in a profession, occupation, or business which undertook illicit activities—and the de-legalisation of activities relating to homosexuality. This meant that NGOs engaging in the provision of services such as legal representation and healthcare services to the LGBTIQ+ community were not engaging in legal business activities. The impossibility of understanding the limitations of "promotion" of homosexuality in practice will lead to an over-criminalisation and targeting of legitimate professional and business activities that include LGBTIQ+ individuals as beneficiaries.

VII. Right to Health and Property

The Court found, in part for the Petitioners, noting that the reporting requirement under Section 14 of the AHA would have had a chilling deterrent effect on access to healthcare by homosexual patients. Further, the Court struck out provisions relating to the unknowing transmission of HIV through same-sex sexual activity, noting that it compounded the susceptibility of HIV+ persons to mental health issues. However, the Court then went on to state that the right to health had not been violated in other instances relating to the law. The Court failed to explain why other aspects of the AHA, which hold similarly harsh sentences for consensual same-sex behaviour, failed to harm the mental health of the LGBTQ community. The Court pointed to Uganda's progress relating to healthcare, the fact that despite criminalisation of homosexuality and widespread stigma towards the LGBTQ+ population there remained improvement in health metrics, and the fact that there were no reports of denial of access to healthcare by LGBTQ+ persons. But there is significant evidence to suggest that criminalisation of homosexuality did harm the health of LGBTQ persons, which the Court ignored. Further, the Court noted that it was protecting the health of vulnerable groups such as children from the harms of the LGBTQ+ community. However, no harm to children resulting from consensual same-sex activity between adults had been proven. As such, the Court engaged in speculative arguments, not raised in the pleadings.

VIII. Dobbs case

The Court cited **Dobbs v. Jackson Women's Health Organization**, in the Human Dignity section on Pg. 103, Pg. 266 and used it in several ways. First, the Court used *Dobbs* to state that culture and history and traditions can overrule personal rights. However, the U.S. Supreme Court in *Dobbs* specifically said it was *sui generis* (unique or peculiar), and was not about balancing cultural and individual rights, but only

used history and tradition in reference to originalism. We note that the decision in *Dobbs* was not broadly about a right to autonomy but rather was limited to abortion.

Second, the Court stated that *Dobbs* stood for the U.S. returning the decision about abortion to the people, as they were returning the decision about the AHA to the people (through their elected representatives). However, the U.S. Supreme Court's situation is in a federalist system, and their restriction to the use of Substantive Due Process in this case, meant that they are not returning this decision to the "people," but to the States.

Third, the Court generally used *Dobbs* in a way that implied that it had bearing on the case regarding the AHA. However, the two cases are distinguishable because *Dobbs* was not about an identity and criminalisation. The majority in *Dobbs* clarified, "And to ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion."

Additionally, the Court should not have relied on the *Dobbs* decision at all because it does not reflect the latest US human rights law on the subject of LGBTQ+ rights. The right of LGBTQ+ people to personal dignity is still a constitutional right in the U.S. *See the case of Lawrence v. Texas; US v. Windsor; and Obergefell v. Hodges.*

IX. Johar case

The Court largely declined to consider the applicability of **Navtej Singh Johar & Others. v Union of India & Another (2018) INSC 790**, which decriminalised homosexuality in India. *Johar*, as cited by Petitioners, was misinterpreted throughout the decision.

The Supreme Court of India in *Johar eschewed* social morality or a homogeneous, standardised societal ideology in deference to constitutional morality. But in adding that Parliament must consider directive principles of state policy governed on the principles of "national interest" and "common good," the Court's own definitions of these terms are more inclusive and all-encompassing than exclusive. It is also untrue that morality is not regarded as important within the Constitution of India, as it is mentioned in tangible ways in at least three separate Articles.

The Court also held that an individual's sexual autonomy is an individual's right to behave as they wish, provided they have the consent of their partner. This point was supported by the other incorrect analysis that *Johar was* premised on the belief that pleasure derived from an action would negate its criminality. Not only did the Court repeatedly misinterpret, misunderstand and misrepresent foreign jurisprudence and other persuasive authorities and mistake dicta for legal analysis, but it also ignored global consensus on the innateness of homosexuality. The Court also misunderstood what *Johar* turned on, missing out on the dispositions of dignity, privacy, and arbitrary restrictions on the LGBTQ+ community rather than individual autonomy.

Contents

I. Principle of Legality

Throughout the principle of legality section, the Court used an exceedingly strict understanding of vagueness and overbreadth to invalidate arguments raised by Petitioners regarding the AHA's ambiguity about the scope of conduct prohibited under the law. In interpreting Article 28(12) of the Ugandan Constitution, which requires offences to be defined with clarity, the Court claimed that the Constitution did not bar mere uncertainty but applied where the statutory provision "can be given no sensible or ascertainable meaning and must therefore be regarded as meaningless." (Pg. 162). The Court then relied on this standard to uphold provisions that were otherwise left undefined in the AHA. The Court found that the terms "overt act" in Section 2(4) of the AHA, and "encourage," "promote," "observe," and "normalise" in Section 11(2) of the AHA were sufficiently defined for constitutional purposes (Pg. 171; Pg. 175).

In so holding, the Court misinterpreted Uganda's Constitution and impermissibly left Ugandans unsure of the scope of conduct that is prohibited under the AHA.

1. Court Finding 1: The Court misinterpreted Article 28(12) of the Ugandan Constitution as requiring meaninglessness

A. Analysis 1: The Court adopted an unnecessarily strict interpretation of Art. 28(12).

The Ugandan Constitutional Court (hereinafter "the Court") adopted an unnecessarily strict interpretation of Article 28(12) of the Ugandan Constitution. That article state that "[e]xcept for contempt of court, no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it is prescribed by law." To determine the appropriate standard of clarity, the Court repeatedly adverted to the proposition that "[i]t is not proper to treat Statutory provision as void for mere uncertainty unless the uncertainty cannot be resolved and the provision can be given no sensible or ascertainable meaning and must therefore be regarded as *meaningless*." **Centre for Domestic Violence Prevention & Others v Attorney General, Constitutional Petition No. 13 of 2014** (quoting **Fawcett Properties v Buckingham County Council (1960) 3 All ER 503 at 507).** This is an unreasonably permissive standard, and one that is in irresolvable tension with the requirement that the statute "give sufficient guidance for legal debate, that is, for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria." **Andrew Karamagi & Another v Attorney General [2023] UGCC 2**.

Plenty of laws, like the AHA, can be meaningful and still fail to supply the sufficient guidance for legal debate, and for the achievement of a definitive interpretation by means of reasoned analysis applying legal criteria. The analysis below demonstrates that the AHA does not provide an intelligible standard according to which it can be interpreted.

B. Analysis 2: The term "Overt Act" fails to supply reasonable notice of the conduct covered by the Act.

The Court held that the term "overt act" need not be clearly defined in Section 2(4) of the AHA (*offence of homosexuality*) because it was already defined in Uganda's Penal Code. In the Code, that term is defined as "[e]very act in furtherance of the commission of the offence defined or every act of

conspiring with any person to the effect that purpose and every act done in furtherance of the purpose by any of the persons conspiring shall be deemed to be an overt act manifesting the intention." While this standard may be useful in the laws of murder and conspiracy, it is less useful in the AHA, where it is more difficult to determine what constitutes an offence. In the context of murder, for instance, an overt act happens when a person obtains a weapon in furtherance of the commission of the offence of murder. By contrast, the line between sexual and other conduct is inherently difficult to draw. For example, under the Court's interpretation, a woman who says "love you, babe" to her female friend and cuddles may be committing the offence of attempted homosexuality. While not every word of a statute needs to be clearly defined, that statute cannot be constitutional unless it puts citizens on notice as to the conduct that it proscribes. Accordingly, even after supplying the definition of "overt act," the AHA fails to define what conduct that definition covers.

2. Court Finding 2: The Court incorrectly found that the AHA's language is not ambiguous

A. Analysis 1: The AHA failed to supply a reasonable definition of the conduct covered by the terms "encourage," "promote," "observe," and "normalise."

The Court held that key terms in Section 11(2) of the AHA (*promotion of homosexuality*)—including "material promoting or encouraging homosexuality," "facilitating activities that encourage homosexuality," "any form of financial support," "facilitate activities that 'encourage' homosexuality," "observance," and "normalisation"—are adequately and unambiguously defined (Pg. 173-74). The Court asserted that these terms are clearly articulated by their "plain, natural and ordinary meaning," such that any person is on notice of the covered criminalised conduct (Pg. 175). However, the plain meaning of these words does not provide an adequate basis for determining the full extent of permissible and impermissible behaviours.

For example, under the Court's interpretation, a health clinic that carries or provides condoms and lubricants may be understood as "encouraging" or "normalising" homosexuality if they are given to a member of the LGBTQ+ community who may use them in a same-sex sexual activity. An NGO providing legal, advocacy or counselling services for the LGBTQ+ community may also be understood as "encouraging" "promoting" or "normalising" homosexuality for providing professional services. Similarly, a woman who holds hands with, hugs, or engages in other ordinary displays of affection with a friend of the same sex may be seen as "normalising" or "encouraging" homosexuality. The lack of specificity may additionally have negative effects for individuals seeking healthcare, for fear of being seen as promoting homosexuality. For example, a person who is HIV+ may avoid informing their doctor of their sexual partners, for fear of being accused of being homosexual. Conversely, healthcare institutions may avoid providing sexual healthcare, including for HIV/AIDS, for fear of being seen as "normalising" or "promoting" homosexuality.

While it is true that not every word of a statute needs to be clearly defined, the breadth of potential actions covered under Section 11 of the AHA means that it impermissibly fails to provide a comprehensive standard for regulating behaviour.

II. Human Dignity

Throughout the human dignity section, the Court used numerous sources to make the argument that there is some concept of "cultural dignity" that superseded any individual right to dignity or personal autonomy. "Cultural dignity" does not seem to be an established principle in existing scholarly work or the law. Thus, the Court constructed this idea from a misinterpretation of several scholars, *General Comment No. 21: Right of Everyone to Take Part in Cultural Life* (hereinafter "the Comment"), and **The MEC for Education: KwaZulu-Natal v Pillay [2008] 1 SA 474 (CC)**.

Importantly, the Court held that cultural dignity can often be in conflict with individual dignity, and that when this happens, cultural dignity must take priority. Specifically, the Court found that there is a "conflict between individuals' right to self-determination, self-perception and bodily autonomy on one hand; and the communal or societal right to its own self-determination" (Pg 228) and that "individual autonomy or the exercise of sexual autonomy ought not to override the national interest as set out in national laws that are anchored in non-repugnant socio-cultural sensitivities . . ." (Pg 263).[1] The Court went on to hold that Objective XXVI of the Ugandan Constitution further required that they prioritise societal interests, and therefore advance principles that align with the morality of Ugandan culture.

The main response to the Court's holding about cultural dignity is that they misunderstood the sources they cited and that the advancement of cultural rights is not a legitimate reason to derogate individual rights. These arguments, as well as some other possible responses to their argument regarding cultural dignity, are developed in more depth below.

The Court also used the human dignity section to make numerous other (seemingly disjointed) findings, including that the AHA was supported by the rights of the family, that the popularity of the AHA supported the idea that it is in line with the morals of the nation, and that homosexuality was not innate. Furthermore, the Court found that the lack of global unanimity regarding the protection of LGBTQ+ persons meant that they were not violating international treaties, that same-sex sexual activity was not harmless because it could increase the spread of HIV, that criminal law is relative and based on harm to the community, that there is no evidence that the AHA is being used to harm or blackmail suspected LGBTQ+ people, and that mere inquiry into one's sexual orientation did not amount to inhuman treatment. Specific findings rebutting each of the additional claims are addressed below.

[1] *See also*: Pg. 230 ("[C]ultural rights are the bedrock of human dignity and positive social interaction. So that, human dignity essentially emanates or is derived from a community's way of life, traditions, customs and even religion (where it is tied to culture), and not necessarily vice versa."); Pg. 230 ("It follows that conduct that deviates from the cultural manifestations of way of life, language, literature, music, religion, traditions and customs operates cross-purposes with the right to human dignity."); Pg. 233 ("However, when competing elements of other social values (such as the interests of the individual against that of the community) are weighed against each other, the element of '*human dignity as constraint*' on free choice kicks in to constrain on account of societal interests those rights that flow from individual autonomy."); Pg. 234 ("Given the competing societal interests that underpin the right to human dignity, the Court is required to consider the inherent right to dignity against the communal cultural dignity of the Ugandan society.").

1. **Court Finding 1: The Court misinterpreted international scholars to hold that "cultural dignity" can supersede individual rights (Pg. 223-230, 233-239).**

To reach this conclusion, the Court relied on the scholarship of Rinie Steinmann,[2] Paolo Carozza,[3] and especially Christopher McCrudden.[4]

A. Analysis 1: The Court misconstrued the scholars they cite (Steinmann, Carozza, and McCrudden), each explained below.

Use of Rinie Seinmann: The Court cited Steinmann's work for the proposition that dignity was related to social recognition and respect (Pg. 223-24), quoting Steinmann as describing the "so-called dignity of recognition being the social dimension of dignity."

Analysis*:* This is inaccurate. Steinmann does not claim that dignity arises only out of social relations, but rather that the respect and recognition of an individual by their community is an important part of that individual's dignity. Specifically, Steinmann is quoted as saying:

> "Recognition and respect for inherent dignity relates to types of treatment that are inconsistent with inherent dignity, as proscribed by international and national law texts. McCrudden refers to the second element as the "relational claim". In other words, it emphasises the relationship and expectations of the individual vis-à-vis the perceptions of his community - the so-called dignity of recognition, being the social dimension of dignity." (Pg. 223)

This quote was followed by the statement that the "state should exist for the sake of the individual, not vice versa," further emphasising the relationship between human dignity and the community as one where the rights of the individual must be prioritised.

Use of Paolo Carozza: The Court went on to discuss Carozza's work, claiming that it endorses the idea that the concept of human dignity is entirely relational (Pg. 225-26).

Analysis: This is inaccurate. Though Carozza states that the precise meaning of dignity in different contexts can be "contested and uncertain," the purpose of his article is to articulate the common ways that courts across the globe employ the concept of dignity, showing that the definition of dignity is not entirely undetermined. Carozza even explicitly states that one of those common uses of dignity is in the context of "equality as necessary to the respect for human dignity," and that "many jurisdictions, including Canada, the United States and South Africa, have invoked human dignity in a central way in judicial discussions of the rights of gays and lesbians."[5]

Use of McCrudden: Finally, the Court referenced Christopher McCrudden's article *Human Dignity and Judicial Interpretation of Human Rights* in which he quotes the German Constitutional Court's *Lifetime Imprisonment Case*:

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[2] *The Core Meaning of Human Dignity*
[3] *Human Dignity in Constitutional Adjudication*
[4] *Human Dignity and the Judicial Interpretation of Human Rights*
[5] Carozza, *Human Dignity in Constitutional Adjudication*, 464.

> "This freedom within the meaning of the Basic Law is not that of an isolated and self-regarding individual but rather of a person related to and bound by the community. In the light of this community-boundedness it cannot be "in principle unlimited". The individual must allow those limits on his freedom of action that the legislature deems necessary in the interest of the community's social life; yet the autonomy of the individual has to be protected" (Pg. 227)

Analysis*:* However, the Court incorrectly held that this demonstrated a "conflict between individuals' right to self-determination, self-perception and bodily autonomy on one hand; and the communal or societal right to its own self-determination, self-conceptualisation and dignity" (Pg. 228). The Court then took this argument to mean that individual autonomy may be abridged in light of alleged cultural values (Pg. 266). Yet, in making this claim, the Court manifestly ignored the final line quoted above that despite the sometimes limiting reality of community living, "the autonomy of the individual has to be protected" (Pg. 277). Thus, an accurate interpretation of these scholars' work would in fact likely support the overturning of the AHA.

2. Court Finding 2: The Court misinterprets General Comment No. 21: Right of everyone to take part in cultural life in finding that cultural dignity can supersede individual rights

The Court cited *General Comment No. 21: Right of Everyone to Take Part in Cultural Life*, alleging that (to quote the Court) "the Committee recognised that cultural rights are the bedrock of human dignity and positive social interaction. Human dignity essentially emanates or is derived from a community's way of life, traditions, customs and even religion (where it is tied to culture), and not necessarily vice versa" (Pg. 230).

A. Analysis 1: The Comment did not suggest that the right to practise one's culture should supersede an individual's right to dignity.

The interpretation adopted by the Court was not accurate summary of the Comment. First, the Comment did not suggest that the right to practise one's culture should supersede an individual's right to dignity. In fact, it states that individuals have a right to practise their culture so long as it does not interfere with the rights of others. Citing the Vienna Declaration and Programme of Action and the Universal Declaration on Cultural Diversity, the Comment specifically states that:

> "The Committee wishes to recall that, while account must be taken of national and regional particularities and various historical, cultural and religious backgrounds, it is the duty of States, regardless of their political, economic or cultural systems, to promote and protect all human rights and fundamental freedoms. Thus, no one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope."[6]

Thus, the Comment is best understood as suggesting that every individual and community has a right to practise their culture *only to the extent* that it does not harm or abridge the rights of others. Therefore,

[6] General Comment No. 21: Right of Everyone to Take Part in Cultural Life. Pg. 18.

assuming that the rejection of homosexuality is a legitimate expression of some cultural value, that does not give the Ugandan government the ability to infringe on the fundamental rights of any individual.

B. Analysis 2: Respecting cultural values cannot be equated with forced homogeneity.

The Comment specifically states that "[t]he right to take part in cultural life can be characterized as a freedom"[7] and goes on to state that "[t]he decision by a person whether or not to exercise the right to take part in cultural life individually, or in association with others, is a cultural choice and, as such, should be recognised, respected and protected on the basis of equality."[8] These statements further emphasize that the right to take part in cultural life is about the right of multiple cultures to co-exist in a society: the right for people to pray differently, and to exist according to their own beliefs.

However, the right to practice one's own cultural values does not permit a government to force its people to conform to a particular way of life or to infringe on individual rights on the basis of cultural ones. Even though Uganda is not an individualist society, Uganda is a multicultural society, and the AHA criminalises the private actions of a group of Ugandan adults on the basis of their perceived gender or sexual orientation and limits the mere existence of this entire group. Respecting cultural values cannot be equated with forced homogeneity. As the Comment states, "Article 15, paragraph 1 (a) may not be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized in the Covenant or at their limitation to a greater extent than is provided for therein."[9]

3. Court Finding 3: The Court misinterpreted the MEC for Education: KwaZulu-Natal v Pillay in holding that cultural dignity can supersede individual rights and autonomy

Another source of authority the Court relied on is **The MEC for Education: KwaZulu-Na I v Pillay [2008] 1 SA 474 (CC)**, in which the Constitutional Court of South Africa affirmed the right of a female Hindu student to wear her nose ring in school as an expression of her South Indian Tamil Hindu culture. The Ugandan Constitutional Court claimed that this case stood for the proposition that "conduct that deviates from the cultural manifestations of way of life, language, literature, music, religion, traditions and customs operates at cross-purposes with the right to dignity" (Pg. 230).

*A. Analysis 1: **KwaZulu-Natal v Pillay** actually stands for the principle that minorities must be permitted to practise their own ways of life, not that cultural dignity/expression is superior to individual dignity.*

While it is true that an *individual's* dignity may be tied up with their ability to practise their own way of life, it does not follow that deviations from the dominant culture of an entire nation is in conflict with the concept of human dignity. In fact, in **The MEC for Education: KwaZulu-Natal v Pillay**, the student, Sunali Pillay, as a South Indian, was engaging in the cultural practises of a minority in South Africa. In that case, therefore, the South African Court affirmed the right of a minority to practise their

[7] *Id.* Pg. 6.
[8] *Id.* Pg. 7.
[9] *Id.* Pg. 20.

own way of life in the face of the cultural expectations of Sunali's school and the larger South African culture. The opinion even states that:

> "[S]ometimes the community, whether it is the State, an employer or a school, must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally."[10]

> "While the extent of this exclusion is most powerfully felt by the disabled, the same exclusion is inflicted on all those who are excluded by rules that fail to accommodate those who depart from the norm. Our society which values dignity, equality, and freedom must therefore require people to act positively to accommodate diversity."[11]

Thus, returning to the Ugandan context, then, this case would actually dictate that all Ugandans, including those who are a part of the LGBTQ+ community, be permitted to "enjoy all their rights equally," even where their identity may not align with the majoritarian group in Uganda.

B. Analysis 2: Even though academics may be able to debate the role between cultural expression and individual autonomy/dignity, Uganda is ultimately bound by international law, which finds human dignity to be a non-derogable right.

Perhaps most importantly, not only does the Constitutional Court misinterpret this scholarship and the *UN General Comment No. 21* in advancing the argument that individual human dignity can be subject to limitations due to some broader principle of cultural dignity, it also runs afoul of the many international treaties to which Uganda is a party. The African Charter on Human and Peoples' Rights (ACHPR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR) all affirm the dignity of the human person.

C. Analysis 3: If the Court's argument is taken to its natural conclusion, no people would be entitled to individual rights.

Finally, the Court's finding that people can be deprived of their individual rights and autonomy in order to promote "cultural dignity," if taken to its natural conclusion, would suggest that no person is entitled to individual rights. Though the Constitution states that "All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law," the Court's finding would lead to majoritarian rule, where women and religious minorities, for example, could not exercise their rights if they differed from the perspectives of the majority. Thus, suggesting that people can be stripped of their individual rights in service of the larger culture ultimately creates a society where there are no fundamental rights.

[10] The MEC for Education: KwaZulu-Natal v Pillay [2008] 1 SA 474 (CC), Pg. 73.
[11] The MEC for Education: KwaZulu-Natal v Pillay [2008] 1 SA 474 (CC), Pg.75.

4. Court Finding 4: The Court incorrectly held that Objective XXVI of the Ugandan Constitution condoned the abridgement of individual rights on account of societal interests (Pg. 231-234).

The Court held that the Constitution's mandate in Objective XXVI(a) is that the State enacts laws that "[p]romote and preserve those cultural values and practises which enhance the dignity and well-being of Ugandans" stands for the principle that individual autonomy can be constrained on account of societal interests (Pg. 231-234).

A. Analysis 1: This holding misinterpreted Objective XXVI and ignored the other parts of the Objective which explicitly state that the promotion of cultural values must be consistent with fundamental rights and freedoms.

The Court's interpretation disregarded the first part of Objective XXVI which reads: "Cultural and customary values *which are consistent with fundamental rights and freedoms, human dignity, democracy, and with the Constitution* may be developed and incorporated in aspects of Ugandan life" (emphasis added). Thus, the Court mistakenly disregarded the part of Objective XXVI which clarifies that societal interests or other cultural values can only be incorporated by the State to the extent that they are consistent with other fundamental rights. It cannot then be the case that individual autonomy and individual dignity can be abridged for the advancement of any cultural or customary value.

B. Analysis 2: LGBTQ+ Ugandans are still included within the meaning of "Ugandans" or "the people."

The Court further held that their finding is supported by Objective XIV(a), which obligates the State to ensure that "all development efforts are directed at ensuring the maximum social and cultural well-being of the people." However, LGBTQ+ people are still included within the meaning of "the people."

See also Section IX.1 below for further discussion of the Court's use of Articles 8A and 126(1) of the Ugandan Constitution, which are also used in the judgement's dignity section to argue that the Ugandan Constitution requires the State to promote cultural values. Section X.1 also compares these articles with the Indian Constitution, as the opinion suggests that the Ugandan Constitution is unique and exceptional.

5. Court Finding 5: The Court incorrectly held that overturning the AHA is consistent with Uganda's cultural value of the family (Pg. 238-239)

The Court cited Objective XIX: The Protection of the Family and Article 31(2a) of the Constitution, which prohibits marriage between persons of the same sex, in support of the AHA.

A. Analysis 1: There is a difference between the legalisation of marriage and criminalisation of homosexuality, and the legalisation of marriage is not an issue in this case.

This case isn't about legalising same-sex marriage. There is a difference between the State denying LGBTQ+ people the benefit of legally recognised marriage, and the State actively criminalising

the mere existence of LGBTQ+ people. This is the difference between the conference of a positive right, which the State is under no obligation to do, and the punishment of criminalisation and the death penalty.

See also Section III.1 below which also explains that the ability to discriminate on the basis of sexual orientation and the ability to become married no matter your sexual orientation are two very different things.

B. Analysis 2: Uganda is a multicultural society and should permit its citizens to decide how to live their lives, as it already permits many different types of families and religions to flourish.

Furthermore, the State already protects diverse families. Uganda celebrates and permits families of differing religions and races, as well as polygamous marriages.[12] Thus, like the State permits different kinds of families to flourish in Uganda, so too should parents be permitted to love and house their children no matter how they decide to live their lives.

See also Section III.3 below for further discussion of the non-homogeneity of Uganda and Uganda's values.

6. Court Finding 6: The Court incorrectly relied on the popularity of the AHA to challenge its constitutionality (Pg. 242-243)

The Court cited the public support for the AHA as further evidence for why it should be upheld, emphasizing that the Ugandan people's parliamentary representatives would know the will of the people. The Court does not deny that the Penal Code is a relic of the country's colonial past, but still affirms the AHA on the grounds that it "captures the societal sentiments on the subject of homosexuality." The Court even went on to quote the parliamentary debate that preceded the enactment of the AHA, in which representatives argued that any genuinely universal human right would not face objection.

A. Analysis 1: It is sometimes the role of the judiciary to be counter-majoritarian, particularly when public opinion may seek to deprive a group of people of fundamental rights.

The role of the judiciary is not to bow to majoritarian rule. In fact, courts may at times be required to rule counter to the majority in order to protect the rights of the people. Just because something is popular does not necessarily mean that it is morally or constitutionally correct. The Court's mandate is to rule in accordance with the constitution and human rights principles, even where that decision may be unpopular with the people at the time.[13] History has shown that judiciaries that side with the majority do

[12] Kristen Cheney, *Locating Neocolonialism, 'Tradition,' and Human Rights in Uganda's 'Gay Death Penalty'*, African Studies Review 55, no. 2 (2012), 86. https://doi.org/10.1353/arw.2012.0031 ("Ugandans have always had very pliable family arrangements that involve, among other things, widespread informal child fosterage and polygamy (formal and informal)."). See also Comment, Rachel C. Loftspring, *Inheritance Rights in Uganda: How Equal Inheritance Rights Would Reduce Poverty and Decrease the Spread Of HIV/AIDS in Uganda*, 29 U. Pa. J. Int'l. L. 243 (2009), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1161&context=jil (describing the polygamous culture in Uganda and even suggesting on page 259 that polygamy can increase the spread of HIV).
[13] Nadine Strossen, *Supreme Court's Role: Guarantor of Individual and Minority Group Rights*, The Essay

not always side with justice, while judiciaries that reject majoritarian rule are often vindicated in time. For instance, slavery was, for a long time, very popular among the white majority in the United States, and the 1857 decision by the United States Supreme Court in **Dred Scott v. Sandford 60 U.S. 393 (1857)** famously denied citizenship to African Americans as part of the Court's decision to deny freedom to an enslaved person who had been living in a free state. Of course, this decision is now widely considered to be one of the worst decisions in the history of U.S. jurisprudence. Charles Evans Hughes, Chief Justice of the United States Supreme Court from 1930 to 1941, famously characterised the *Dred Scott* decision as the Court's great "self-inflicted wound"[14] and an entire constitutional amendment (the 13th Amendment to the U.S. Constitution) was later passed to nullify the decision. Nonetheless, at the time, it was widely popular, particularly in the American South, demonstrating the dangers of a court that fails to live up to their duty to protect the rights of all its country's citizens, even in the face of the views of the majority.

7. Court Finding 7: The Court rejected the reality that homosexuality is innate (Pg. 244-245).

As part of its discussion of the right to dignity, the Court rejected the reality that homosexuality is partly driven by innate, biological factors.

A. Analysis 1: Scientific research, as well as jurisprudence from other courts have affirmed that homosexuality is driven by biological factors.

Though scientists have not yet determined exactly what causes people to be homosexual, many studies support the conclusion that homosexuality is driven by biological factors.[15] Other courts have also supported the conclusion that homosexuality is largely biological. For instance, the court in **Navtej Singh Johar & Others. v Union of India & Another (2018) INSC 790** cited the fact that the American Psychiatric Association removed 'homosexuality' from the Diagnostic and Statistical Manual of Psychological Disorders in 1973 and "opined that the manifestation of sexual attraction towards persons of the opposite sex, or same sex, is a natural condition."[16] The *Johar* decision also cited the World Health Organization, which also removed homosexuality from the list of diseases in the International Classification of Diseases in the publication of ICD-10 in 1992.[17]

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26 U. Rich. L. Rev. 467 (1991-1992). Though discussing the U.S. Courts specifically, Strossen points to the courts' "unique role as the ultimate guarantor of individual and minority group rights by subjecting governmental decisions that infringed on those rights to searching judicial review" and "the guardian of individual and minority group rights" (468). *See also* James Rogers & Joseph Daniel Ura, *A Majoritarian Basis for Judicial Countermajoritarianism*, 32 Journal of Theoretical Politics 435-459 (2020). https://doi.org/10.1177/0951629820927784, discussing how, "popular majorities will support minority-protecting judges despite majority preferences hostile to minority rights."

[14] Melvin I. Urofsky, *Dred Scott Decision*, Britannica (last updated Apr. 15, 2024), https://www.britannica.com/event/Dred-Scott-decision.

[15] Anthony F. Bogaert & Malvina N. Skorska, *A Short Review of Biological Research on the Development of Sexual Orientation*, 119 Hormones & Behavior 104659 (2020), https://doi.org/10.1016/j.yhbeh.2019.104659 (reviewing various studies that provide "substantial support for biological influences underlying the development of sexual orientation"); Andrea Ganna *et al.*, *Large-scale GWAS Reveals Insights into the Genetic Architecture of Same-sex Sexual Behavior*, Science, Aug. 30, 2019, at eaat7693, https://www.science.org/doi/10.1126/science.aat7693.

[16] Jack Drescher, *Out of DSM: Depathologizing Homosexuality*, 5(4) Behavioral Sciences (2015), at p. 565.

[17] *The ICD-10 classification of mental and behavioural disorders*: *clinical descriptions and diagnostic guidelines*, World Health Organization, Geneva (1992) available at http://www.who.int/classifications/icd/en/bluebook.pdf.

See Section IX.2 below for a response to the Court's misinterpretation of Johar as holding that an individual's sexual autonomy is an individual's right to behave as they wish, provided they have the consent of their partner and that pleasure derived from an action would negate its criminality.

8. Court Finding 8: The Court held that the lack of global unanimity in the protection of LGBTQ+ people absolves them of the protection of human rights principles (Pg. 250).

In Pg. 250 of the decision, the Court held that the principles of universality and inalienability of human rights do not apply to LGBTQ+ people because there is a lack of global unanimity on LGBTQ+ non-discrimination. The Court specifically stated that "the absence of consensus on this is reflected in the fact that to date non-discrimination on the basis of SOGIESC variables has not explicitly found its way into international human rights treaties" and that the adoption of a binding declaration protecting LGBTQ+ rights has been vetoed by a bloc of UN member states.

A. Analysis 1: There is a difference between agreement on non-discrimination and the violation of fundamental human rights.

While the Court found that there is no global unanimity regarding the non-discrimination of LGBTQ+ people, this law is not fundamentally about non-discrimination. Petitioners do not argue that Uganda must permit the marriage of homosexual people, or that Uganda must implement non-discrimination laws protecting LGBTQ+ people. Rather, Petitioners argue that the AHA violates universal human rights principles, including the right to life and the right to dignity, among others. These *are* principles that have achieved global unanimity.[18] Thus, the mere fact that the global community has not ratified a mandate protecting the rights of LGBTQ+ people to non-discrimination does not make this law permissible.

B. Analysis 2: Even if there are not global protections for LGBTQ+ people, the AHA is still uniquely punitive.

The AHA is still unique in its vindictiveness. Uganda is one of only twelve countries where private, consensual same-sex sexual activity can be punished with the death penalty.[19] Therefore, while there may not yet be global unanimity in protecting LGBTQ+ people from discrimination, there is nearly global unanimity that same-sex sexual activity should not be punished with the death penalty, as it is in the AHA.

[18] The UDHR explicitly acknowledges the importance of human dignity in Article 1, which states that "all human beings"—*without exception*—"are born free and equal in dignity and rights." Similarly, the ACHPR upholds the right to dignity in its preamble by citing the Charter of the Organisation of African Unity, which stipulates that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples" The ACHPR further affirms that respect for human dignity is a fundamental principle in Article 5, which states, "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status."

[19] Human Dignity Trust, Map of Countries that Criminalize LGBT People, https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalization/?type_filter_submitted=&type_filter%5B%5D=death_pen_applies. The other countries that impose the death penalty for same-sex sexual conduct are: Afghanistan, Brunei, Iran, Pakistan, Qatar, Saudi Arabia, United Arab Emirates, Yemen, Mauritania, Nigeria, and Somalia.

9. Court Finding 9: The Court incorrectly attributed the spread of HIV to the LGBTQ+ community and compared homosexuality to bestiality, incest and rape (Pg. 253-257)

In rejecting the argument that private, consensual sex between two adults does not cause any harm, the Court held that sex between two people of the same sex does cause harm by potentially spreading HIV. In making this decision, the Court relied on outdated data from 2008/9 and 2005 to suggest that homosexual men and transgender people had higher rates of HIV infection as compared with the general population.

A. Analysis 1: If the purpose of the AHA were genuinely to target sex that has a high risk of HIV transmission, then that would demand the criminalisation of all sex between persons who could transmit HIV.

First, while we would be opposed to such an action for stigmatising people living with HIV, we find that if the purpose of the AHA were genuinely to target sex that has a high risk of HIV transmission, then that would demand the criminalisation of all sex between persons who may have HIV or who have not recently been tested and found to be HIV negative. Yet, the AHA does not target all sexual conduct that carries a risk of spreading HIV. Sex between a man and a woman can still spread HIV and recent data even suggests that the rates of HIV transmission are rising among heterosexual people. In Uganda, HIV prevalence in 2016 among gay men was 13%, and men in uniformed services 18.2%, among sex workers 37%, and as high as 40% among fishing communities.[20] Recent reports out of the UK indicate that in 2020, 49% of new HIV diagnoses were in heterosexuals, and only 45% in gay and bisexual men.[21]

B. Analysis 2: The criminalisation of vulnerable populations actually increases the spread of HIV.

Second, the scientific community agrees that the criminalisation of vulnerable populations, including the LGBTQ+ community, actually increases the spread of HIV. The 2022 Uganda HIV & AIDS Legal Environment Assessment for Key Populations shows that approximately 25% of new HIV infections are among members of key populations, who include members of the LGBTQ+ community.[22] Knowledge of HIV status in countries that do not criminalise same-sex sexual activity is 11.3% higher than in countries that do criminalise same-sex sexual activity.[23] Rates of viral suppression are also 8.1% higher in countries that don't criminalise same-sex sex.[24] The Uganda Network of Aids Service

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[20] Samuel Okiror, *Uganda fails to target gay men and sex workers in fast-track HIV initiative,* The Guardian, Global Health (June 14, 2017, 07:32 BST), https://www.theguardian.com/global-development/2017/jun/15/uganda-fails-to-target-gay-men-sex-workers-fast-track-hiv-initiative-president-museveni

[21] Harriet Barber, *Heterosexual HIV Diagnoses Overtake Those in Gay Men for First Time in Decade*, Telegraph (Feb. 7, 2022, 6:00 AM), https://www.telegraph.co.uk/global-health/science-and-disease/heterosexual-hiv-diagnoses-overtake-gay-men-first-time-decade/.

[22] U.S. Ambassador Natalie E. Brown, *Uganda HIV/AIDS Legal Environment Assessment for Key Populations Report Launch,* U.S. Embassy in Uganda (Sept. 2, 2022), https://ug.usembassy.gov/uganda-hiv-aids-legal-environment-assessment-for-key-populations-report-launch-friday-september-2-2022/

[23] HIV Policy Lab, *Progress and the Peril: HIV and the Global De/Criminalisation of Same-Sex* Sex 8 (2023), https://www.undp.org/sites/g/files/zskgke326/files/2023-11/undp-hiv-policy-lab-progress-and-the-peril-hiv-and-the-global-decrimalisation-of-same-sex-sex.pdf.

[24] *Id.* See also *Human Dignity Trust, Criminalising Homosexuality and Public Health: Adverse Impacts on the Prevention and Treatment of HIV and AIDS* (2015), https://www.humandignitytrust.org/wp-content/uploads/resources/5.-Criminalization-Public-Health-and-HIV-March-2019.pdf; Matthew Kavanagh, Law,

Organisations (UNASO) has noted that "Uganda will not end Aids if these populations are left out and [continue] to be marginalised, stigmatised and discriminated against in our planning."[25]

C. Analysis 3: Bestiality, rape, and incest involve issues of consent and the potential for birth defects that are not present with same-sex sexual activity.

Finally, same-sex sexual activity is not at all equivalent to bestiality, rape or incest. Looking first to bestiality and rape, both of these acts lack consent, whereas consensual same-sex sexual activity does not lack consent. Rape, by its very definition, does not involve consent,[26] and animals also are not able to consent. Importantly, Petitioners do not ask for the non-criminalisation of non-consensual sex between people of the same sex. Thus, rape and bestiality can clearly be distinguished from consensual same-sex sexual activity on the basis of consent. Incest is criminalised because of the known birth defects that can occur when closely related people procreate. This risk is not present with same-sex sexual conduct.

10. Court Finding 10: The Court incorrectly held that cultural relativity as applied to criminal law does and can permit the criminalisation of any and all "harms" to the community (Pg. 263-265)

The Court held that criminal law is socially and culturally constructed, citing Grant Lamont: "Actions which constitute a public wrong will be classified as a crime. Public wrongs were characterised as a breach and violation of the public rights and duties…."

A. Analysis 1: We do not criminalise all "public wrongs," and this is not an accurate description of the types of actions that criminal laws are intended to target.

It does not follow that just because criminal law is culturally situated, that the State can then criminalise any conduct that is a "public wrong." In fact, there are many actions that may be characterised as public wrongs that we do not criminalise. For instance, we do not criminally punish people who cheat in school or who continue to support relatives who have committed crimes. Here, as established, same-sex sexual relations do not cause harm to the public, and therefore are not even accurately considered a public wrong.

Criminalization and HIV in the World: Have Countries that Criminalise Achieved More or Less Successful Pandemic Response, BJM Glob. Health 6(8) (2021), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8330576/.

[25] Samuel Okiror, *Uganda fails to target gay men and sex workers in fast-track HIV initiative,* The Guardian, Global Health (June 14, 2017, 07:32 BST), https://www.theguardian.com/global-development/2017/jun/15/uganda-fails-to-target-gay-men-sex-workers-fast-track-hiv-initiative-president-museveni

[26] *See* Ugandan Penal Code Section 123, defining rape as: "Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind or by fear of bodily harm, or by means of false representations as to the nature of the act, or in the case of a married woman, by personating her husband, commits the felony termed rape."

11. Court Finding 11: The Court held that there is no evidence the AHA is being abused to permit further violence to and exploitation of the LGBTQ+ community in Uganda (Pg. 268-269)

In response to Petitioners' argument that Sections 2(1-4), 3(1), 9, 11(1), 11(2)(d), and 16 put LGBTQ+ people at risk of blackmail, police entrapment, violence, and denial of facilities, accommodation and opportunities, the Court ruled that these were mere speculative harms.

A. Analysis 1: There is lots of evidence of escalating violence and exploitation of LGBTQ+ Ugandans.

In their submissions, the Petitioners presented to the Court overwhelming evidence of escalating violence and exploitation against LGBTQ+ community during the legislative process and post enactment of the AHA. For instance, they attached a September 2023 research report issued by the Strategic Response Team (STG) detailing 306 cases of abuse and discrimination against LGBTQI+ people. 180 of the cases documented involved forced evictions, displacement and banishment from villages and family homes. 176 cases involved abuse of the freedom from inhuman and degrading treatment while 159 cases involved discriminatory incidents because of their sexual orientation and gender identity. 102 cases of mental health conditions directly linked with violations, abuse and general climate of fear were documented. Most of the mental health conditions presented with anxiety and panic attacks, suicidal ideation and depression.[27] It was therefore not accurate for the Court to dismiss reports of violence and abuse as mere speculation.

12. Court Finding 12: The Court erroneously held that the use of the death penalty is not a violation of human dignity, and doesn't address its appropriateness to the actions in question (Pg. 270-276)

The Court held in **Attorney General v Susan Kigula & Others, Constitutional Appeal No. 3 of 2006** for the proposition that the retention of the death penalty is not in and of itself a violation of international laws and goes on to suggest that the framers of the Ugandan Constitution did not believe that the death penalty amounted to cruel, unusual, inhuman or degrading treatment or punishment.

A. Analysis 1: Many countries around the world have decided that the death penalty is a violation of human dignity and should be illegal.

First, as more and more countries continue to outlaw the death penalty,[28] the mere fact that a country has decided for themselves that they are permitted to use the death penalty does not automatically make it permissible under international law.

[27] Simon Collins, *Uganda report: Increase in LGBTQI+ assaults and human rights violations need urgent activist responses,* i-base (Oct. 1, 2023), https://i-base.info/htb/46384
[28] Death Penalty Information Center, Countries that have Abolished the Death Penalty Since 1976, https://deathpenaltyinfo.org/policy-issues/international/countries-that-have-abolished-the-death-penalty-since-1976.

B. Analysis 2: The application of the death penalty to actions that do not result in death or extreme harm is not a proportionate application of the death penalty.

Second, the ICCPR demands that the death penalty, if imposed, only be imposed "for the most serious crimes." *The Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty* define "most serious crimes" as "intentional crimes with lethal or other extremely grave consequences." The Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has stated that the restrictions set out in Safeguard 1 disallow imposing the death penalty for "actions primarily related to prevailing moral values," which includes "matters of sexual orientation."[29]

Similarly, in *General Comment 36 regarding Article 6: right to life*, the UN Human Rights Committee (HRC) has stated unequivocally that the expression "most serious crimes" in Article 6(2) "must be read restrictively and appertain only to crimes of extreme gravity involving intentional killing."[30] When a crime does not result directly or intentionally in death, this can "never serve as the basis, within the framework of article 6, for the imposition of the death penalty."[31] In this General Comment, the HRC explicitly states that "under no circumstances can the death penalty ever be applied" to homosexuality.[32] Moreover, the HRC specifically requires parties to the ICCPR to "take special measures of protection towards persons in vulnerable situations whose lives have been placed at particular risk because of specific threats or pre-existing patterns of violence," which includes "lesbian, gay, bisexual, transgender, and intersex persons."[33] Not only is Uganda in violation of its obligations under Article 6 of the ICCPR, but as a party to the ICCPR, Uganda should be acting affirmatively to protect the vulnerable LGBTQ+ community.

Yet, under the AHA, "repeat offenders" of consensual same-sex activity and those convicted for "aggravated homosexuality" can be punished with the death penalty, an act which does not pose any extremely grave consequences, and thus does not rise to the level of severity required to even begin to justify the imposition of the death penalty.

13. Court Finding 13: The Court erroneously held that the AHA does not promote inhuman treatment (Pg. 271-278)

The Court claims that "mere inquires" into one's sexual orientation do not rise to the level of cruel, inhuman or degrading treatment (Pg. 277).

A. Analysis 1: The Court mischaracterised the harm inflicted by the AHA.

However, the Court mischaracterised the harm being experienced by the LGBTQ+ community in Uganda as a result of the AHA. The result of the AHA is not merely that people inquire into one's sexuality. Rather, the AHA criminalises all aspects of a homosexual person's life. By criminalising both the "promotion" "encouraging" or "normalisation" of homosexuality, which, as described above, is

[29] Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN document E/CN.4/1999/39, 6 January 1999, Pg. 63.
[30] General Comment 36 regarding Article 6: right to life, CCPR/C/GC/36, 3 September 2019, Pg. 35.
[31] *Id.*
[32] *Id*. at Pg.36.
[33] *Id.* at Pg. 23.

already incredibly vague, the AHA essentially prohibits LGBTQ+ people from engaging with society. It further criminalises the professional work and services of allies to the LGBTQ+ community. Furthermore, reports of LGBTQ+ people being subject to extreme violence have risen, with citizens no doubt emboldened given the message of the AHA that LGBTQ+ people do not deserve to be a part of Ugandan society. Not only is expulsion from society generally considered inhuman treatment, but this extreme extrajudicial violence certainly falls within the definition of cruel or inhuman treatment as it is usually defined.[34]

14. Court Finding 14: The Court erroneously relied on *Dobbs* for the proposition that cultural values can override individual autonomy (Pg. 266)

The Court cited **Dobbs v. Jackson Women's Health Organization, No. 19-1392, 597 U.S. 215 (2022)** on Pg. 266 to stand for the principle that cultural values can overcome individual autonomy and as an example of another case where the decision was driven by the will of the people.

A. Analysis 1: Not only did Dobbs not stand for a general restriction on the right to autonomy, as it was limited to the abortion context, but it also did not return the decision to the people per se, given the unique federalist system of the United States.

Please see Section VIII below for an in-depth analysis of how the Ugandan Court misinterpreted and misapplied Dobbs.

[34] *See* Equality and Human Rights Commission, The Human Rights Act Article 3: Freedom from Torture and Inhuman or Degrading Treatment, https://www.equalityhumanrights.com/human-rights/human-rights-act/article-3-freedom-torture-and-inhuman-or-degrading-treatment#:~:text=Inhuman%20treatment%20or%20punishment%20is,value%20of%20all%20human%20beings. (defining inhuman or degrading treatment as including serious physical assault).

III. Right to Equality and Non-Discrimination

The Court made six findings in the Equality and Non-Discrimination section: first, that interpreting the Ugandan Constitution to include the protection of sexual orientation would create an internal conflict within the Constitution. However, the provision of a public benefit like marriage is different from protection from discrimination.

Second, the Court held that discrimination on the basis of sexual orientation was deliberately omitted from the Constitution. However, the sections cited only establish this with respect to the decision not to allow same-sex marriage, and are not strong enough to establish they deliberately omitted sexual orientation.

Third, the Court held that the values and norms of the Ugandan people must be read into the language of the Constitution, and therefore that the protection of LGBTQ+ people should not be read into the Constitution. However, values and norms should only be used to support rights, not eliminate them, and there is no one homogenous set of Ugandan values.

Fourth through sixth, the Court held the protections against non-discrimination in international law can be overridden by using a multi-part test, which is met in this case. However, they largely ignored most international law arguments, the test is not met in this case, and the UK case cited is distinguishable.

1. Court Finding 1: The Court held that protection of LGBTQ+ people would lead to an internal conflict in the Ugandan Constitution

In paragraph 313, the Court held that to interpret the term "sex" in Article 21 to include "sexual orientation" would cause internal conflict within the Constitution, as Article 31(2a) prohibits marriage between people of the same sex. They argue that the Constitution cannot protect against discrimination on the basis of sexual orientation because the Constitution itself discriminates on the basis of sexual orientation.

A. Analysis 1: The ability to discriminate on the basis of sexual orientation and the ability to become married no matter your sexual orientation are distinct.

There is a difference between the provision of a public benefit like marriage and the use of a State's correctional power to criminalise consensual sexual conduct. The two are distinct, as Articles 21 and 31 are distinct in the Constitution. The Petitioners did not make any submissions seeking same-sex marriage. The submissions on Article 31 were narrow – to challenge the amendment procedure. The Court therefore went astray and made findings on a matter that was not provided for in the list of consolidated issues. The Petitioners' case was about whether consensual sexual activity, and freedom to exercise and enjoy other fundamental rights, outside of marriage is legal.

2. Court Finding 2: The Court deliberately omitted the term "sexual orientation" from the Constitution

In Pg. 316, the Court also goes through the drafting history of the Constitution and points out that there was a deliberate omission of the term "sexual orientation." They show how a delegate brought it up

and was interrupted, showing disagreement. They later show that, upon writing the provision preventing marriage between people of opposite sexes, that one of the delegates said, "we need to say 'the man and woman intending to marry . . . Let us be specific and say the man and the woman to avoid Sodom and Gomorrah coming into our society."

A. Analysis 1: The Court should not use legislative history as a method of interpretation because it is ambiguous, poses a special danger of misinterpretation, and can be easily manipulated.

The method of legislative interpretation which relies upon transcripts when the Constitution was written is a flawed methodology. Textualists often argue that it is often more ambiguous than the statute itself, that it can be misinterpreted easily because it is less clear than a statute, and that those drafting the laws can easily manipulate the legislative history to serve their own interpretive ends that do not reflect the reality of the compromises made in drafting.[35] If it must, this method of interpretation should be approached narrowly and with caution to avoid the many grave pitfalls.

B. Analysis 2: The aspect of legislative history referencing "Sodom and Gomorrah" only referenced marriage, not protection from discrimination.

The part of the legislative history referencing "Sodom and Gomorrah" seems clear that they deliberately excluded marriage between persons of the same sex, but this only applied to the part of the legislative history where they were debating whether to allow marriage between same-sex partners, not the prevention of discrimination. However, similar to the argument above, permitting marriage only between a man and a woman involves the positive provision of a public benefit. This is different from preventing discrimination.

C. Analysis 3: The presence of an interruption in the debate is not enough to establish a deliberate omission.

In regards to preventing discrimination, the mere presence of an interruption when bringing up protecting sexual orientation is not enough to show a deliberate omission. Instead, the delegate specifically says, "in the future as we know there will be people of different sexual orientations. So, they too should be protected (interruption) - Yes, lesbians and homosexuals." This could be argued as a positive indication, on the part of at least one of the framers, to extend protection through the use of the word "sex."

3. Court Finding 3: The Court held that they must rely on values and norms when interpreting the Constitution

In paragraph 319, the Court also stated that the values and norms of the Ugandan people "cannot be entirely ignored in constitutional adjudication." They cite the overwhelming support for the AHA to suggest they should find the Act constitutional.

[35] *See* Jonathan R. Siegel, The Use of Legislative History in a System of Separated Powers, 53 *Vanderbilt Law Review* 1457 (2000), https://scholarship.law.vanderbilt.edu/vlr/vol53/iss5/11

A. Analysis 1: Values and norms should only support rights, not eliminate them.

While it can be important to understand the values and norms of the culture in choosing to preserve or create new rights, those values and norms should not be considered when taking away rights. If rights only depend upon a majority of the population favouring those rights, then the concept of universal, unalienable rights have no meaning. Rights by their very nature must be upheld despite a lack of favour by the population, or they will be constantly in flux. It is the very role of a court to be counter-majoritarian, and to protect the rights of minority groups despite popular opposition.[36]

B. Analysis 2: Ugandan society does not have one homogenous set of values.

Ugandan society also does not have a homogenous set of values.[37] Uganda has over fifty tribes and languages, as well as a pluralistic history. There is not even a homogenous view of marriage, as some tribes say it should be between two people, whereas others allow plural marriage. The rights of any groups or minorities would be in jeopardy if the Court is allowed to outlaw practises which are not maintained by the majority of the tribes.

See also Section II.5.B above.

See also Section IX.1.A below that discusses the Court's defined principles of "national interest" and "common good," which involves values and norms.

4. Court Finding 4: The Court held they are not violating human rights law

First, the Constitutional Court decision largely ignored all arguments regarding the various human rights treaties to which Uganda is a party that are violated by the AHA.[38]

A. Analysis 1: Uganda has obligations under several international, continental and regional human rights treaties, conventions and instruments.

Uganda is a party and signatory to several international, continental and regional human rights treaties, conventions and instruments. The obligations and rights created under the said human rights

[36] *See* James Rogers & Joseph Daniel Ura, *A Majoritarian Basis for Judicial Countermajoritarianism*, 32 Journal of Theoretical Politics 435-459 (2020). https://doi.org/10.1177/0951629820927784, discussing how, "popular majorities will support minority-protecting judges despite majority preferences hostile to minority rights."
[37] *See* Managing Diversity- Uganda's Experience, A Collection of Essays Produced by the Pluralism Knowledge Programme in Uganda, Cross Cultural Foundation of Uganda, ISBN:978-9970-9274-0-1. From https://crossculturalfoundation.or.ug/docs/Managing-Diversity-Ugandas-Experience-@CCFU2014-1.pdf; Tamale, Sylvia. (2014). Exploring the contours of African sexualities: Religion, law and power. *African Human Rights Law Journal*, *14*(1), 155. Paragraph 4. Retrieved April 27, 2024, from http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1996-20962014000100011&lng=en&tlng=en; citing S Tamale (ed) *African sexualities: A reader* (2011), especially S Tamale 'Researching and theorising sexualities in Africa' in Tamale (above) 11-36.
[38] These include: Articles 2, 3, and 26 of the ICCPR, Articles 2 and 15(1) of the CEDAW, articles 2,3, and 19 of the ACHPR. (Pg. 284, p. 109). The ICCPR includes prohibition on discrimination based on sexual orientation as read into the prohibition on "sex" discrimination, and other treat bodies like ICESCR, the Convention on the Rights of the Child, and CEDAW have made similar extensions or clarifications. (Pg.285, p. 110) Uganda has ratified these treaties, (Pg. 285, p. 110) The African Commission on Human Rights has established that the ACHPR also includes prohibition on discrimination on the basis of sexual orientation. (Pg. 286, p. 110)

instruments are constitutionally recognised and protected. The applicable treaties, conventions and instruments, read together with Uganda's Constitution, are all unequivocal on the command for the State to protect, promote and uphold all human rights and freedoms to all persons. The very purpose and origins of human rights law were place certain fundamental rights beyond the whims of majority opinion, and to protect those who may find themselves in the minority.

5. Court Finding 5: The Court held they can override international law due to the Siracusa Principles

In Pg. 335-340, the Court held that the above (largely ignored) rights can be overcome if there is a good purpose (Pg. 336). To make this argument, the Court applies a test from *The Siracusa Principles on the Derogation from the International Covenant on Civil and Political Rights* ("the Siracusa Principles"), which "were formulated to clarify when and to what extent a State can limit a human right affirmed by the ICCPR, and how to measure whether the restriction of the right is proportionate to the public safety concern" (Pg. 335).

A. Analysis 1: The "legitimate purpose" in the Siracusa principles is not present here.

According to the Court itself in referencing the Siracusa Principles, the derogation "must further a legitimate aim in a manner proportionate with that aim."[39] Here, the Court found that the "legitimate aim" of the AHA is to stop the recruitment of children. However, the recruitment of children "into homosexuality" factually does not occur.[40] No evidence was adduced in Court to support the allegation.

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[39] Pg. 335, p. 128. From citation 55: See UN Doc. E/CN.4/L985/4, Annex (1985); 'The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, Human Rights Quarterly, Vol. 7, No. 1 (February 1985).
Found at: https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf

[40] *See* Abel, G. (1987, August). "The Child Abuser: How Can You Spot Him?," *Redbook*, 100, ("…[M]ost men who molest little boys are not gay. Only 21 percent of the child molesters we studied who assault little boys were exclusively homosexual. Nearly 80 percent of the men who molested little boys were heterosexual or bisexual and most of these men were married and had children of their own.");
Zero Abuse Project, *Sexuality of Offenders*, Jacob Wetterling Resource Center, https://www.zeroabuseproject.org/victim-assistance/jwrc/keep-kids-safe/sexuality-of-offenders/, ("In a 1994 study, researchers reviewed 352 medical charts, representing all of the children seen in the emergency room or child abuse clinic of a Denver children's hospital as a result of being sexually abused. In looking at charts for a one year period (from July 1, 1991 to June 30, 1992), the researchers found that the molester was a gay or lesbian adult in fewer than 1 percent of cases (2 of 269) in which the adult molester could be identified."), citing Jenny, C., Roesler, T. A., & Poyer, K. L. (1994). Are children at risk for sexual abuse by homosexuals? *Pediatrics*, 94(1), 41-44. Accessed online; Charol Shakeshaft, *Educator Sexual Misconduct: A Synthesis of Existing Literature*, U.S. Dept of Educ. Doc # 2004-09, at Pg. 25-26 https://www2.ed.gov/rschstat/research/pubs/misconductreview/report.pdf#page=30, (finding that the majority of offenders are heterosexual and that "[r]esearchers have failed to find a consistent connection between sexual identification or sexual orientation label and child sexual abuse. For instance, Jenny et al. (1994) reviewed 350 cases of child sexual abuse and found no patterns. In another study (Freund et al., 1984), researchers found that homosexual males responded no differently to pictures of male children than did heterosexual males to pictures of female Children." citing Jenny C., Roesler T. A., and Poyer, K.L. (1994); Freund, K., Watson, R. Rienzo, D. (1989). Heterosexuality, homosexuality, and erotic age preference. *The Journal of Sex Research*, 26 (1), 107-117.
Dr. Gregory Herek, a Professor of Psychology at the University of California at Davis has put ;together a comprehensive, cited website of the research around the sexual orientation of child molesters,

B. Analysis 2: The rest of the test in the Siracusa principles are not met in this case.

Additionally, the Court does not address the other elements of the test, and significantly, the AHA does not pass the rest of the test. The Siracusa Principles require that the "limitations on individual rights are to be narrowly construed," that "interference with an ICCPR freedom must not jeopardise the essence of the right concerned," that the limitation "must be subject to the possibility of challenge to and remedy against its abusive application," and "must not be imposed in an arbitrary manner." The remainder of these aspects of the test are not addressed by the court.

6. Court Finding 6: The Court held this case is like *Adamson v. United Kingdom*, which derogated privacy rights

In paragraph 338, the Court referenced **Adamson v United Kingdom, Application 4223/98, Decision of January 26, 1999**, which permits the UK to derogate the right to privacy in order to require sex offenders to register with a national system. The decision indicates that interference with private life is allowed as long as the interference is proportionate to the aims pursued. Here, they found that the UK was allowed to require sex offenders to register with the police and report their status to employers.

A. Analysis 1: The UK case the Court references is distinguishable because it is about sex offenders charged with violating conduct.

However, Adamson can be distinguished from the present case. Sex offenders, whose rights are under consideration in Adamson, are convicted because they committed a sexual act without consent. That is distinct from the AHA, where consensual sexual acts are criminalised. Petitioners do not argue that any sexual acts committed without consent should become legal, and they are not challenging that those who are sex offenders because of a lack of consent should not have to report that status.

https://lgbpsychology.org/html/facts_molestation.html; Intelligence Report, UC-Davis Psychology Professor Gregory Herek Aims to Debunk Anti-Gay Extremist Paul Cameron, *Intelligence Report* 2005, Jan 31, 2006, https://www.splcenter.org/fighting-hate/intelligence-report/2006/uc-davis-psychology-professor-gregory-herek-aims-debunk-anti-gay-extremist-paul-cameron.

IV. Right to Privacy

1. **Court Finding 1: The Court found that the AHA does not authorise unlawful entry into, search, or interference with a person's body, home or other property, correspondence, or communication (Pg. 355)**

    A. Analysis 1: The Court erred, as in practice, there is no way to enforce the AHA without unlawfully interfering with a person's body, home, property, correspondence or communication.

The Court failed to explain why consensual sexual activity in private is not governed by the right to privacy. While they refer to the Petitioners' arguments, including the precedent of **Toonen v. Australia**, that consensual sexual activity in private is covered by the concept of privacy, they dismiss arguments relating to privacy on the basis that any hypothetical harm is unsubstantiated. The Court argues that "the insinuation by the petitioners that such violations are inevitable in the enforcement of the act descends into the realm of speculation that is unsupported by evidence and therefore untenable" (Pg. 355). Yet, all public interest litigation challenging a new law as unconstitutional will generally not have significant examples of violations – as the law has yet to be in effect for the duration required for these violations to occur (and the purpose of the litigation is to prevent the violations). Yet, the Court fails to explain how, in practice, law enforcement will uphold the AHA in situations of consensual same-sex activity occurring in private spaces, without unduly interfering into said private spaces.

In general, the Court failed to properly address the privacy-related arguments raised by Petitioners. As privacy is a core rationale for the protection of LGBTQ+ rights in other jurisdictions (see for instance **Lawrence v. Texas**), these are arguments that are worth raising again. Furthermore, any evidence of arrests already happening in private spaces will be helpful in rebutting the Court's claim that privacy violations are not substantiated or even implicated.

2. **Court Finding 2: Limitations to the right to privacy are justified limitations under Article 29(2) of the UDHR**

The Court noted that there are justifiable limitations to the right to privacy. Article 29(2) of the UDHR allows for limitations for the purpose "of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society," because "the offence of homosexuality reflects the socio-cultural realities of the Ugandan society."

    A. Analysis 1: The Court errs in applying the standard for Article 29(2) which can only be applied non-discriminatorily and in conformity with the universality of human rights.

However, limitations on the basis of morality can only be included where they apply non-discriminatorily and in conformity with the universality of human rights. In its general comment relating to freedom of expression, the UN Committee on Human Rights notes that,

> "The concept of morals derives from many social, philosophical and religious traditions; consequently, limitations . . . for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition."[41]

In this instance, the limitation is not justified as it both a) discriminates against LGBTQ+ Ugandans; and b) imposes the supposed "socio-cultural realities of the Ugandan society" onto all individuals.

B. Analysis 2: There is no single definition of the socio-cultural realities of Ugandan society.

As has been argued in other sections, there is no one definition of the "socio-cultural realities of the Ugandan society," which is pluralistic and complex. There is considerable contention relating to questions of pre-colonial culture, but the criminalisation of homosexuality is a distinctly colonial imposition onto Ugandan society. Therefore, to the extent that criminalisation of homosexuality is within a tradition, it should be understood as being part of late 19th and early 20th century British colonialism.[42]

*C. Analysis 3: The Court relied on an outdated case in **Mr. X v. Hospital Z (1998) 8 SCC 296**, from India, which was subsequently overruled and re-reviewed in 2003 (see, **Mr. X vs. Hospital Z, (2003) 1 SCC 500**).*

In making its arguments, the Court relied upon the case of **Mr. X v. Hospital Z (1998) 8 SCC 296**, from India. However, that case was subsequently reviewed in 2003, and the Court later held that the Court had exceeded its mandate in observing what rights and obligations arose in relation to the rights for privacy or confidentiality of HIV+ persons. As such, the Court's comments regarding dismissal of the privacy rights of the appellant were uncalled for.

[41] Human Rights Committee, General Comment No. 34 Article 19: Freedoms of Opinion and Expression, ccpr/c/gc/34 (12 September 2011) para 32.
[42] A/78/227: Protection against violence and discrimination based on sexual orientation and gender identity - Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz, Para 15; 31.

V. Freedoms of Expression, Thought and Association

In the Court's discussion of freedom of expression, thought, and association, the Court mainly held that the restrictions on speech and association implemented in the AHA pass the proportionality test, which sets out standards for the limitations of particular rights. The main responses to this argument are that the Court misapplied the proportionality test, doesn't adequately recognise the limitations/harms of the AHA, and uses circular reasoning in support of its claims.

The Court also makes two secondary findings:

First, the Court held that freedom of religion is not implicated (which is one of the first arguments made in this section of the Court's opinion). The Court rejects the religious freedom arguments on the grounds that the Petitioners did not appropriately attest to the proposed harms, and on appeal these arguments should likely be raised again.

Second, the Court held that the AHA does not infringe on academic freedoms. The strongest response to this argument is likely to highlight the extreme chilling effects of the AHA.

1. **Court Finding 1: The Court erroneously rejected Petitioners' claim that the AHA implicates freedom of religion (Pg. 401-402)**

The Court rejected the argument that the AHA violates religious freedom on somewhat technical grounds, stating that the petitioner who raised the issue did not attest to any of the raised issues in his affidavit. Specifically, Petitioners claimed that the AHA violated their rights as Christians because it prohibited them from being able to freely give money to all needy people. Another Petitioner also argued that it limited the ability for churches and religious leaders to house, feed, and care for all needy people.

A. Analysis 1: Raise the issue of religious freedom again, with attestations to the harms.

Since the Court rejected this argument on technical grounds rather than substantive grounds, it is likely worthwhile to raise the issue again and affirm that the AHA infringes on the right to religious freedom by limiting their ability to practise their faith through charity. The AHA also limits the ability of the church and religious leaders to host and cater for all persons:

2. **Court Finding 2: The Court misapplied the proportionality test to argue that the AHA is a legitimate restriction on freedom of speech and expression (Pg. 400, 403-425).**

The Court claims that AHA meets the requirements of the proportionality test, which has been adopted by Uganda as well as several other countries and that provides guidelines for the limitation of a particular right. The proportionality test requires that the limitation (1) be rationally linked to the objective sought, (2) should impact the restricted freedom as little as possible, and (3) the effect of the measures must be proportional to the aim (Pg. 409-410).

However, there are numerous general reasons why the AHA cannot be considered proportional:

A. Analysis 1: The application of the death penalty to any action that does not itself result in death seems clearly disproportionate.

For one, the application of the death penalty for an act that does not result itself in a death can hardly be considered proportionate, but that is less applicable to the right of freedom of speech and association.

See Section II.12 above for a discussion of the inapplicability of the death penalty to homosexual actions.

B. Analysis 2: The prohibition of even the discussion of homosexuality is so broad sweeping that it can hardly be said to be restricting the freedom of speech as little as possible.

The prohibition of nearly any discussion of the concept of homosexuality is extremely disproportionate to the alleged "harm," especially since any concrete harm has not been substantiated.

C. Analysis 3: Generally, the right to freedom of expression, speech, and association are core to free societies and the suppression of speech has historically been used by colonial powers and oppressors.

The freedom of speech and association in the foundation of free societies.[43] The ability for societies to protest and freely discuss different issues and beliefs is a fundamental right in any just society. The practice of the people's rights to free expression, speech, and association have been at the forefront of the leading justice movements throughout history, including the civil rights movement in the United States, where massive protests and the revolutionary thoughts and speeches of civil rights leaders eventually led to change. Time and time again, suppression of speech has been shown to be the tool of colonisers and oppressors. Ultimately, just because one disagrees with an idea, does not mean that one can close the public square.

3. Court Finding 3: As part of the proportionality test, the Court held that because homosexuality is an affront to public morals, therefore the aim of the AHA is legitimate

First, the Court found that given the affront to public morals and socio-cultural sensitivities at issue, the AHA is of "of such critical importance to Ugandan society that its claim to legitimacy is unassailable" (Pg. 415). The Court found that the Petitioners' depiction of LGBTQ+ persons as "sexual minorities" supports this view.

[43] *See* Lord Neuburger, Amal Clooney, Baroness Helena Kennedy & Can Yeginsu, *The Need for Independent Judges and a Free Press in a Democracy*, United Nations Office on Drugs and Crime, https://www.unodc.org/dohadeclaration/en/news/2021/05/the-need-for-independent-judges-and-a-free-press-in-a-democracy.html ("The media have been described as the watchdogs of democracy, highlighting democratic deficits and demanding accountability from elected officials. And judges have no more important role than to hold the Government to account when it does not adhere to the law and to uphold the rights of individuals. And there is no more vital right than freedom of expression."). See also European Court of Human Rights, *Judges Preserving Democracy Through the Protection of Human Rights*, Judicial Seminar 2023 (Nov. 23, 2022) (further describing the importance of freedom of expression and association and citing relevant international cases).

A. Analysis 1: Minority status, by itself, has no logical connection to the morality of the practices of that group.

The mere fact that a group is a minority does not mean that their view is in opposition to public morals and should therefore be criminalised. If this were the case, any religious practises or views practised by a minority of Ugandans would be in opposition to public morals, and taken to the extreme, this argument would quash religious freedom in Uganda.

4. Court Finding 4: As part of the proportionality test, the Court held that there is no issue with the severity of the AHA because it is merely ensuring that NGOs and other businesses comply with the law (pg. 418-421)

Second, the Court also held that there is no issue with the severity of the AHA, particularly in relation to NGOs, because it is merely ensuring that those organisations comply with the letter of the law (Pg. 418-421). Similarly, with regard to promotion, the Court argues that this provision is equivalent to laws that prohibit the promotion or incitement of other kinds of illegal activity.

A. Analysis 1: The Court's findings were circular and there are many other crimes for which mere debate of that action would not be punishable under the law.

Not only are these arguments circular, as according to this reasoning any action or belief could be criminalised by the government and subsequently discussion of that action could be criminalised, but this is also not an accurate characterisation of existing Ugandan law. One is not arrested for merely considering the pros and cons of theft in the abstract, for instance. However, under the AHA, even discussing the pros and cons of accepting homosexuals as part of Ugandan culture would be grounds for prosecution, even if the speaker did not themselves believe the pros outweigh the cons.

5. Court Findings 5: The Court erroneously suggests that academic freedoms are still entirely protected under the AHA (pg. 426-443)

The opinion seems to suggest that the Court does not believe the AHA should interfere with academic freedoms and clarifies that academics are permitted to discuss issues related to homosexuality as part of their scholarship.

A. Analysis 1: The harsh penalties of the AHA still have a chilling effect on academics who may want to research homosexuality or discuss it in an academic setting.

Even if the Court stated that academics are still permitted to discuss homosexuality, on appeal, it is worthwhile to emphasise the chilling effects of the AHA. Academics who may wish to discuss homosexuality may likely be afraid of pursuing that scholarship or line of discussion given the harsh penalties associated with violations of the AHA.

VI. Right to Profession, Occupation and Business

1. Court Finding 1: The Court held that restrictions on the right to work are permissible because it is a derogable right and that the right does not apply to illegal operations

The Court held that any restrictions to profession, occupation, and business "reflects the tenor of permissible limitations under regional and international human rights instruments," as the right to employment and related rights to work are not non-derogable rights. Further, it points to its analysis on the right to privacy as the reasons restrictions are permissible. Third, the Court notes that the right to carry out one's occupation, trade, or business applies only to the legality of that occupation. As such, NGOs engaging in promotion of activities that have been de-legalised, are not considered to be engaging in legal work.

A. Analysis 1: Derogations of rights are only permitted under particular circumstances, which are not met in this case.

There is a very specific process for derogating rights, which is usually only permissible in times of national emergency, armed conflict, etc.[44] Even if the Court claims that COVID is a national emergency that permits the derogation of certain rights, that cannot justify a law that exists in perpetuity.

B. Analysis 2: The impossibility of, in practise, understanding the limitations of "promotion" of homosexuality will lead to an over-criminalisation and targeting of legitimate professional and business activities.

First, this is a circular argument. However, even assuming that the Court's finding that they are only restricting illegal activities is legitimate, there is still an issue of vagueness and a likely chilling effect. Questions regarding legality and an overbroad interpretation of the law have been covered in prior sections. Here, the vagueness of the provisions and inability to understand the law will prevent individuals and organisations engaging in legitimate protection of vulnerable minorities, human rights advocacy, and other forms of social justice work from carrying out their work due to a fear of criminalisation.

[44] Gilles Giacca, "Limitations on Conventional Economic, Social, and Cultural Rights on Security Grounds," *Economic, Social, and Cultural Rights in Armed Conflict* (Oxford, 2014; online ed, Oxford Academic, 20 Nov. 2014), https://doi.org/10.1093/acprof:oso/9780198717447.003.0003.

VII. Right to Health and Property

1. Court Finding 1: The Court held that there have been no outright denials of healthcare, that there has been improvement in health metrics, and that they are protecting vulnerable groups

The Court held in part for the Petitioners, noting that the reporting requirement under Article 14 of the AHA would have had a chilling deterrent effect on access to healthcare by homosexual patients. Further, the Court struck out provisions relating to the unknowing transmission of HIV through same sex sexual activity, noting that it compounds the susceptibility of HIV+ persons to mental health issues. However, the Court then went on to state that the right to health has not been violated in other instances. The Court cited various reasons for this, including Uganda's progress relating to healthcare, the fact that despite criminalisation of homosexuality and widespread stigma toward the LGBTQ+ population there remains improvement in health metrics, and the fact that there are no reports of denial of access to healthcare by LGBTQ+ persons. Further, the Court held that it is protecting the health of vulnerable groups such as children from the harms of the LGBTQ+ community.

A. Analysis 1: No harm to children resulting from consensual same-sex activity between adults had been proven. As such, the Court engaged in speculative arguments, not raised in the filings.

The Court engaged in entirely speculative arguments about the need to protect children and young persons from recruitment into homosexuality. Questions about violations of the right to health of LGBTQ+ persons centre significantly on the rights to health of consenting adults. Further, any links to LGBTQ+ individuals and harm to children was not founded in contemporary science or fact. Recent scientific studies show that children who grow up raised by two same-sex parents do not suffer different mental health outcomes than those raised by different sex parents.[45]

A. Analysis Response 2: There is significant evidence to suggest that criminalisation of homosexuality does harm the health of LGBTQ+ persons, which the Court ignores.

The Petitioners' case, as well as the amicus contributions by UNAIDS, lay out the health harms faced by criminalisation of homosexuality. It impedes access to health, causes fear, and exacerbates mental health harms. Individuals who fear criminalisation are less likely to seek treatment, including preventative treatment, which in turn further burdens the healthcare system.

B. Analysis 3*: The Court failed to explain why other aspects of the AHA, which hold similarly harsh sentences for consensual same-sex behaviour, fail to harm the mental health of the LGBTQ+ community.*

The Court itself acknowledged the mental health toll that individuals may face if charged with aggravated homosexuality for unintentionally transmitting HIV as a result of (consensual) same-sex

[45] Deni Mazrekaj, Mirjam Fischer, Henny Bos, *Behavioral Outcomes of Children with Same-Sex Parents in The Netherlands*, 19 Int J Environ Res Public Health 5922 (2022), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9141065/.

activity. As a result, the Court upheld the Petitioners' request to strike out part of the AHA. Presumably, life imprisonment for consensual same sex activity which would not result in the transmission of HIV to another person would have a similarly harmful effect on the mental health of homosexual persons. Yet, the Court failed to distinguish why it focuses only on the narrow instance of unintentional transmission of HIV in determining which mental health harms are a violation.

VIII. *Dobbs* Case: Analysis and Responses

The Constitutional Court cited **Dobbs v. Jackson Women's Health Organization**,[46] in the Human Dignity section on page 103, 266. Below are several analysis responses to the Court's use of *Dobbs* that are distinguishable. First, the Constitutional Court used *Dobbs* to say that culture and history and traditions can overrule personal rights. However, the U.S. Supreme Court in *Dobbs* specifically said it was *sui generis*, and was not about balancing cultural and individual rights, but only used history and tradition in reference to originalism.

Second, the court said that *Dobbs* stood for the U.S. returning the decision about abortion to the people, as they were returning the decision about the AHA to the people (through their elected representatives). However, the US. Supreme Court's situation in a federalist system, and their restriction to the use of Substantive Due Process in this case, means that they are not returning this decision to the "people," but to the states.

Third, the court generally used *Dobbs* in a way that implied that it had bearing on the case regarding the AHA. However, the two cases are distinguishable because *Dobbs* was not about identity and criminalisation. Additionally, the court should not have relied on *Dobbs* at all because it is a bad case and does not reflect the latest US human rights law on the subject of LGBTQ+ rights.

Case Brief

Below is a brief description of the *Dobbs* case:

Dobbs v. Jackson Women's Health Organization, No. 19-1392, 597 U.S. 215 (2022),[47] reviewed Mississippi's Gestational Age Act, which prohibited abortions after 15 weeks with a few exceptions, and included penalties for abortion providers. Jackson Women's Health Organization filed as petitioners to challenge its constitutionality, with the Mississippi State Health Officer as the respondent.

The Court held that the United States Constitution does not guarantee the right to abortion, and therefore it does not prohibit each state from individually regulating abortion. This overruled previous court precedent in **Roe v. Wade** and **Planned Parenthood of Pennsylvania v. Casey**, which explicitly protected the right to abortion and prevented states from enacting abortion bans. In *Roe*, this protection was found to fall under the Due Process Clause of the 14th Amendment and the right to privacy that has been read into that clause. However, with a recent conservative majority, the Supreme Court held in *Dobbs* that the United States Constitution not only didn't explicitly protect the right to abortion, but also that it should not be implicitly protected by the Due Process Clause.

In overturning Roe, the Supreme Court argued that the right must be "deeply rooted in the Nation's history and tradition" and "implicit in the concept of ordered liberty" in order to be protected

[46] *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 597 U.S. 215 (2022)
[47] *See also*
https://www.law.cornell.edu/wex/dobbs_v._jackson_women%27s_health_organization_%282022%29
https://supreme.justia.com/cases/federal/us/597/19-1392/#tab-opinion-4600822

under the Due Process Clause.[48] The Court's new interpretation of the Due Process Clause was that the right in question must have been affirmatively protected throughout history, not merely in line with other more general protections that can be traced back (such as the protection of privacy or autonomy), as it had been interpreted before. Thus, the Court found that there was no evidence of affirmative protections for abortion throughout history, and as there is no federal law governing abortion, the decision should be returned to the state legislatures.

1. Court Finding 1: The Court used *Dobbs* to say culture/history and traditions overrule autonomy

The Court used *Dobbs* to say that one should look to a "nation's history and traditions . . . to overrule the broader right to autonomy" and that the U.S. Supreme Court "considered the implications upholding the broader right to autonomy under the guise of personal dignity" (Pg. 266). More broadly, the Court used *Dobbs* to justify their decision to restrict individual autonomy in favour of Uganda's culture and "history and traditions." This is wrong for several reasons:

A. Analysis 1: Dobbs is sui generis and only applies to abortion.

First, the U.S. Supreme Court did not use *Dobbs* to overrule a broader right to autonomy, in other words, *Dobbs* is *sui generis*. The U.S. Supreme Court in *Dobbs* was very specific in stating that this ruling only applies to whether abortion is protected by the Due Process Clause in the 14th Amendment to the Constitution.[49] This does not affect the broader right to privacy or individual autonomy. *Dobbs* even specifically stated that this right was different from the right to "intimate sexual relations," clearly stating that the decision did not impact at all the legalization of same-sex sexual relations in the United States.[50] *Dobbs* also did not explicitly overrule a broader right to autonomy, as it did not enact a national ban on abortion. In fact, post *Dobbs*, several states have enacted even more stringent protections for abortion than were present before *Dobbs* (ex: Ohio). It also leaves open the potential for the federal government to pass country-wide legislation protecting the right to abortion.

B. Analysis 2: Dobbs was not about balancing cultural and individual rights.

Second, *Dobbs* was not about balancing cultural and individual rights. The U.S. Supreme Court specifically cabined *Dobbs* as being about the state's interest in the potential life of the child, and about balancing those interests with the pregnant person's right to privacy.[51] Other rights such as consensual

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[48] *Dobbs,* 597 U.S. at 231, quoting *Washington* v. *Glucksberg*, 521 U. S. 702, 721 (1997).
[49] "The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment." *Dobbs*, 597 U.S. at 231.
[50] The abortion right is also critically different from any other right that this Court has held to fall within the Fourteenth Amendment's protection of "liberty." *Roe*'s defenders characterise the abortion right as similar to the rights recognised in past decisions involving matters such as intimate sexual relations, contraception, and marriage, but abortion is fundamentally different, as both *Roe* and *Casey* acknowledged, because it destroys what those decisions called "fetal life" and what the law now before us describes as an "unborn human being." *Dobbs* , 597 U.S.at 231.
[51] "Abortion is a profoundly difficult and contentious issue because it presents an irreconcilable conflict between the interests of a pregnant woman who seeks an abortion and the interests in protecting foetal life. The interests on both sides of the abortion issue are extraordinarily weighty". *Dobbs*, 597 U.S. at 337.

sexual intercourse does not involve an interest in potential life. There is a possible argument to be raised responding to this by stating that their interest is in protecting children from recruitment, and this is similar to the protection of potential life. However, while the interest in potential life is a philosophical one, it can be empirically shown that the recruitment of children is not occurring.

C. Analysis 3: The history and tradition of Uganda indicates laws against homosexuality originate from colonial times.

Third, if the Court wished to discuss history and tradition, it would have been helpful to highlight that the history and tradition of Uganda indicates that laws against homosexuality originate from colonial times, before which there was a much broader perception of marriage and of sexual life. However, the Court has been less receptive to this line of arguing in recent years. There is also an argument that the proper role of history and tradition is in supporting the inference that individuals should be free from unwarranted state interference (although this could be a mostly American focus of the constitution).[52]

D. Analysis 4: The use of history and tradition is only relevant to originalism.

Finally, in *Dobbs*, the use of history and tradition, or originalism, was only used in a specific context in interpreting the U.S. Constitution. This use of originalism only applied to U.S. constitutional interpretation and should not be imported to other systems which differ significantly. Further, even in the U.S. the use of originalism is considered to be highly controversial due to the challenges in identifying what the history and tradition at a particular moment in time was, and is therefore not consistently used in U.S. Supreme Court Jurisprudence.[53]

2. Court Finding 2: The Court said *Dobbs* returned the decision to the people.

The Ugandan Court also used *Dobbs* to argue that "it was time to return the permissibility of abortion and the limitations thereon to the people's elected representatives as demanded by the Constitution." (Pg. 266).[54]

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[52] Pamela S. Karlan, *Abortion, Gay Equality, and the Normative Power of the Actual*, N.C. L. REV. (forthcoming).
[53] See generally, Erwin Chemerinsky, Worse than Nothing: The Dangerous Fallacy of Originalism (2022); Paul Brest, The Misconceived Quest for the Original Understanding, 60 B. U. L. Rev., 204 (1980);
[54] The Ugandan court likely took this from the quote in *Dobbs*: "It is time to heed the Constitution and return the issue of abortion to the people's elected representatives. 'The permissibility of abortion, and the limitations, upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting.' *Casey*, 505 U.S., at 979, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (Scalia, J., concurring in judgement in part and dissenting in part). That is what the Constitution and the rule of law demand." *Dobbs*, 597 U.S. at 232, quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in judgement in part and dissenting in part).

A. Analysis 1: The U.S. Supreme Court is situated in a federalist system, so this returned the decision to the states, not to the people.

However, the U.S. Supreme Court is situated within a federalist system which means that *Dobbs* did not return the decision to the people *per se*. *Dobbs* was decided in the context of a federalist system which allows the federal government to protect certain rights. However, if the federal system does not protect those rights, it is reserved for the states to do so. Therefore, *Dobbs* did not stand for the proposition that the will of the people in the United States could take away all right to abortion. The *Dobbs* decision did not allow the federal government to take away fundamental rights because a majority of the people wished to do so, as the court is claiming.

B. Analysis 2: The Dobbs decision was about Substantive Due Process, not about returning the decision to the people.

Instead, *Dobbs* stated that the 14th Amendment to the United States Constitution did not give the U.S. Supreme Court the ability to provide heightened protection for abortion and override state laws. This was specifically about the Substantive Due Process Clause of the 14th Amendment. The court felt it was required to allow the state governments, including the legislatures and courts, to decide how the competing interests of the pregnant person and the potential life of the foetus should be weighed.

The Court specifically mentioned that this decision was situated within the context of federalism and Substantive Due Process when it stated that, "In interpreting what is meant by the Fourteenth Amendment's reference to 'liberty,' we must guard against the natural human tendency to confuse what that Amendment protects with our own ardent views about the liberty that Americans should enjoy. That is why the Court has long been 'reluctant' to recognise rights that are not mentioned in the Constitution."[55]

This is distinct from the Court giving this decision to the people, as the Court still determined that the right could be protected, it was just up to the states to do so because the federal legislature had not yet acted. This is actually one of the reasons we have a Constitution and Bill of Rights in the United States—to ensure that there are certain inalienable rights that are not subject to the will of the people, but are protected no matter how popular they are. This allows the states to choose for themselves the level of protection to award to the right to abortion. State courts therefore have the ability and right to still protect the right to abortion, and still can be counter-majoritarian.

3. Court Finding 3: Responses to the use of *Dobbs* in general

Even if the Court were to use *Dobbs* correctly, *Dobbs* is distinguishable from the case on appeal for several reasons. In addition to those stated above (interest in potential life, originalism, federalism, and Substantive Due Process), there are several other factors which make *Dobbs* distinguishable from this case:

[55] *Dobbs*, 597 U.S. at 239, citing *Collins* v. *Harker Heights*, 503 U. S. 115, 125 (1992).

A. Analysis 1: Dobbs is distinguishable from the case before the Court because it does not criminalise an identity.

Dobbs is about the permissibility of a specific medical procedure, and when that procedure can take place. While it does disproportionately affect women, it is not about a woman's identity. Here, the AHA criminalises the expression of the identity of being LGBTQ+, in actions, "promotion," provision of support, etc., to such an extent that it essentially criminalises all aspects of a homosexual person's life, not just one discrete procedure.

B. Analysis 2: Dobbs is distinguishable from the case before the Court because permitting conduct is different from criminalisation.

Dobbs also did not criminalise getting an abortion. There should be a much higher standard for the criminalisation of conduct, especially when involving the death penalty, than when deciding whether to grant affirmative protection. There is a canon of constitutional interpretation which states that one must construe legislation dealing with criminal punishment in the defendant's favour. That principle was not applicable in *Dobbs*, but should apply to the current case.

C. Analysis 3: Dobbs should not be used by the Ugandan Court because it is a bad case.

There are many criticisms which could be levelled against *Dobbs*. First, it displayed a deep mistrust of Substantive Due Process and did not properly apply history and tradition.[56] There are also several arguments that the moral value of potential life has never been the primary motivation for abortion laws.[57] It did not grapple with the cost of being forced to continue a pregnancy.[58] It created economic discrimination in abortion access.[59]

D. Analysis 4: Dobbs should not be used by the Ugandan Court because it does not accurately reflect the state of the U.S. Law. Law.

If the Court wished to use U.S. case law, **Lawrence v. Texas,** 539 U.S. 558 (2003), would have been better suited to this situation. *Lawrence* stands for the proposition that the freedom to make one's own intimate decisions is inherent to the dignity of a person. *Lawrence* further rejected the originalist argument that you could reject a person's humanity because of history and tradition. Additionally, **Romer v. Evans**, 517 U.S. 620 (1996) is directly applicable, as it struck down Colorado's law, based upon support from the ballot, stating that anyone in the LGBTQ+ community or those with "homosexual, lesbian or bisexual orientation, conduct, practises or relationships" could receive no legal protections.[60] The Court overturned this popular law and instead determined, "a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it."[61]

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[56] *Id.* at 103.
[57] *Id.* at 106.
[58] *Id.* at 107.
[59] *Id.* at 108.
[60] *Romer v. Evans*, 517 U.S. 620, 624 (1996)
[61] *Id.* at 635.

IX. *Johar* Case: Analysis and Responses

In its decision, the Constitutional Court largely declined to consider the applicability of **Navtej Singh Johar & Others. v Union of India & Another (2018) INSC 790**, which decriminalised homosexuality in India. In *Johar*, the court made two holdings. The first was that the Supreme Court of India in Johar eschewed social morality or a homogeneous, standardised societal ideology in deference to constitutional morality. The second was that an individual's sexual autonomy was an individual's right to behave as they wish, provided they have the consent of their partner. The Court added that *Johar* is premised on the belief that pleasure derived from an action would negate its criminality. *Johar*, as cited by Petitioners, was misinterpreted throughout the Court's decision.

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India's decriminalisation of homosexuality hinged on a contradictory reading between Article 14, Article 15, and Article 21 of the Indian Constitution. Article 14 offers a pertinent analysis.

Article 14 of the Indian Constitution, which demands that each person experiences "equality before the law or the equal protection of the law,"[62] closely aligns with Uganda's Article 21 which states that all are "equal before and under the law…and shall enjoy equal protection."[63] Writing that "legislation [that] discriminates on the basis of an intrinsic and core trait of an individual…cannot form a reasonable classification based on an intelligible differentia," without "rational nexus with the objective sought to be achieved,"[64] the Supreme Court of India found the prohibition on homosexual sex to be violative of Article 14 of the Constitution of India *only* if applied to consenting adults. Despite the similarities between Article 14 of the Indian Constitution and Article 21 of the Ugandan Constitution, the Ugandan Court declined to apply the Supreme Court of India's reasoning in *Johar*.

Below are two elements of the *Johar* case that the Court holding construed incorrectly.

1. **Court Finding 1: The Court contended that the Supreme Court of India in *Johar* eschewed social morality or a homogeneous, standardised societal ideology in deference to constitutional morality**

Citing Article 126(1) of the Constitution of Uganda, the Court found that a duty to exercise its judicial authority in conformity with "the law and with the values, norms and aspirations of the people," thus underscoring an emphasis on "socio-cultural interests of the Ugandan society" (Pg. 234). In the AHA decision, Article 126(1) is read in a manner that requires the Court to conclude that the judiciary is loyal to no Constitution and risks Ugandan rule of law being at variance with majoritarian sentiments. The Court stated that it has a constitutional order of *social* morality, which itself is Uganda's *constitutional* morality, and casts India's as distinct. But social morality, as defined earlier in their Constitution, may betray the Court's reasoning.

[62] Constitution of India, Article 14.
[63] Constitution of Uganda, Article 21.
[64] *Johar,* p. 461.

A. Analysis 1: The Court's own definitions of national interest and common good are inclusive of the LGBT+ community.

Article 8A of the Ugandan constitution commands Parliament to make laws "enshrined in the national objectives and directive principles of state policy" that are governed on the principles of "national interest and common good."[65] But the principles of national interest and common good in Article 8A do not make clear that their interpretation would even be valid. The Court helpfully defines the terms as "considerations that are broader than individual or group ideals or preferences" and "an intersection of interests that similarly transcend individual or group autonomy," respectively (Pg. 258). Unlike India's analogue, Article 37, which provides that these principles "shall not be enforceable"[66] by any court, Uganda's constitutional framework puts the state under "obligation" (Pg. 260). Key to this point is that the language in the opinion does not define neither "individual or group ideals or preferences" nor "interests that similarly transcend" individual or group autonomy. The Court glaringly fails, in establishing definitions, to get at the majoritarian sentiments they allude to in various other sections.

With help from *Johar*, one could say that the "values, norms and aspirations" of Ugandans are all-encompassing.[67] In defining "national interest" and "common good," the court gives direction about current intent and suggests that it is the responsibility of the judiciary, from the Indian perspective, to "curb any propensity or proclivity of popular sentiment or majoritarianism."[68] Continuing that an attempt to "push and shove a homogenous, uniform, consistent and a standardised philosophy" would result in a violation of constitutional morality is where the Indian and Ugandan constitutional morality converge.[69] The court does "recognize the need to protect the fundamental rights of those who…deviate from the majoritarian view…to ensure that the majority…does not trample over the fundamental rights of the minority" (Pg. 90). For the Ugandan state to enact a law that narrows national interest to discrete groups as part of a common good would violate Article 8A – and their claimed mandate of social morality in constitutional interpretation.

See Section II.4 for discussion on the Ugandan Court's claim that their Constitution asserts societal interests over individual rights.

B. Analysis 2: The Constitution of India does consider morality.

A point of note is that the Indian Constitution, in ways more comprehensive than the Ugandan Constitution, does indeed consider social morality in various sections. In the Constitution of Uganda, the word "morality" is only mentioned twice: in Article 26 Protection from deprivation of property (takings in the interest of public morality) and Article 28 Right to a fair hearing (exclusion of press and public from proceedings).[70] In the Indian Constitution, "morality" is imposed in various sections, including Article 19 Protection of certain rights regarding freedom of speech (nothing prevents State from imposing law in interest of public morality), Article 25 Free of conscience and free profession, practise and

[65] Constitution of Uganda, Article 8A.
[66] Constitution of India, Article 37.
[67] Constitution of Uganda, Article 8A.
[68] *Johar,* p. 77.
[69] *Id.*
[70] Constitution of Uganda, Article 26 and Article 28.

propagation of religion (these freedoms subject to morality), and Article 26 Freedom to manage religious affairs (religious affairs management subject to morality).[71] The purpose of enumerating these mentions is to show that India's consideration of morality is not a "duty" (Pg. 261) as the Ugandan Court describes, but that the considerations in India are far broader and textually assigned in the Constitution. So even as India is stricter on the utilisation of "morality" within constitutional law, it is read together with Article 14, Article 19, and Article 21.[72]

2. Court Finding 2: The Court interpreted *Johar* as holding that an individual's sexual autonomy is an individual's right to behave as they wish, provided they have the consent of their partner and that pleasure derived from an action would negate its criminality.

The Court overextends the *Johar* judgement by calling an individual's sexual autonomy "unfettered," and the judgement extended the logic to bestiality, incest, and "other unnatural offences" (Pg. 254). But key in *Johar* is that in its constitutional review of § 377A, the Supreme Court only concludes that consensual homosexual intercourse between adults is not a crime. It does not, in any way, permit sex with minors, non-consensual sexual acts, and bestiality.[73]

A. Analysis 1: Evidence shows professional consensus on innate homosexuality.

The Court reduced the *Johar* decision on the issue of homosexual sex to individuals seeking to "behave as they wish," so long as they have consent (Pg. 253). This reflects a fundamental disagreement between the way Indian and Ugandan courts understand homosexuality, with the Ugandan judiciary seeing homosexuality as nothing but a choice. Comparatively, the Indian courts see homosexuality as innate, determined by "neurological and biological factors," and are in consensus with many jurisdictions around the world.[74] Rather than providing scholarship to support their position, the Ugandan Court bizarrely relies on an affidavit from a single respondent that in his work, he has seen Ugandans abandoning homosexuality after being "recruited" into it (Pg. 254). Meanwhile, in *Johar*, the Court cites at least three sources correcting anachronistic views on homosexuality, including the World Health Organization, of which Uganda is a member.[75]

See Section II.7 for the Ugandan opinion's rejection of homosexuality as innate.

B. Analysis 2: The Court repeatedly misreads jurisprudence and other persuasive authorities.

To support their point, the Court included a quote from Prof. Sylvia Tamale, a Ugandan activist, which in part says that "sexuality is not exclusively driven by biology,"[76] itself implying that sexuality *is* indeed driven by "biological factors,"[77] at least in part, as the court in India writes. Tamale continues by explaining that prior to Messianic religious influence, there was "general tolerance, even acceptance, of

[71] Constitution of India, Article 19, Article 25, and Article 26.
[72] Conversation with Mihir Samson.
[73] *Johar,* p. 155
[74] *Johar*, p. 93.
[75] *Johar*, p. 458-459
[76] Tamale, Sylvia. (2014). Exploring the contours of African sexualities: Religion, law and power. *African Human Rights Law Journal*, *14*(1), 155. Retrieved April 27, 2024, from http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1996-20962014000100011&lng=en&tlng=en.
[77] *Id.* at 28.

homosexuality in Africa."[78] She goes on to describe the "renewal evangelical movements (aligned with the neoconservative right in the United States)" that are influencing African religious and politically motivated homophobia.[79]

Other African scholars agree. Eric Nii Bortey Anum, a Ghanaian scholar also agrees that biology is part of a gamut of experiences that define human sexuality.[80] The Court refers broadly to Ugandan values, but neglects to consider the "diversity…of Africa in terms of people groups and cultures," and that the "notion of a homogenous, unchanging sexuality for all Africans is out of touch" with both reality and scholarship.[81]

C. Analysis 3: The Court confused dicta and legal reasoning for the holding.

Putting aside the Court's misunderstanding of homosexuality and their own cited works, there are two issues to dispel here: that pleasure derived from action would negate its criminality and that consent implies unqualified permission to do as one pleases.

In brief, the judgement did not suggest that criminality is negated if pleasure is derived from the act. Instead, it applies 18th-century English philosopher Jeremy Bentham's three-part test against sodomy laws while conducting a utilitarian analysis for punishment.[82]

D. Analysis 4: Johar turns on dignity, privacy, and arbitrary restrictions on the LGBTQ+ community rather than individual autonomy.

The *Johar* court lays considerable attention to the issue of consent, but the jurists do not focus on consent as it relates to individual autonomy "behave as they wish." (¶ 253) The court in India answers the question of whether, if the expression of choice and sexual orientation "has the consent of the other, where dignity of both is maintained," and privacy, as a "seminal facet of Article 21," is "not dented."[83] In a brief discussion on autonomy, the court determines only that one can "surrender [their] … autonomy wilfully to another individual and their intimacy in privacy is a matter of choice."[84] They also find that "dignity is an inseparable facet of every individual," which "invites reciprocative respect from others."[85] The Court found that § 377A "woefully targeted" the LGBT+ community resulting in "discrimination and unequal treatment" is violative of Article 14.[86]

See Section II for greater discussion on human dignity.

See Section IV for greater discussion on one's right to privacy.

[78] *Id.* at 166.
[79] *Id.*
[80] Nii Bortey Anum, Eric. (2014). The Body Matters: Rights and Rites of African Sexualities and the Body in the context of 1Cor.6. *International Journal of Humanities Social Sciences and Education,* 1(8), 92. Retrieved May 1, 2024 from https://www.arcjournals.org/pdfs/ijhsse/v1-i8/12.pdf.
[81] Nii Bortey Anum, 93.
[82] *Johar*, p. 150-154.
[83] *Johar*, p. 10.
[84] *Johar*, p. 162.
[85] *Johar*, p. 159.
[86] *Johar*, p. 164.