NOTE

Gay Rights in Uganda: Seeking to Overturn Uganda's Anti-Sodomy Laws

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The Constitution protects all Ugandans, and this is about us claiming these rights.

–Victor Mukasa[1]

INTRODUCTION

According to Section 145 of the Uganda Penal Code Act, the act of sodomy is punishable by life imprisonment.[2] Penal Code Sections 146 and 148 similarly punish attempted sodomy with penalties of up to seven years in prison.[3] Although imposed during British colonial rule, these

1. Interview with Victor Mukasa, Program Assoc., The Horn, E., & Cent. Afr., Int'l Gay & Lesbian Human Rights Comm'n, in Kampala, Uganda (Jan. 3, 2008). Victor Mukasa, a transgender lesbian, was born Juliet Victor Mukasa, but she now goes by the name Victor Juliet Mukasa. Although she was born female and remains female in gender, her outward appearance is that of a man, and she has relationships with women. Mukasa is currently a Program Associate for the Horn, East, and Central Africa region at the International Gay and Lesbian Human Rights Commission and has helped to found such groups as Sexual Minorities Uganda, East and Horn of Africa Human Rights Defenders Network, Freedom and Roam Uganda, and the Pan-African group, African Solidarity.

2. Penal Code Act, (1998) ch. 120 § 145 (Uganda) ("Any person who (a) has carnal knowledge of any person against the order of nature . . . or (c) permits a male person to have carnal knowledge with him or her against the order of nature commits an offence and is liable to imprisonment for life."); *see also* LILLIAN TIBATEMWA-EKIRIKUBINZA, CRIMINAL LAW IN UGANDA: SEXUAL ASSAULTS AND OFFENSES AGAINST MORALITY 97–99 (2005) (explaining that the ambiguous language of Section 145 refers specifically to sodomy or "buggery" in the British common law system).

3. Penal Code Act § 146 ("Any person who attempts to commit any of the offences specified in Section 145 commits a felony and is liable to imprisonment for seven years."); *id.* § 148 ("Any person who, whether in public or in private, commits any act of gross indecency with another person or procures another person to commit any act of gross indecency with him or her or attempts to procure the commission of any such act by any person with himself or herself or with another

sections of the Penal Code have been wholeheartedly adopted by Uganda in the post-colonial era.[4] This Note presents a comprehensive legal argument for overturning these anti-sodomy laws using both a national constitutional framework and an international framework that includes treaties, other international agreements, and a developing international consensus that persecution of lesbian, gay, bisexual, transgender, or intersex (LGBTI) individuals is a human rights violation.

Like their statutory counterparts in the United States prior to the U.S. Supreme Court's decision in *Lawrence v. Texas*,[5] the Ugandan anti-sodomy laws are rarely, if ever, enforced. In fact, they are enforced so rarely that interviews with activists in the LGBTI community reveal that a constitutional challenge to such a law is not a current priority of the movement. As Victor Mukasa, an outspoken gay rights activist and transgender Ugandan, said, these laws are "not even on the radar right now; we just want to live in peace."[6] Why, then, attack these laws? What purpose will it serve to attack a set of laws that are never enforced and therefore not used to directly harass or to violate the rights of the LGBTI community?

There appear to be two types of harassment of the Ugandan LGBTI community: human rights violations against this community, as well as failure to provide governmental and non-governmental services to this community. First, in Uganda, there is a strong cultural abhorrence and complete lack of understanding of LGBTI individuals. This is reflected in everyday actions throughout the country, from minor forms of harassment in clubs, restaurants, and on the streets, to more pernicious forms of discrimination in jobs and service distribution.[7] Interviews with members of the LGBTI community suggest that an openly gay individual will likely be excommunicated by his or her church, will be neglected by his or her family and community, may be kicked out of school, will have difficulty finding and holding a job, and will be otherwise persecuted in everyday life.[8] Stories of people being maimed or killed because they are thought to be gay are a persistent reminder to the LGBTI community to maintain strong secrecy, often forcing people to engage in heterosexual relationships to give the impression of being

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person, whether in public or in private, commits an offense and is liable to imprisonment for seven years.").

4. *See* TIBATEMWA-EKIRIKUBINZA, *supra* note 2, at 97–99, 109.

5. 539 U.S. 558 (2003).

6. Interview with Victor Mukasa, *supra* note 1.

7. *See* Interview with David Kato, Sec'y, Integrity Uganda, and Bd. Member, Sexual Minorities Uganda (SMUG), in Kampala, Uganda (Jan. 3, 2008); Interview with Sam Opio, Dir., Queer Is Uganda, in Masaka, Uganda (Jan. 14, 2008).

8. Interview with David Kato, *supra* note 7; Interview with Sam Opio, *supra* note 7.

straight to the outside world.[9] Much of this type of cultural bias and discrimination cannot be attacked using current laws; it can only be attacked through new laws creating positive rights enabling LGBTI individuals to be free from this type of harassment and discrimination. These types of positive laws are an obvious goal for the LGBTI movement; however, it is difficult to imagine such positive laws being created in a country where the simple act of intercourse between two men is illegal. By removing the barrier represented by the sodomy laws, the movement's efforts to create new positive legal rights will be far easier, although still difficult.

Second, the anti-sodomy laws, although not directly enforced, serve as justification for the discrimination, harassment, and personal indignities suffered by the LGBTI community in Uganda. Social services organizations use these laws to explain why they lack services for the LGBTI community,[10] and the government uses them to punish those who attempt to provide services or support to the LGBTI community.[11] All too frequently, government officials, leaders of nongovernmental organizations (NGOs), and social service organizations state incorrectly that homosexuality itself is illegal, despite the fact that only sodomy is illegal under Ugandan law.[12] For example, a government official in the Ministry of Gender and Development stated in an interview that, because homosexuality is illegal, it would not make sense to have anyone in the government working on issues facing the LGBTI community.[13] Similarly, a number of NGOs and service providers indicated that one of the reasons that they did not provide services to LGBTI individuals was that they feared government repercussions. Harriet Mabonga, the Director of Advocacy for The AIDS Support Organization (TASO) said, "We cannot work outside national guidelines, and it is illegal in national guidelines to be gay. It would jeopardize TASO to have programs begin

9. Interview with David Kato, *supra* note 7; Interview with Sam Opio, *supra* note 7.

10. Interview with Harriet Mabonga, Dir. of Advocacy, The AIDS Support Org. (TASO), in Kampala, Uganda (Jan. 9, 2008) (stating that because homosexuality was illegal, TASO could not provide specific programs or counseling aimed at gay people despite their general mission to help those with HIV/AIDS).

11. *See, e.g.*, *Fine for Ugandan Radio Gay Show*, BBC NEWS, Oct. 3, 2004, http://news.bbc.co.uk/2/hi/africa/3712266.stm.

12. To clarify, it is not illegal to be a homosexual nor is it illegal for men to kiss, live together, or take any other action short of intercourse. Only anal sex has been criminalized in Uganda; however, people throughout the country seem to have taken this to mean that it is illegal merely to be homosexual.

13. Interview with an anonymous member of the Ministry of Gender and Development, in Kampala, Uganda (Jan. 8, 2008). It is important to note that this is not the official government policy on gay and lesbian issues—rather this was the statement of an individual government worker. Nonetheless, it demonstrates the attitude of ordinary government workers towards the idea of providing any services to gay individuals.

that may be called 'advocacy' of being gay."[14] Even beyond this worry of having programs targeted at the LGBTI community for fear of government intervention, Mabonga seemed generally reluctant to the idea of providing special TASO services to LGBTI individuals because, as she claimed, there are not many gay people in Uganda. She said that if there were more gay people in Uganda, TASO would "have to handle the situation" and provide special services to them.[15] Presently, TASO does not offer special services to LGBTI individuals.[16] However, TASO already runs a special program for the deaf, the population of which may arguably be less than that of the LGBTI community.[17]

This fear of official government reprisal for working with LGBTI individuals is warranted. On two different occasions in the past four years, the government fined and suspended radio broadcasters for presenting shows that included a discussion of the problems faced by LGBTI individuals. In the first incident, the Ugandan Broadcasting Council (UBC) fined Radio Simba more than one thousand dollars for airing a program in August 2004 dealing with lesbianism that was considered "contrary to public morality."[18] More recently, the UBC suspended Gaetano Kaggwa, a popular presenter on Capital FM Radio, for interviewing a transgender lesbian activist, Victor Mukasa, on the air because she used "unacceptable language."[19] Mukasa, however, did nothing more than explain the abuses she received at the hands of the police.[20] Finally, after a series of press conferences by the LGBTI community in late 2007, anti-gay activists, in conjunction with key government officials, were

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14. Interview with Harriet Mabonga, *supra* note 10.

15. *Id.*

16. Although TASO offers its services to all individuals with HIV/AIDS, there was concern among the LGBTI community that the questions asked by TASO necessarily revealed the sexual orientation of those seeking services. Once revealed to be gay, an individual could suffer from a range of reprisals, from scorn by TASO employees to violence by family members. This leaves LGBTI individuals suffering from HIV/AIDS in a tough situation: in order to seek medical care safely, they must lie about their past sexual history; but these lies might compromise the ability of a doctor to care for them.

17. *Id.* The interview with Mabonga demonstrates the truly circular nature of this problem: because there is such a fear of serving the LGBTI population, there have been no comprehensive studies conducted inquiring into the LGBTI population in Uganda. Mabonga's response is conclusory and really begs the question of how many gay people are in Uganda. Because she does not offer special services to the LGBTI community, Mabonga does not see many gay people coming for help.

18. *See Fine for Ugandan Radio Gay Show*, *supra* note 11 (quoting UBC Chairman, Godfrey Mutabazi).

19. *See* Press Release, Human Rights Watch, Uganda: Rising Homophobia Threatens HIV Prevention (Oct. 11, 2007), *available at* http://www.hrw.org/en/news/2007/10/10/uganda-rising-homophobia-threatens-hiv-prevention.

20. Interview with Gaetano Kaggwa, Disc Jockey, Capitol FM Radio, in Kampala, Uganda (Jan. 16, 2008).

rumored to be considering drafting a bill that would make the mere advocacy of gay rights illegal.[21] While it is unclear whether this bill will pass, or whether such a bill could ever be constitutional in light of Uganda's existing constitutional guarantees of freedom of expression, assembly, and association,[22] the bill's very proposal is detrimental to the rights of Uganda's LGBTI community.

By attacking and overturning the sodomy laws, the LGBTI community can overcome a major legal and psychological hurdle toward achieving true equality in Uganda. Outside the government, organizations that want to tackle issues facing the LGBTI community will feel more free to do so, and those, like TASO, that do not want to provide services despite clear evidence that they are needed, will have little argument to avoid providing such services. In addition, the media will be able to discuss LGBTI issues more freely, without fear of reprisal from the government. Furthermore, the government will not be able to create ever more restrictive laws when the most basic laws regarding sodomy are no longer in existence. Finally, the wider Ugandan community will no longer be able to hold onto the misperception that it is illegal to be gay.

It is important to note that overturning these laws will only serve to remove hurdles—it will not create any new positive rights, nor will it change the culture of Ugandan society. Viewed against the background of the gay rights movements in other nations, the struggle for rights equality for LGBTI individuals in Uganda will be a long and multifaceted battle of which this is only one important part. A legal victory will be symbolic and will cause many both inside and outside the gay community to take notice. Change within any legal system may be slow, especially since the general populace considers the changes sought to be socially radical. Some legal barriers already have fallen due to a court victory in late 2008 challenging the police treatment of two lesbian women.[23] Others, however, may take far more time to fall. As the movement progresses, the LGBTI community will gain rights, dignity, liberty, and, most of all, the ability to live a life of peaceful enjoyment.

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21. *See* Press Release, Human Rights Watch, *supra* note 19. On June 30, 2009, Uganda Minister for Ethics and Integrity, Dr. James Nsaba Buturo, held a press conference announcing that an anti-gay bill which would make it an offense "to publish and distribute literature on homosexuality or advocate for it" would be introduced soon. Joyce Namutebi, *Anti-gay Bill to be Tabled Soon*, The NEW VISION (Kampala), July 1, 2009, *available at* http://www.newvision.co.ug/D/8/13/686525.

22. UGANDA CONST. art. 29.

23. *See* Press Release, Int'l Gay & Lesbian Human Rights Comm'n, Uganda: Victory for Human Rights (Dec. 23, 2008), *available at* http://www.iglhrc.org/cgi-bin/iowa/article/pressroom/pressrelease/829.html (explaining the currently unpublished oral opinion given by the Ugandan Constitutional Court in *Oyo & Mukasa v. Attorney General*, (Misc. Application No. 247 of 2006) [2008] UGCC (Uganda)).

To achieve all of these goals, the LGBTI community and its supporters, both inside and outside Uganda, will have to fight many battles on many different fronts and with many different tools. In a country that is so staunchly against gay rights, the movement to overturn the sodomy laws may be long with many setbacks along the way. This Note, and the ideas that it presents, represent just a small stepping stone on a long path; however, each stone is important in and of itself. The ideas presented within will not be immediately successful, but, pressed over a long campaign, they will win out.

This Note proceeds in four parts. Part I briefly discusses the history of the anti-sodomy laws in Uganda. Part II discusses a number of international treaties to which Uganda is a signatory. All of these treaties contain strong language that disfavors, if not prohibits, anti-sodomy laws, yet only one treaty—the International Covenant on Civil and Political Rights (ICCPR)—has been used to overturn national anti-sodomy laws.[24] Part III discusses the emerging international consensus in support of LGBTI rights and against anti-sodomy laws. Although this consensus is primarily found within the Western world and has not yet made it to the vast majority of Africa and Asia, it nonetheless may prove persuasive to the Ugandan courts. Part IV discusses Ugandan constitutional provisions that could be used to invalidate the anti-sodomy laws. Finally, this Note concludes that the LGBTI community will be able to live peacefully and free of discrimination in Uganda only through a multi-faceted approach that involves not only changes to the law, but also deep changes in the cultural, public, and religious perceptions of homosexuality.

I. HISTORY OF THE ANTI-SODOMY LAWS

The history of anti-sodomy laws in Uganda is unclear given the limited information available. Some proponents of the anti-sodomy laws suggest that sodomy was a criminal act in many areas of what is now Uganda even before colonial times. Oscar Kahike, the president of the Ugandan Law Society, told me that these laws have been on the books

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24. *See* African Charter on Human and Peoples' Rights art. 2, June 27, 1981, 1520 U.N.T.S. 217 [hereinafter African Charter]; International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social, and Cultural Rights art. 2(2), Dec. 16, 1966, S. EXEC. DOC. D, 95-2 (1978), 993 U.N.T.S. 3 [hereinafter ICESCR]. See *infra* Part II.A for a discussion of *Toonen v. Australia*, which used the ICCPR to overturn Australian anti-sodomy laws. Toonen v. Australia, U.N. Human Rights Comm., Commc'n No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (1994), *available at* http://www.unhcr.org/refworld/docid/48298b8d2.html.

"for ages."[25] When pressed on this point, he said that the laws, which are currently in a form promulgated by the British colonial government, were around in pre-colonial times. He told me that homosexuality was punished by brutal penalties in many tribes, including death by stoning or walking off a cliff.[26] On the other hand, some members of the Buganda royal family suggest that homosexuality was existent and tolerated before colonial rule.[27] To this day, it is said that many members of the Buganda royal family are gay, and that many have moved to London to avoid persecution in Uganda.[28]

Although the origin of anti-sodomy laws in Uganda is not well-established, it is clear that Britain brought its anti-sodomy laws to its colonies, and that these laws are still in force in Uganda.[29] Today, the United Kingdom and many of its former colonies have abandoned their anti-sodomy laws,[30] and Uganda should as well. Using foreign precedent as an argument for reversing such laws, however, is unlikely to hold sway among Ugandans given both the deep Christian morality and cultural bias against homosexuals justifying adherence to these laws.[31]

II. INTERNATIONAL TREATIES

In theory, international treaties to which Uganda is a signatory should provide a strong source of protection for LGBTI individuals. In practice, these international treaties and agreements may play little more than a rhetorical role in overturning the anti-sodomy laws in Uganda.

Uganda is a signatory to a number of international treaties meant to protect human, civil, and political rights. First, Uganda is a signatory to several United Nations treaties dealing with international human rights,

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25. Interview with Oscar Kahike, President, Ugandan Law Soc'y, in Kampala, Uganda (Jan. 11, 2008). In this interview, Kahike did not reveal his personal thoughts on the anti-sodomy laws, but rather adhered to the topic of the laws' origins.

26. *Id.*

27. *See* Buganda.com, The Christian Martyrs of Uganda, http://www.buganda.com/martyrs.htm (last visited Sept. 3, 2009) (describing a former Bugandan king's homosexual activities). Buganda is the kingdom that encompasses much of southern Uganda, especially the area surrounding Kampala. Although it enjoyed much more power before British Colonialism, it remains politically influential. *See* Buganda.com, Introduction, http://www.buganda.com/bugintro.htm (last visited Sept. 3, 2009).

28. *See* Interview with Victor Mukasa, *supra* note 1. I also interviewed a woman who told me that she was a princess in the Buganda royal family and that she is gay. Interview with Nikki Mawanda, in Kampala, Uganda (Jan. 3, 2008).

29. *See* TIBATEMWA-EKIRIKUBINZA, *supra* note 2, at 97–99, 109.

30. Among other countries, the United Kingdom and former British colonies Ireland, Northern Ireland, Canada, Australia, and the United States have all abandoned their sodomy laws in the last thirty years. *See infra* Part III.

31. *See supra* text accompanying notes 7–9.

including the ICCPR and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), both of which went into force in 1976.[32] Also, as a member of the African Union, Uganda is a signatory to the African Charter on Human and Peoples' Rights (African Charter), which came into effect in 1986.[33] All of these treaties recognize the protection and promotion of human rights as a significant part of their mission; however, only the ICCPR has been successfully used to combat anti-sodomy laws or to protect individuals from sexual-orientation discrimination.[34] Furthermore, none of these treaties have extensive enforcement mechanisms for their rulings; therefore, even if a monitoring body of one of the aforementioned treaties were to rule that Uganda's anti-sodomy laws are a derogation of its treaty obligations, it is unlikely Uganda would comply with this ruling.[35]

Uganda, like many nations, has not held its duty under international treaties in high regard. As Frans Viljoen noted in his book discussing international human rights law in Africa, "without doubt, most African states do not comply with the views issued by the" monitoring body of the ICCPR, the Human Rights Committee.[36] In fact, in its concluding observations on Uganda's required periodic report as a signatory to the ICCPR, the Human Rights Committee praised Uganda for submitting a "detailed and comprehensive" report that was "frank" and that "admit[ted] shortcomings in the implementation of the Covenant," but it also admonished Uganda for submitting its report more than seven years late.[37] The Committee went on to lament Uganda's failure to implement even those decisions of the *Ugandan* Human Rights Commission—a national body established by the Ugandan Constitution—regarding human rights violations:

> While acknowledging the important role of the Uganda Human Rights Commission in the promotion and protection of human

32. ICCPR, *supra* note 24; ICESCR, *supra* note 24. For information on the formation of these treaties, see SCOTT CARLSON & GREGORY GISVOLD, PRACTICAL GUIDE TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 1–2 (2003); MATTHEW CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT 1–5 (Ian Brownlie ed., 1995).

33. African Charter, *supra* note 24.

34. *See infra* Part II.A.

35. *See* African Charter, *supra* note 24, chs. II–III; CARLSON & GISVOLD, *supra* note 32, at 4–5; CRAVEN, *supra* note 32, at 1–5.

36. FRANS VILJOEN, INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA 117 (2007).

37. U.N. Human Rights Comm., *Concluding Observations of the Human Rights Committee: Uganda*, ¶ 2, U.N. Doc. CCPR/CO/80/UGA (May 4, 2004) [hereinafter *Concluding Observations*]. Uganda was supposed to submit its report in September 1996, but did not actually submit the report until February 2003. *See also* Office of the High Comm'r of Human Rights, Reporting Status, *Uganda's Reporting Round: 1*, http://www.unhchr.ch/tbs/doc.nsf/5038ebdcb712174dc1256a2a002796da/80256404004ff315c125638c005faad4 (last visited Sept. 3, 2009).

> rights in Uganda, the Committee is concerned about recent attempts to undermine the independence of the Commission. It is also concerned about the frequent lack of implementation by the State party of the Commission's decisions concerning both awards of compensation to victims of human rights violations and the prosecution of human rights offenders in the limited number of cases in which the Commission had recommended such prosecution (art. 2). The State party should ensure that decisions of the Uganda Human Rights Commission are fully implemented, in particular concerning awards of compensation to victims of human rights violations and prosecution of human rights offenders. It should ensure the full independence of the Commission.[38]

In short, the Human Rights Committee recognized that if Uganda would not implement the decisions of its own Human Rights Commission there was little hope of it implementing the decisions of any supranational treaty body. This point is well taken; it is hard to imagine that Uganda, a country that has been derelict in implementing the rulings of its own Human Rights Commission, would enthusiastically implement the decisions of a foreign human rights commission or treaty enforcement body. Without respected means of enforcing the decisions of international human rights bodies and treaty organizations, these sources of law, while rhetorically important, will not soon occupy a strong position in the fight to overturn Uganda's anti-sodomy laws.

Uganda's failure to implement rulings of foreign treaty bodies is only the beginning of the problem with using these treaties and their enforcement mechanisms to overturn the anti-sodomy laws in Uganda. The emerging international consensus represented by the rulings in these foreign jurisdictions may persuade Uganda to change its stance on homosexuality and anti-sodomy laws, but the rulings of these foreign bodies are not binding in any fashion on Ugandan courts. With respect to the treaties to which Uganda is a signatory, very little literature is dedicated to sexual minorities because, with the exception of the ICCPR, so far these treaties have not been used to protect the rights of sexual minorities, despite language that suggests they should.[39]

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38. *Concluding Observations*, *supra* note 37, ¶ 7.

39. The African Charter, for example, states at the outset of Part I that the rights guaranteed within it shall be enforced without distinction to "race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status." African Charter, *supra* note 24, art. 2; s*ee infra* Part II.

A. The International Covenant on Civil and Political Rights

The treaty that holds the most potential for protecting the rights of sexual minorities is the ICCPR. The ICCPR's Human Rights Committee has on two separate occasions found that discrimination based on sexual orientation is not allowed under the treaty. These two rulings have focused on Articles 2, 17, and 26 of the ICCPR.

Article 2(1) states:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[40]

Article 17 states:

> No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> Everyone has the right to the protection of the law against such interference or attacks.[41]

Article 26 states:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[42]

In *Toonen v. Australia*, decided in 1994, the ICCPR Human Rights Committee directly applied the ICCPR to overturn an Australian law criminalizing sodomy.[43] Twelve years later, the United Nations Working Group on Arbitrary Detention found that the detention of eleven men in Cameroon on the basis of their sexual orientation was a violation of the ICCPR.[44] These decisions appear to stand alone as there have not

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40. ICCPR, *supra* note 24, art. 2.

41. *Id.* art. 17.

42. *Id.* art. 26.

43. Toonen v. Australia, U.N. Human Rights Comm., Commc'n No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (1994), *available at* http://www.unhcr.org/refworld/docid/48298b8d2.html.

44. *See* U.N. Working Group on Arbitrary Detention, No. 22/2006, Opinion (Aug. 31, 2006) (Cameroon), *reprinted in* U.N. Human Rights Council, *Opinions Adopted by the Working Group*

been any additional rulings regarding gay rights under the ICCPR; however, they set the stage for the possibility of future rulings that anti-sodomy laws violate the ICCPR and that they must be revoked in the treaty's signatory countries.

1. *Toonen v. Australia*

Toonen was a citizen of Australia residing in Tasmania, and was a leading member of the Tasmanian Gay Law Reform Group.[45] He challenged three provisions of the Tasmanian Criminal Code: Sections 122(a), 122(c), and 123, all of which criminalized various forms of sexual conduct between men, including acts between consenting adults conducted in private.[46] Although these laws had not been enforced for a number of years prior to Toonen's claim under the ICCPR, he argued that these laws threatened his privacy by calling into question his long-term relationship with a man, his activities as an activist against these laws, and his work on HIV/AIDS in the gay community.[47] He also noted that these laws contributed to "discrimination in employment, constant stigmatization, vilification, threats of physical violence, and the violation of basic democratic rights."[48] Perhaps somewhat uniquely, he also claimed that the use of derogatory and insulting language by government officials "created constant stress and suspicion" in what should otherwise be routine meetings with government authorities.[49] Finally, he claimed that the existence of the laws fueled violence, discrimination, and harassment by the general population against the gay community in Tasmania.[50]

With these claims in mind, Toonen challenged the criminal provisions under ICCPR Articles 2(1), 17, and 26, stating that these domestic provisions: (1) violated his right to privacy, because police could use the acts to enter a household on suspicion of a violation; (2) distinguished the privacy of individuals based on their sexual orientation; and (3) only punished men for these actions when conducted with other men, but allowed them when they were conducted with or among women.[51] In its defense, the Tasmanian government stated that Article 17 does not

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on Arbitrary Detention, at 91, U.N. Doc. No. A/HRC/4/40/Add.1 (Feb. 2, 2007) [hereinafter *Working Group Opinions*]; *see also* Doug Ireland, *U.N. Condemns Cameroon Jailings*, GAY CITY NEWS, Nov. 2, 2006, *available at* http://www.gaycitynews.com/articles/2006/11/02/gay_city_news_archives/international%20news/17415836.txt.

45. *Toonen*, U.N. Human Rights Comm., Commc'n No. 488/1992, ¶ 1.

46. *See id.* ¶ 2.1.

47. *Id.* ¶ 2.3.

48. *Id.* ¶ 2.4.

49. *Id.* ¶ 2.5.

50. *Id.* ¶ 2.7.

51. *Id.* ¶ 3.1(a)–(c).

create a right to privacy, but rather prohibits arbitrary or unlawful interference with privacy.[52] Therefore, because the laws were not arbitrarily enforced, they were not contrary to Article 17.[53] The government further argued that, because the laws were enacted by democratic process, their enforcement could not be construed as unlawful.[54] In addition, the government claimed that the laws were part of its plan to protect Tasmanians from the spread of HIV/AIDS and to protect morality.[55]

The Human Rights Committee unequivocally rejected the State's arguments and found the laws to be in direct violation of Article 17 of the ICCPR.[56] The Committee held that even though the laws had not been enforced for a decade, the policy of the State to not enforce the laws against consensual private conduct "does not amount to a guarantee that no actions will be brought against homosexuals in the future."[57] Furthermore, the link between the law and HIV/AIDS prevention was strongly rejected by the Committee:

> [T]he criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV. The Government of Australia observes that statutes criminalizing homosexual activity tend to impede public health programmes "by driving underground many of the people at the risk of infection." . . . Secondly . . . no link has been shown between the continued criminalization of homosexual activity and the effective control of the spread of the HIV/AIDS virus.[58]

Finally, the Committee rejected the argument that moral concerns are exclusively within the domestic control of nations and outside the ICCPR's jurisdiction because "this would open the door to withdrawing from the Committee's scrutiny a potentially large number of statutes interfering with privacy."[59]

The Committee concluded by noting that, "in its view," the reference to "sex" in Articles 2(1) and 26 encompasses sexual orientation.[60] Because the ruling primarily rested on Article 17, it is unclear whether this declaration is binding authority or dicta. In the context of overturning an anti-sodomy law, this is not particularly important so long as the ruling

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52. *Id.* ¶ 6.2.
53. *Id.*
54. *Id.*
55. *Id.* ¶ 6.5.
56. *Id.* ¶¶ 8.2–8.6.
57. *Id.* ¶ 8.2.
58. *Id.* ¶ 8.5.
59. *Id.* ¶ 8.6.
60. *Id.* ¶ 8.7.

of the Committee with respect to Article 17—i.e., finding anti-sodomy laws to be a violation of privacy rights—stands.

2. *Opinion of the United Nations Working Group on Arbitrary Detention Regarding the Detention of Homosexuals in Cameroon*

In late 2006, the United Nations Working Group on Arbitrary Detention rebuked the Republic of Cameroon for its detention of eleven men on charges of homosexuality.[61] The men were arrested in a raid on a gay bar in 2005. The Working Group held that the detention was an arbitrary deprivation of liberty in violation of the ICCPR.[62] Unfortunately, one year later, a news release from the International Gay and Lesbian Human Rights Commission noted that, in the two previous years over thirty people had been arrested on charges of homosexuality despite the ruling of the United Nations Working Group.[63] Although this ruling is the only one on LGBTI rights in the fifteen years since *Toonen*, it nonetheless holds out the promise that the ICCPR has the potential to be used as a continuing force in the removal of anti-sodomy laws and in the reduction of discrimination against the LGBTI community. While it seems surprising that there have not been more rulings under the ICCPR regarding national anti-sodomy laws and the ongoing discrimination against the LGBTI community in places like Uganda, these two rulings, twelve years apart, show that the ICCPR has a place in this battle and perhaps can be used by activists to achieve positive rulings on an international stage.

B. *The International Covenant on Economic, Social, and Cultural Rights*

Unlike the ICCPR, which guarantees civil and political rights as the foundation of liberty, the ICESCR guarantees the "second generation" rights of economic, social, and cultural security.[64] The ICESCR pledges, among other things, the "rights to work, to fair conditions of employ-

61. U.N. Working Group on Arbitrary Detention, *supra* note 44, ¶¶ 19, 22, at 93–94; *see also* Ireland, *supra* note 44.

62. U.N. Working Group on Arbitrary Detention, *supra* note 44, ¶ 20, at 94.

63. Press Release, Int'l Gay & Lesbian Human Rights Comm'n, Human Rights Activists Protest Continued Arrests of Gay Men in Cameroon (Dec. 10, 2007), *available at* http://www.iglhrc.org/cgi-bin/iowa/article/pressroom/pressrelease/327.html.

64. *See* CRAVEN, *supra* note 32, at 8 (citing ICESCR, *supra* note 24). Note that in the language of human rights, rights are often construed in the manner of the French Revolution: liberty, equality, fraternity. First generation rights (liberty) protect the civil rights of individuals; second generation rights (equality) protect the right to earn a living and to be secure; and third generation rights (fraternity) protect the collective rights of peoples or cultures.

ment, to join and form trade unions, to social security, housing, health, education, and culture."[65] In its preamble, the ICESCR, like the ICCPR, declares that the rights found within it are derived from the "inherent dignity of the human person."[66] While the Covenant itself has a very broad scope, it has been criticized for excessive generality, which places a heavy burden on the overseeing body tasked with the interpretation and development of human rights norms related to economic, social, and cultural rights.[67] The Covenant also suffers from a weak enforcement mechanism that is critically important to efforts to overturn the anti-sodomy laws in Uganda. Unlike the ICCPR, which requires States to "respect and ensure" the rights contained within,[68] the ICESCR asks States to "take steps . . . with a view to achieving progressively the full realization of the rights."[69] In other words, failing to live up to the lofty goals of the ICESCR is not necessarily a violation of that treaty, so long as a country can say that it is "taking steps" to achieve the rights specified in the treaty.

Despite its weaknesses, the ICESCR does have language that mirrors the non-discrimination language also contained in the ICCPR. In particular, Article 2, Paragraph 2 states: "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[70] Taken together with other rights guaranteed within the Covenant, this Article could serve as a powerful means to assert the rights of the LGBTI community and, if not dismantle the anti-sodomy laws themselves, at least act to dismantle the restrictions on NGOs and other service organizations working with LGBTI individuals. For example, Article 6(1) recognizes the "right of everyone to the opportunity to gain his living by work which he freely chooses or accepts"; Article 11(1) recognizes the "right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions"; and Article 12(1) recognizes the "right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[71] Any of these guarantees could feasibly be used in

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65. *Id.* at 7; *see also* ICESCR, *supra* note 24, arts. 6–9, 11–13, 15.
66. ICESCR, *supra* note 24, pmbl.; *accord* ICCPR, *supra* note 24, pmbl.
67. CRAVEN, *supra* note 32, at 25–26.
68. ICCPR, *supra* note 24, art. 2(1).
69. ICESCR, *supra* note 24, art. 2(1); *see also* CRAVEN, *supra* note 32, at 26.
70. ICESCR, *supra* note 24, art. 2(2).
71. *Id.* arts. 6(1), 11(1), 12(1).

conjunction with Article 2 to protect the rights of the LGBTI community from public and private discrimination.

Unfortunately, this goal has not yet been realized under the ICESCR. As Matthew Craven notes: "In principle, there is no reason why the extent of a person's enjoyment of economic, social, or cultural rights should depend upon their sexual orientation."[72] The problem, however, is that there needs to be a "sufficient moral consensus within which [the enforcement body of the ICESCR] may locate [such protections]."[73] Without a moral consensus, the members of the ICESCR will have no reason or foundation upon which to create such rights, despite the language of the treaty. Although there is an emerging international consensus—at least in the Western world—of recognizing rights for LGBTI individuals, sodomy remains a criminal offense in many nations, particularly those in Africa and Asia.[74] Even if there were a consensus within the ICESCR enforcement body, the weak enforcement mechanisms of the ICESCR and Uganda's reluctance to follow international treaty declarations render the ICESCR a weak tool in combating the anti-sodomy laws.

C. *The African Charter on Human and Peoples' Rights*

Like the other international treaties to which Uganda is a signatory, the African Charter is, in practice, nothing more than a well-meaning rhetorical device. The African Charter states at the outset of Part I that the rights guaranteed in it shall be enforced without distinction to "race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status."[75] It then goes on to catalog a host of rights that should be applicable in the context of overturning an anti-sodomy law. The Charter guarantees, for example, that "every individual shall be equal before the law" and "entitled to the equal protection of the law."[76] Similarly, it guarantees "the right to the respect of the dignity inherent in a human being," "the right to liberty," and the right to be free from arbitrary detention.[77]

These rights, however, are tempered to some extent by other sections of the Charter. For example, the right to freedom of association is condi-

72. CRAVEN, *supra* note 32, at 171.
73. *Id.*
74. As of 2003, eighty-four nations, many of which are in Africa or Asia, still have anti-sodomy laws. Int'l Gay & Lesbian Human Rights Comm'n, *Criminalization and Decriminalization of Homosexual Acts*, July 24, 2003, http://www.iglhrc.org/cgi-bin/iowa/article/takeaction/resourcecenter/817.html.
75. African Charter, *supra* note 24, art. 2.
76. *Id.* art. 3.
77. *Id*. arts. 5–6.

tioned on the fact that those exercising it abide by the law; this means that a man cannot associate with another man for the purpose of sex if sex between two males is unlawful.[78] Additionally, the African Charter does not mention a right to privacy. Notwithstanding these two weaknesses, the anti-sodomy laws are at odds with the provisions requiring equality before the law without regard to "sex" or "any status." The anti-sodomy laws discriminate based on the sexual orientation of one's partner, as well as on the general status of people as homosexuals.[79]

Unfortunately, the African Charter, despite some positive language, has not yet been used to protect the rights of the LGBTI community. This is most likely because the overseeing body of the Charter, the African Commission on Human and Peoples' Rights is composed of members of the various African States that are signatories to the African Charter. To the extent that the vast majority of these nations do not recognize the rights of the LGBTI community and individuals, the Commission itself will not recognize these rights. An adjudicative and protective body is only as strong as the members that comprise it.

Although the African Charter appears to hold out hope for the LGBTI community, at least in its rhetoric, the structure of the adjudicative process leaves little hope that this agreement could be used to bring pressure on the Ugandan government regarding its anti-sodomy laws. Any attack on the anti-sodomy laws in the Ugandan Constitutional Court could cite Articles 2, 3, 5, and 6 of the Charter, but it remains to be seen whether the Constitutional Court will be persuaded at all by this international source of law.

III. EMERGING INTERNATIONAL CONSENSUS

Over the past thirty years, an international consensus has emerged condemning laws that discriminate against gay individuals.[80] This ad-

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78. *Id.* art. 10.

79. This concept is discussed in more depth *infra* Part III, but the argument that anti-sodomy laws are an impermissible form of sex discrimination has been successfully used throughout the world. In the Supreme Court of Hawaii, for example, anti-gay marriage laws were held to be impermissible sex discrimination because the laws focused on the sex of a man's marriage partner: if the partner were female, the marriage would be legal, but if the partner were male, the marriage would be illegal. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993). In Uganda, the anti-sodomy laws also necessarily focus on the sex of a male's sexual partner: male sexual activity with a female will be presumed legal, while sexual activity with a male partner will be presumed illegal.

80. This Note purposely uses the word gay rather than LGBTI here because the emerging international consensus does not universally extend beyond gay individuals to other sexual minorities such as transgender, transsexual, and intersex individuals. Although many countries have found that equal rights should exist for all sexual minorities, others have merely done away with anti-sodomy laws—laws that affect not only gay and bisexual individuals, but also other sexual minorities.

vancement of gay rights has come through a mixture of legislation, international agreements, and court cases filed by LGBTI individuals challenging local laws that discriminate against them either explicitly or in practice. At its most basic level, this emerging international consensus has done away with anti-sodomy laws in a wide range of countries, many of which, like Uganda, are former British colonies. For example, Australia, Canada, Cyprus, South Africa, the United States, and the United Kingdom have all abandoned anti-sodomy laws in recent years.[81] This international movement has not stopped with anti-sodomy laws, however. In many countries, any form of discrimination against LGBTI individuals has been deemed illegal. In the last decade, for example, this has allowed for same-sex marriages in Belgium, Canada, Norway, the Netherlands, Spain, and South Africa; the right to be free of discrimination in the workplace due to sexual orientation in the European Union; and even the right to state-funded sex change operations for transsexuals in a number of countries, including the United Kingdom.[82]

An emerging international consensus is, of course, just that—a consensus that the international community has moved toward—and nothing more. Such an emerging consensus is not binding on Ugandan courts, nor do the courts even have to consider these foreign rulings. Furthermore, as demonstrated in Figure 1 below, this emerging consensus is almost entirely a Western phenomenon, not one that has been embraced by Africa or many parts of Asia. However, the recognition of a right in much of the world should serve as an indicator to the Ugandan courts that this is neither a fleeting right nor an outrageous claim. Furthermore, because roughly one-sixth of the Ugandan GDP comes from direct foreign aid, foreign governments may pressure the Ugandan government to fall into line with their norms regarding the criminalization

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81. The United Kingdom legalized all private sexual acts between adult males in 1967 (England and Wales), 1980 (Scotland), and 1982 (Northern Ireland) following the recommendations of the Wolfenden Report—officially known as the Report of the Departmental Committee on Homosexual Offences and Prostitution—written by a subcommittee formed to advise Parliament on sexual legislation. *See* Sexual Offences Act, 1967, § 1 (Eng.) (repealing the section of the Offences Against the Person Act of 1861 that dealt with "buggery," defined as either anal intercourse with a human, regardless of the sex of either person, or vaginal or anal intercourse with an animal); *see also* THE WOLFENDEN REPORT: REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION 48 (Authorized American ed., Stein & Day 1963) (1957) [hereinafter THE WOLFENDEN REPORT].

82. Same sex marriage legislation was passed in the Netherlands in 2000, Belgium in 2003, Spain and Canada in 2005, South Africa in 2006, and Norway in 2008. *See* Pew Forum on Religion & Public Life, *Same-Sex Marriage: Redefining Marriage Around the World* (Jan. 22, 2009), *available at* http://pewforum.org/docs/?DocID=235. For information on the European states, see KEES WAALDIJK & MATTEO BONINI-BARALDI, SEXUAL ORIENTATION DISCRIMINATION IN THE EUROPEAN UNION: NATIONAL LAWS AND THE EMPLOYMENT EQUALITY DIRECTIVE, 17–18, 83 (2006).

of sodomy, especially in light of the harsh penalties imposed for violations under the Ugandan laws.[83]

FIGURE 1: COUNTRIES WITH ANTI-SODOMY LAWS[84]

In *Lawrence v. Texas*, Justice Kennedy performed the unusual judicial act in U.S. Supreme Court jurisprudence of looking beyond U.S. borders to this international consensus for the proposition that Western civilization and Judeo-Christian morals can allow gay rights.[85] This act, coupled with the removal of anti-sodomy laws in many former British colonies as well as in the United Kingdom, serves to show that a law once considered justified and staunchly entrenched within a society can be repealed. The Ugandan courts should seize upon this emerging consensus as a sign that laws restricting the liberties of gay individuals have no place in a country whose constitution promises the protection of per-

83. *See* GLOBAL INTEGRITY, 2006 COUNTRY REPORT: UGANDA 81 (2006), *available at* http://www.globalintegrity.org/reports/2006/pdfs/uganda.pdf (stating that Uganda's GDP per capita in 2004 was $262.40 whereas the foreign aid per capita was $41.66).

84. For a list of countries with anti-sodomy laws, on which this figure was based, see Int'l Gay & Lesbian Human Rights Comm'n, *supra* note 74. To view an interactive version of this map, see Countries with Anti-Sodomy Laws, http://maps.google.com/maps/ms?ie=UTF8&hl=en&msa=0&msid=116458230167884434621.00044c416d93ad8604c03&ll=9.16685,57.727661&spn=175.19752,360&z=1 (last visited Sept. 7, 2009). Map ©2009 Google. Map data ©2009 Europa Technologies.

85. 539 U.S. 558, 572–73, 576–77 (2003). Justice Kennedy noted that: "The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon v. United Kingdom.* Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent." *Id.* at 576–77 (citations omitted).

sonal liberty, equality, and freedom from discrimination.[86] There is no liberty when the State can use a law such as this one to control the lives of gay individuals. As Justice Kennedy noted in *Lawrence*, "[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[87]

A. European Convention on Human Rights

The Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms, first signed by only fourteen countries in 1950, has grown to include forty-seven signatories throughout the European continent.[88] The Convention was drafted by the Council of Europe in the aftermath of World War II, and the system it established has, since then, acted as one of the most effective international legal tribunals in the world.[89] Unlike other international legal tribunals, such as the International Court of Justice, the Convention has formal legal mechanisms such as the European Court of Human Rights (ECHR) that are able to exercise actual authority over its member countries.[90] According to several scholars, one of the most important aspects of the ECHR has been member states' willingness to submit to the decisions of the court, even when they are highly controversial.[91] They attribute this willingness, to some extent, to the fact that the ECHR is a formal legal body rather than a nonjudicial board issuing directives like the United Nations.[92] To defy the ECHR would, they believe, evince a "defiance of the commitment to human dignity and the rule of law," which would not be a politically viable option in Europe.[93]

The ECHR has jurisdiction over petitions for relief brought before it by individuals and states.[94] The primary mechanism for justice by the ECHR is a ruling that a state action or law is in violation of the Conven-

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86. UGANDA CONST. arts. 20–21, 23.

87. *Lawrence*, 539 U.S. at 562.

88. For a list of signatories to the Convention for the Protection of Human Rights and Fundamental Freedoms, see Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms CETS No.: 005, http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CL=ENG (last visited Sept. 3, 2009). *See also* Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter CPHRFF].

89. *See* MARK W. JANIS, RICHARD S. KAY & ANTHONY W. BRADLEY, EUROPEAN HUMAN RIGHTS LAW 1, 6 (2d ed. 2000).

90. *See id.* at 6.

91. *See id.* at 7.

92. *See id.*

93. *See id.*

94. CPHRFF, *supra* note 88, arts. 33–34; *see also* JANIS, KAY & BRADLEY, *supra* note 89, at 23.

tion.[95] In the aftermath of a case, a state is required to comply with the Court's ruling either through the payment of damages, the alteration of a conflicting national law, or complying with both of these measures.[96]

The ECHR has made a number of significant rulings regarding the rights of gay individuals, striking down numerous anti-sodomy laws and requiring equal treatment of LGBTI individuals in various contexts including employment, military service, and inheritance rights. As with all rulings of the ECHR, these decisions are binding on all forty-seven signatories of the Convention. Most of the applications and rulings under the ECHR take place under Articles 8 and 14 of the Convention. Article 8, which enumerates a right to respect for private and family states:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[97]

Article 14, providing for a prohibition on discrimination states:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.[98]

Article 14 prevents discrimination in the rights and freedoms guaranteed in other articles of the Convention and, consequently, must be paired with another article of the treaty. Frequently, claims for equal protection are brought under both Article 14 and Article 8. Perhaps the only disheartening aspect of the rulings under the ECHR is that they all require a prior unfavorable ruling in the highest court of a nation before reaching the ECHR.[99] In other words, cases reaching the ECHR indicate that nations on their own refused to protect the rights of LGBTI individuals without the urging of a supranational body applying an international convention.

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95. JANIS, KAY & BRADLEY, *supra* note 89, at 68–69.
96. *See id.* at 69.
97. CPHRFF, *supra* note 88, art. 8.
98. *Id.* art. 14.
99. *Id.* art. 35 (stating that cases are admissible to the ECHR only "after all domestic remedies have been exhausted").

1. *Dudgeon v. United Kingdom of Great Britain and Northern Ireland*

The seminal case for gay rights in the ECHR is *Dudgeon v. United Kingdom of Great Britain and Northern Ireland*, decided in 1981.[100] Dudgeon was a thirty-five-year-old shipping clerk residing in Belfast, Northern Ireland, whose house was raided by police in 1976 under the Misuse of Drugs Act of 1971.[101] Although the search of his house was ostensibly to discover drugs, the police found a diary that described "homosexual activities."[102] Dudgeon was brought into the police station and questioned following the discovery of the diary, but he was never charged with a crime.[103]

Under the law of Northern Ireland at the time of the offense, committing or attempting to commit "buggery" was punishable by a maximum of life imprisonment and ten years imprisonment, respectively.[104] These laws had been enforced only sixty-two times in the eight years prior to *Dudgeon* and usually with respect to offenses involving persons under the age of twenty-one.[105] In fact, the vast majority of prosecutions involved minors below the age of eighteen, although there was no official policy within the police department to only prosecute certain types of buggery cases.[106] Despite this lack of enforcement against adults, Dudgeon's application to the ECHR claimed that the very existence of these laws constituted "an unjustified interference with his right to respect for his private life," in violation of Article 8 of the Convention. He further alleged that he had faced discrimination on the grounds of sex, sexuality, and residence based on Article 14.[107]

In upholding Dudgeon's claim that the Northern Ireland law violated the Convention, the ECHR noted that, while there was an intense moral climate against homosexuality in Northern Ireland, "[i]t cannot be maintained in these circumstances that there is a 'pressing social need' to make such acts criminal offences, there being no sufficient justification provided by the risk of harm to vulnerable sections of society requiring protection or by the effects on the public."[108] The Court clearly articulated the extreme effects that the mere existence of the anti-sodomy

100. 45 Eur. Ct. H.R. (ser. A) (1981).
101. *Id.* at 7, 15.
102. *Id.* at 15.
103. *Id.* at 15–16.
104. *Id.* at 8. These acts were illegal under Sections 61 and 62 of the Offences Against Persons Act of 1861.
105. *Id.* at 14–15.
106. *Id.*
107. *Id.* at 16.
108. *Id.* at 24.

laws had on the private lives of gay individuals: "[E]ither [a gay man] respects the law and refrains from engaging—even in private with consenting male partners—in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution."[109]

Although the law itself had not been enforced in the context of an adult relationship in many years, the court noted that it could be enforced at any time and that the police questioning of Dudgeon was directly related to the law, even if no charges were brought.[110] In other words, the ECHR held that a reasonable claim of discrimination and interference with privacy could be sustained even for a law that a state did not directly enforce.

The *Dudgeon* court did recognize that there are situations where the regulation of sexual conduct is appropriate.[111] A minor, or someone who is "weak in body or mind," may require the protection of the state from potential exploitation.[112] However, the law in Northern Ireland applied to all acts between males, regardless of the circumstances, and thus also criminalized sexual activity between consenting males who do not require protection from the state.[113]

2. *Karner v. Austria*

In *Karner v. Austria*, the ECHR ruled that an Austrian law that denied succession of tenancy to a same sex life companion, but allowed the same for a life companion of the opposite sex, violated Articles 8 and 14 of the Convention.[114] In *Karner*, the complainant's life partner contracted AIDS and had designated the complainant as his heir were he to die.[115] Among other things, this entitled the complainant to succeed his partner's tenancy in his apartment.[116] The apartment's landlord believed that the tenancy succession law served only to protect life companions of the opposite sex, and brought eviction proceedings that were eventually upheld by the Austrian Supreme Court.[117]

Despite the fact that a life companion was neutrally defined in the Rent Act, the Austrian high court ruled that the term must be read as it

109. *Id.* at 18.
110. *Id.* at 18–19.
111. *Id.* at 20.
112. *Id.*
113. *Id.* at 20–21.
114. Karner v. Austria, 2003-IX Eur. Ct. H.R. 199, 210–13, *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=699140&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649.
115. *Id.* at 206.
116. *Id*.
117. *Id.*

was intended when the statute was passed in 1974, meaning that it did not include same sex couples.[118] In defense of the Austrian laws, the Austrian high court noted that the protection of the traditional family is a legitimate concern and a state may employ a variety of means to protect it.[119] As the ECHR pointed out, however, under the proportionality principle of international law—requiring that a restriction be proportional to the harm it is designed to deter—an action must not merely be suited to achieving the desired aim, "[i]t must also be shown that [the law] was necessary . . . in order to achieve that aim."[120]

3. L. & V. v. Austria

Similarly, in *L. & V. v. Austria*, the ECHR held that a state must be able to provide a sufficient justification for any difference in treatment among groups of people under Article 14 of the Convention.[121] In *L. & V.*, the petitioners were both gay males who had been sentenced to prison for having sexual encounters with adolescents between the ages of fourteen and eighteen.[122] Under the Austrian Criminal Code, such actions between minors and adults were only illegal if both participants are male; there is no similar restriction for male-female or female-female sexual encounters of this type.[123] Unlike the anti-sodomy laws in Uganda, however, these laws were used quite frequently—roughly sixty persons were prosecuted per year under the law, resulting in about twenty convictions.[124]

In finding that the law violated Articles 8 and 14 of the Convention, the ECHR stated that a difference in treatment is discriminatory under Article 14 if "it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised."[125] The Court found that the critical

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118. *Id.* The law defined a life companion as "a person who has lived in the flat with the former tenant until the latter's death for at least three years, sharing a household on an economic footing like that of a marriage." *Id.* at 207. While this is seemingly neutral on its face, it is doubtful that the Austrian parliament intended same sex couples to have a "footing like that of a marriage." *Id.*

119. *Id.* at 211.

120. *Id.* at 213.

121. L. & V. v. Austria, 2003-I Eur. Ct. H.R. 29, *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=698753&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649.

122. *Id.* at 34–35.

123. At the time of the acts, Section 209 of the Austrian Criminal Code stated: "A male person who after attaining the age of nineteen fornicates with a person of the same sex who has attained the age of fourteen years but not the age of eighteen years shall be sentenced to imprisonment for between six months and five years." *Id.* at 35.

124. *Id.* at 35–36.

125. *Id.* at 42 (internal quotations omitted).

question was why there was a need for protection of males aged fourteen to eighteen from adult men, but no similar need to protect females of the same age from adult men, or young males from adult women.[126] Despite the fact that the Austrian Parliament was informed by a number of experts that the age of consent for homosexual and heterosexual relationships should be the same because sexual orientation is formed at puberty, the Parliament chose to maintain its differing age of consent in 1995.[127] The ECHR called this "predisposed bias on the part of a heterosexual majority against a homosexual minority" insufficient to justify differential treatment based on sexual orientation and declared the law a violation of the Convention.[128]

4. *Modinos v. Cyprus*

The ECHR strongly echoed the language of *Dudgeon* in *Modinos v. Cyprus*, a case very similar to a potential challenge of the Ugandan anti-sodomy laws.[129] In *Modinos*, the petitioner was a gay male, currently in a sexual relationship with another male.[130] While the petitioner was not charged with any crimes under the Cypriot anti-sodomy laws, he claimed that he suffered from "great strain, apprehension and fear of prosecution by reason of the legal provisions which criminalise certain homosexual acts."[131] Although the law had not been enforced since 1981,[132] the Minister of Justice at the time stated that he did not want the law abolished.[133] The ECHR held that the lack of enforcement of a law is no defense to the law's existence.[134] The court wrote:

> [T]he mere fact that the implementation of a penal law has not led to criminal convictions, does not of itself negate the possibility that it has effects amounting to interference with private life. A primary purpose of any such laws is to prevent the conduct it proscribes, by persuasion or deterrence. It also stigmatises the conduct as unlawful and undesirable.[135]

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126. *Id.* at 43.
127. *Id.* at 43–44.
128. *Id.* at 44.
129. Modinos v. Cyprus, 259 Eur. Ct. H.R. (ser. A) (1993).
130. *Id.* at 7.
131. *Id.* Under Cypriot law at the time, sodomy was illegal. Section 171 of the Criminal Code of Cyprus stated: "Any person who—(a) has carnal knowledge of any person against the order of nature; or (b) permits a male person to have carnal knowledge of him against the order of nature, is guilty of a felony and is liable to imprisonment for five years." *Id.*
132. *Id.* at 9 (stating that the law had not been enforced since the *Dudgeon* decision in 1981).
133. *Id.* at 7.
134. *Id.* at 25.
135. Modinos v. Cyprus, 259 Eur. Ct. H.R. (ser. A) at 25 (1993).

Furthermore, the Attorney General's decision not to prosecute cases under this law did not guarantee that he or his successors would not prosecute in the future.[136] As in *Dudgeon*, the Court recognized that some degree of regulation of sexual conduct could be necessary in a free society; however, it also noted that "the interference resulting from regulation of sexual life, a most intimate aspect of private life, requires particularly serious reasons before it can be legitimate."[137] The Cypriot government was unable to show any "particularly serious reasons" to maintain the law.[138] The fact that the law had not been enforced in over a decade further showed the lack of a need for such a law.[139] The ECHR concluded by rejecting the assertion that such a law could remain on the books merely because Cypriot citizens may be offended or disturbed by the homosexual conduct of others.[140] The Court noted that any such offense is "outweighed by the detrimental effects which the very existence of the impugned provisions can have on the life of a person with a homosexual tendency like the applicant."[141]

B. *South Africa*

Using sweeping language, the Constitutional Court of South Africa struck down a series of anti-sodomy laws and regulations as inconsistent with the newly signed 1996 South African Constitution in *National Coalition for Gay & Lesbian Equality v. Minister of Justice of South Africa & Others*.[142] The court in *National Coalition* used a variety of sources of law to strike down these anti-sodomy statutes and regulations, including the rights to dignity, equality, privacy, and freedom found within the South African Constitution,[143] and the emerging international consensus against these types of laws.[144] As Justice Albie

136. *Id.* at 25–26.
137. *Id.* at 26.
138. *Id.* at 26–27.
139. *Id.* (arguing that the fact that the challenged provisions are contrary to the Cypriot Constitution, combined with the Attorney General's unwillingness to prosecute homosexual conduct, evinces a "better understanding" and "increased tolerance of homosexual behavior in Cyprus").
140. *Id.* at 27.
141. *Id.*
142. 1998 (12) BCLR 1 (CC) (S. Afr.).
143. *Id.* at 66–68.
144. The court specifically cited the decriminalization of sodomy in England, Scotland, Wales, Northern Ireland, Australia, New Zealand, Germany, and Canada. *Id.* at 71–72, 75, 77, 79, 81. It also noted several decisions discussed by the ECHR declaring anti-sodomy laws to be unconstitutional. *See, e.g.*, *id.* at 72 (citing Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) (1981)); *id.* at 55 (citing Norris v. Ireland., 13 Eur. Ct. H.R. (ser. A) 186 (1988)). Similarly, the court discussed decisions in Canada evaluating the permissibility of discrimination against sexual orientation. *Id.* at 140 (citing Egan v. Canada, [1995] 2 S.C.R. 513 (Can.)). The court also mentioned that the U.S. Supreme Court had not yet invalidated anti-sodomy laws. *Id.* at 83. It should

Sachs notes in his concurrence, anti-sodomy laws are about far more than just intercourse among gay people, they concern fundamental freedoms and dignities afforded to the citizens of a country:

> Only in the most technical sense is this a case about who may penetrate whom where. At a practical and symbolical level it is about the status, moral citizenship and sense of self-worth of a significant section of the community. At a more general and conceptual level, it concerns the nature of the open, democratic and pluralistic society contemplated by the Constitution.[145]

National Coalition was a direct constitutional challenge to the common law offense of sodomy in South Africa, as well as a number of other criminal procedures and regulations that allowed the police to investigate, fingerprint, and shoot (if resisting arrest), people suspected of sodomy.[146] The challenge was mainly sustained under Section 9 of the 1996 South African Constitution, which stated at the time:

> (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.[147]

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be noted that *National Coalition* was decided after *Bowers*, but before *Lawrence*. It seems, then, that the *Lawrence* decision would only further support the holding in *National Coalition*.

145. *National Coalition for Gay & Lesbian Equality v. Minister of Justice of South Africa & Others* 1998 (12) BCLR 1 (CC) at 134–35 (S. Afr.).

146. *Id.* at 34–37. Note that in South Africa, one can facially challenge a statute without having actually suffered harm because of the statute. A successful challenge will result in a declaration that the statute is unconstitutional by the constitutional court.

147. S. AFR. CONST. 1996 § 9. The challenge was also sustained under Sections 10 and 14 of

The court acknowledged that Section 9(5) of the 1996 Constitution allows for discrimination if the discrimination can be ruled "fair," which the court understood as requiring a balancing of the interests infringed against the interests of the State in that infringement.[148] The rights implicated by anti-sodomy statutes were wide, ranging from dignity to privacy to nondiscrimination. As the court recognized:

> The harm caused by the provision can, and often does, affect his ability to achieve self-identification and self-fulfillment. The harm also radiates out into society generally and gives rise to a wide variety of other discriminations, which collectively unfairly prevent a fair distribution of social goods and services and the award of social opportunities for gays.[149]

Balanced against this harm, on the other hand, were merely the moral views of a section of the community which were "based . . . on nothing more than prejudice."[150] This moral condemnation did not qualify as a legitimate purpose in the eyes of the court.[151] The court did acknowledge the existence of religious opinions regarding sexual relations, but insofar as South Africa supports freedom of religion, the State could not use these religious views to regulate people of all religions.[152]

Appealing more to the emotional side of discrimination and its effects, Judge Sachs stated in his concurrence that, while there can be some regulation of sexuality—especially when concerning deception, violence, and intrusion—the State must make sure that such regulation conforms with the Constitution.[153] Linking inequality and dignity, Judge Sachs noted that inequality perpetuates disadvantage and group-based inequality, ultimately leading to the scarring of dignity and self-worth for those associated with the group.[154] He went on to conclude that:

> In the case of gays, history and experience teach us that the scarring comes not from poverty or powerlessness, but from invisibility. It is the tainting of desire, it is the attribution of perversity and shame to spontaneous bodily affection, it is the prohibition

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the 1996 Constitution. *National Coalition* 1998 (12) BCLR at 59, 66. Section 10 of the 1996 Constitution states that "[e]veryone has inherent dignity and the right to have their dignity respected and protected," whereas Section 14 states "[e]veryone has the right to privacy" and enumerates several spheres where the right exists, such as the home, property, and communications. S. AFR. CONST. 1996 §§ 10, 14.

148. *National Coalition* 1998 (12) BCLR at 33.

149. *Id*. at 36.

150. *Id.* at 37.

151. *Id.*

152. *Id.* at 38.

153. *Id.* at 118.

154. *Id.* at 125.

> of the expression of love, it is the denial of full moral citizenship in society because you are what you are, that impinges on the dignity and self-worth of a group.
>
> . . . .
>
> At the heart of equality jurisprudence is the rescuing of people from a caste-like status and putting an end to their being treated as lesser human beings because they belong to a particular group. . . . To penalise people for being what they are is profoundly disrespectful of the human personality and violatory of equality.[155]

It is important to note that this case arose under the post-apartheid South African Constitution of 1996,[156] the first in the world to explicitly include sexual orientation as a protected class.[157] While sexual orientation had been protected in the past, this protection always came about through a judiciary body reading the protection of "sex" to be inclusive of sexual orientation; in the case of South Africa's post-apartheid Constitution, a non-judicial coalition, directly accountable to the public, explicitly included this protection. Although the inclusion of this term was challenged by the former government, the overwhelming momentum towards equality in post-apartheid South Africa was able to carry the day.[158] Like other opponents of sexual equality, the former government voiced fears that by including sexual orientation, the Constitution would unintentionally protect pedophiles, necrophiles, and zoophiles.[159] These concerns were placated by showing that the "limitations clause" would ensure that those types of people would not be protected.[160] By eliminating state support for this prejudice, South Africa has given LGBTI individuals the dignity of being treated equally under the law.

155. *Id.* at 127–29.

156. S. AFR. CONST. 1996 § 9(3) ("The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.").

157. *See* LOURENS DU PLESSIS & HUGH CORDER, UNDERSTANDING SOUTH AFRICA'S TRANSITIONAL BILL OF RIGHTS 144 (1994).

158. *See* RICHARD SPITZ WITH MATTHEW CHASKALSON, THE POLITICS OF TRANSITION: A HIDDEN HISTORY OF SOUTH AFRICA'S NEGOTIATED SETTLEMENT 306–07 (2000).

159. *See id.*

160. *See id.* The limitations clause of the Constitution, Section 36, states in part: "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom . . . ." S. AFR. CONST. 1996 § 36(1).

C. Canada

In *Vriend v. Alberta*, the Canadian Supreme Court took perhaps the largest step toward recognizing LGBTI rights as a human right on par with other anti-discrimination rights based on race, gender, religion, or age.[161] Canada removed its anti-sodomy laws in 1969, relatively early compared to the rest of the developed world.[162] However, despite its early decriminalization of sodomy, the Canadian Parliament failed to include sexual orientation as an impermissible basis for discrimination in its Individual Rights Protection Act of 1973 (IRPA).[163] Although the Act was amended on numerous occasions over the next several decades, the legislation never included sexual orientation as an impermissible category of discrimination.[164] Under the IRPA at the time, impermissible grounds for discrimination include: race, religious beliefs, color, gender, physical disability, mental disability, age, ancestry, and place of origin.[165]

Vriend was brought by a lab coordinator who was dismissed from his position at King's College, a private college in Alberta because of his sexual orientation.[166] Delwin Vriend attempted to bring a complaint under IRPA, but the Alberta Human Rights Commission ruled that this was not possible because sexual orientation was not a protected ground that could give rise to a complaint.[167] In response, Vriend brought suit for declaratory relief, alleging that IRPA violated Section 15 of the Canadian Charter of Rights and Freedoms (Canadian Charter) for not including sexual orientation.[168]

Section 15(1) of the Canadian Charter states: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."[169] To determine whether or not this Section has been violated, a court must first determine whether: (1) there is a distinction that results in a denial of the

161. Vriend v. Alberta, [1998] 1 S.C.R. 493 (Can.).

162. *See* Criminal Law Amendment Act, 1968–1969 S.C., ch. 38, § 7 (Can.).

163. Individual's Rights Protection Act, R.S.A. ch. I-2 (1980) (Can.). The Act was originally passed in the province of Alberta in 1973. *See* Individual's Rights Protection Act, 1972 S.A., ch. 2 (Can.).

164. *See Vriend*, [1998] 1 S.C.R. at 505–06.

165. *Id.* at 506.

166. *Id.* at 507.

167. *Id.* at 507–08.

168. *Id.* at 508. Note that the Canadian Charter of Rights and Freedoms is a bill of rights within the Canadian Constitution.

169. Vriend v. Alberta, [1998] 1 S.C.R. 493, 516 (Can.).

equal protection or benefit of the law; and (2) whether this distinction is based on an enumerated or *analogous* ground.[170]

The court noted that the IRPA creates a distinction between homosexuals and other groups protected within the Act, as well as a distinction between homosexuals and heterosexuals.[171] Although IRPA is neutral on its face and provides the same remedies to homosexuals and heterosexuals on the basis of the characteristics enumerated in the Act, "discrimination is visited virtually exclusively against persons with one type of sexual orientation," creating a differential impact because of an *absence* of legislative remedies for sexual orientation.[172] Furthermore, the distinction is based on sexual orientation, which is analogous to an enumerated ground in Section 15, because of the "historical social, political and economic disadvantage suffered by homosexuals" and the fact that "[s]exual orientation is 'a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs.'"[173]

Finally, the court held that the exclusion of sexual orientation from IRPA sends a message that it is "permissible, and perhaps even acceptable, to discriminate against individuals on the basis of their sexual orientation."[174] By doing so, the government has, perhaps implicitly, stated that "'all persons are equal in dignity and rights', [sic] except gay men and lesbians."[175] The only conclusion that the court could reach was that sexual orientation should be read into IRPA as a protected status.[176]

D. United States

In its 2003 landmark decision holding unconstitutional anti-sodomy laws in the United States, the Supreme Court in *Lawrence v. Texas* echoed the opinions and reasoning of the major foreign cases dealing with sodomy in the Western world.[177] A latecomer to the decades-old Western consensus regarding rights for LGBTI individuals, the Supreme Court's decision broke very little new intellectual ground. In the context of an effort to overturn the Ugandan anti-sodomy laws, what is most remarkable about *Lawrence* is both its nontraditional use of for-

170. *Id.* at 539.
171. *Id.* at 541.
172. *Id.* at 542 (quoting W.N. Renke, Case Comment, Vriend v. Alberta*: Discrimination, Burdens of Proof, and Judicial Notice*, 34 ALTA. L. REV. 925, 942–43 (1996)).
173. *Id*. at 546 (quoting Egan v. Canada, [1995] 2 S.C.R. 513, 528, 602 (Can.)).
174. *Id.* at 551.
175. Vriend v. Alberta, [1998] 1 S.C.R. 493, 552 (Can.) (quoting Individual's Rights Protection Act, R.S.A. ch. I-2, pmbl. (1980) (Can.)).
176. *Id.* at 578.
177. 539 U.S. 558, 572–73, 576 (2003).

eign precedent as persuasive authority and its treatment of the deep religiousness that existed at the time in the United States.

Like other anti-sodomy decisions around the world, *Lawrence* arose in the context of two men who suffered an invasion of their privacy due to anti-sodomy laws.[178] The petitioners were adult males engaged in homosexual sex when the police broke into their apartment, placed them under arrest, and charged them with sodomy.[179] Under Texas law at the time, sodomy was a class C misdemeanor—a minor crime punishable by a maximum fine of $500, but with no possibility of incarceration.[180] Although the petitioners were fined a mere $200, they decided to challenge the law.[181]

Overturning its decision in *Bowers v. Hardwick*[182] from just seventeen years earlier, the Supreme Court ruled that the Texas statute did not comport with the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.[183] The Court echoed many of the same philosophical points previously raised by many international and foreign court decisions. In a refrain similar to the South African Supreme Court's *National Coalition* decision, Justice Kennedy noted early in the majority opinion that this case was, only in the strictest sense, about the right to engage in homosexual sex.[184] Rather, it was mainly about whether the state could "control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals."[185]

In a strain reminiscent of the foreign judicial opinions, the Court noted that although there are powerful voices, shaped by religious belief, culture, and respect for the traditional family, that condemn homosexuality as immoral, the true issue is "whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law."[186] Following the lead of *Dudgeon*, the ECHR, and other preceding foreign cases and legal bodies, the Court recognized that the criminalization of homosexual conduct by the State invites others to discriminate against homosexuals in both the public and private spheres.[187] In sweeping language, the Court affirmed all of the decisions of the ECHR and foreign courts before it, concluding:

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178. *Id.* at 562–63.
179. *Id.*
180. TEX. PENAL CODE ANN. § 12.23 (Vernon 2003).
181. *Lawrence*, 539 U.S. at 563.
182. 478 U.S. 186 (1986).
183. *Lawrence*, 539 U.S. at 578.
184. *Id.* at 567.
185. *Id.*
186. *Id.* at 571.
187. *Id.* at 575.

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.[188]

In rendering its opinion, the Court explicitly cited the Wolfenden Report,[189] *Dudgeon*,[190] *P.G. & J.H. v. United Kingdom*,[191] and *Modinos*,[192] as well as cases and statutes in Australia, Columbia, Ireland, Israel, New Zealand, and South Africa by reference.[193]

The Court's conclusion was remarkable because it came from one of the most religious countries in the Western world. According to a 2002 survey conducted by the Pew Research Center, 59% of Americans say that religion plays a very important role in their lives.[194] This compares with only 33% of British citizens and 30% of Canadian citizens who say the same.[195] By contrast, 87% of South Africans and 85% of Ugandans say that religion plays a very important role in their lives.[196]

It is conceivable that Ugandan courts could reject international authority as unpersuasive precisely because it stems from Western countries that are considered less religious than Uganda. It will be difficult to turn a blind eye to the experiences of other religious countries, such as the United States and South Africa, however, because the importance of religious morality in those countries is very similar to that in Uganda.

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188. *Id.* at 578.

189. THE WOLFENDEN REPORT, *supra* note 81 and accompanying text.

190. Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) (1981); *see supra* Part III.A.1.

191. 2001-IX Eur. Ct. H.R. 217.

192. Modinos v. Cyprus, 259 Eur. Ct. H.R. (ser. A) (1993).

193. *See Lawrence*, 539 U.S. at 576–77 (referencing the cases and statutes cited in the *Brief for Mary Robinson et al. as Amici Curiae Supporting Petitioners, Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 164151, at *11–13).

194. PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, AMONG WEALTHY NATIONS . . . : U.S. STANDS ALONE IN ITS EMBRACE OF RELIGION 2 (2002), *available at* http://people-press.org/reports/pdf/167.pdf.

195. *Id.*

196. *Id.* Uganda is roughly 42% Roman Catholic, 42% Protestant, and 12% Muslim. CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK: UGANDA (2009), *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/ug.html. Of the Protestants, 36% are Anglican. *Id.* As I discuss in the conclusion, a well known Anglican pastor, Martin Ssempa is one of the major forces promoting the anti-sodomy laws.

E. The Emerging International Consensus in the Ugandan Context

While the emerging international consensus has no direct impact on Ugandan law, the decisions made and reasoning used by the ECHR and foreign courts are a roadmap for the types of arguments that have persuaded other high level tribunals. While one may criticize any comparison between Uganda and Europe, Australia, Canada, or the United States because the latter are more liberal, one must also remember that any judicial repeal of a law necessarily occurs in an environment where the political will to repeal the law is lacking. These laws were not generally overturned in the context of a populace that embraced homosexuality—if that were true, the anti-sodomy laws likely would not have existed in the first place. Rather, they were overturned in a climate closer to that of Uganda today.

The *Lawrence* decision in the United States seems to be a blueprint for the Ugandan Constitutional Court, not because it broke any new ground, but because of the way that it implemented the many arguments for LGBTI rights that the ECHR and foreign courts before it had raised in a manner palatable to the national Constitution. Justice Kennedy echoed the arguments of the international community from the Wolfenden Report, *Dudgeon*, *Modinos*, and *National Coalition*, as well as various other national laws and cases, picking and choosing his language to maintain a foothold within the confines of the U.S. Constitution. Furthermore, Justice Kennedy's willingness to cite foreign and international law—a rare occurrence in U.S. Supreme Court jurisprudence—could serve as encouragement for a Ugandan court that may be similarly reluctant to look beyond its borders.

As was the case in *Dudgeon*, the Ugandan anti-sodomy laws are rarely enforced directly, if at all. However, as the *Dudgeon* court emphasized, a law does not have to be enforced regularly or even at all to greatly affect a community and serve as the basis for a discrimination claim.[197] In Uganda, while the anti-sodomy laws are not directly enforced, the fact that they exist and *can* be enforced can be just as palpable an invasion of privacy as a law that is enforced. Victor Mukasa's case against the government for an invasion of her home serves as one very public example among what are likely many other instances of the police using anti-sodomy laws as an excuse to invade a citizen's home, life, and liberty.

The *Dudgeon* court also made another very important point: there are situations where it is appropriate to regulate sexual conduct, such as re-

197. Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) at 18–19 (1981).

lationships between minors and adults.[198] It is very important for an advocate trying to overturn the anti-sodomy laws in Uganda to acknowledge this point because there are always some circumstances where islation may be necessary to protect society from sexual deviance. In situations where consent is not possible, such as in a sex act between an adult and a minor, a person with a diminished mental capacity, or an animal, legislation regarding sexual conduct is appropriate. Acknowledgement that such a wall does exist could protect advocates against accusations that tearing down sexual prohibitions on homosexuality will auautomatically lead to bestiality, child rape, and other kinds of nefarious activity.

Advocates can similarly use the *Karner* proportionality principle to support their arguments that a restrictive law should be proportional to the harm meant to be deterred.[199] To paraphrase the *Karner* court, one must inquire whether a law is not only effective in achieving its intended goal, but also whether that law is both necessary and well-tailored to achieve that goal.[200] Applying this principle to Uganda reveals that while the criminalization of sodomy may be suited to protection of the traditional family, such a law is both an ill-tailored and unnecessary means to achieving this goal.

Stated more simply, the anti-sodomy laws are both over-inclusive and under-inclusive. The laws are over-inclusive in their reach, as they extend far beyond the family context: services are frequently denied to all gay people because of fear that the government will crack down on service providers for promoting an illegal act; radio shows are prevented from having on-air discussions about homosexuality because these discussions supposedly violate public morals; the Uganda AIDS Commission refuses to focus any efforts on educating the gay population on its proclivity to transmit HIV; and private discrimination denies LGBTI children an education, a family, and, often, employment. These ramifications all go beyond the need to "protect the family," and in many cases severely harm both individuals and families. On the other hand, the laws are under-inclusive in that there are many other restrictions that are needed to protect the traditional family in Uganda that are not in place. Ugandan women and children, for example, still lack basic protections against domestic violence forty years after the Constitution was signed, despite a two-decade-long campaign to enact protective legislation.[201]

198. *Id.* at 20.

199. Karner v. Austria, 2003-IX Eur. Ct. H.R. 199.

200. *Id.*

201. *See* HUMAN RIGHTS WATCH, JUST DIE QUIETLY: DOMESTIC VIOLENCE AND WOMEN'S VULNERABILITY TO HIV IN UGANDA 16–20 (2003), *available at* http://www.hrw.org/sites/default/files/reports/uganda0803full.pdf.

Given that the Ugandan government justifies its anti-sodomy laws as a protection of the traditional family, yet fails to protect so many aspects of family life seems to demonstrate that the anti-sodomy laws are motivated more by animus towards homosexuals than by a motivation to protect traditional families. As the ECHR noted in *L. & V.*, animus of the heterosexual majority towards the homosexual minority is insufficient to justify disparate treatment based on sexual orientation when there is no science available to suggest the need for disparate treatment.[202] Just like the Cypriot government in *Modinos v. Cyprus*, the Ugandan government will have a difficult time identifying a legitimate and weighty pressing social need to outlaw sodomy. Furthermore, any argument that the Ugandan government could make to justify the law will be undercut by the current lack of direct enforcement of the anti-sodomy laws.

Finally, while *Vriend* may be hailed for its forward-thinking views and groundbreaking push for the protection of individuals based on sexual orientation, the Ugandan Constitutional Court is unlikely to adopt the approach of the Canadian Supreme Court. The *Vriend* court relied on a very broad and inclusive reading of the Canadian Constitution to find implicit protections in a statute.[203] While the court's efforts were laudable and understandable given Canada's relatively liberal political climate, there is little hope that the Ugandan Constitutional Court would take such a giant leap forward before taking smaller steps.

IV. UGANDAN CONSTITUTIONAL LAW

Ultimately, the best source of law that can be used to declare the anti-sodomy laws unconstitutional is the Ugandan Constitution itself. The Constitution is very strong from a rhetorical standpoint, prohibiting discrimination, protecting the freedom of expression and assembly, and guaranteeing every citizen a right to dignity. Whether it will be applied in a manner true to its promising language is another question, however. As a preliminary matter, the Ugandan Constitution is the supreme law of the land; any law contrary to it is void.[204] In practical terms, this means that if a challenger can demonstrate to the Ugandan Constitutional Court that the anti-sodomy laws are inconsistent with the Ugandan Constitution, the laws will either be declared void or will be interpreted so as not to violate the Constitution. Most promising with regard to the anti-sodomy laws are four constitutional provisions: Article 21 (freedom

202. L. & V. v. Austria, 2003-I Eur. Ct. H.R. 29.
203. Vriend v. Alberta, [1998] 1 S.C.R. 493, 542, 546, 551–52 (Can.).
204. UGANDA CONST. art. 2.

from discrimination); Article 24 (respect for human dignity); Article 29 (freedom of expression and association); and Article 37 (right to maintain and practice a culture).[205] While none of these protections have been employed in Uganda in the context of protecting the rights of the LGBTI community, their plain language speaks strongly to the fact that they should apply in this context. Furthermore, rulings in other countries and international tribunals suggest that the language of some of these provisions could protect the LGBTI community from discrimination.

A. *The Ugandan Court System*[206]

According to the Ugandan Constitution, only the Uganda Court of Appeal, sitting as a constitutional court, is allowed to interpret the Ugandan Constitution.[207] This means that any challenge to the anti-sodomy laws in Uganda must be adjudicated by a direct challenge to a constitutional court. While the Court of Appeal does not have original jurisdiction for most matters, it may exercise such jurisdiction as a constitutional court.[208] Article 137(3) allows any individual to bring such a case alleging that an act of Parliament, or any other law, is inconsistent with the Constitution of Uganda.[209]

The Constitution itself does not require that an individual have standing before bringing a case before a constitutional court. It would not be hard to imagine, however, that a constitutional court would attempt to skirt this issue and dispose of any potential meritorious case before it, by requiring an applicant to have standing based on some other source of law. With a law so rarely enforced, a court could deny standing to virtually anyone since hardly anyone is directly affected by these laws. In such a situation, a homosexual male would have the best chance of establishing standing. LGBTI advocates could make the argument previously used in many cases—that the very existence of the anti-sodomy laws, despite the fact that they are not directly enforced, threatens the privacy and security of any gay male because the law may be enforced

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205. *Id.* arts. 21, 24, 29, 37.

206. My education has been primarily in the area of U.S. law and legal reasoning. As such, this Section should be seen as a point of departure for anyone working within Uganda to actually overturn the anti-sodomy laws, rather than a definitive guide to the existing substantive law and application of that law. Furthermore, although I have found it difficult to find Ugandan case law while in the United States, I suspect that far more law is available to a researcher working in Uganda. Mindful of this fact, I have concluded this Section with suggestions for further research for someone with greater access to and greater knowledge of the Ugandan legal system.

207. UGANDA CONST. art. 137(1) ("Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the constitutional court.").

208. *See* KIER STARMER & THEODORA CHRISTOU, HUMAN RIGHTS MANUAL AND SOURCEBOOK FOR AFRICA (Kate Beattie et al. eds., 2005).

209. UGANDA CONST. art. 137(3).

at any time.[210] Furthermore, the existence of the laws, as well as derogatory statements made by government officials, has led to widespread discrimination and harassment against gay people that is all but sanctioned by the government.[211] Finally, these statements by government officials have made it impossible for a gay individual to have routine contact with government authorities, such as the police, agency officials, and local parliamentarians.[212] All of these harm gay males even if the anti-sodomy laws are not formally enforced, thus providing a basis for standing to any gay male. Such an argument should focus on the Constitution's freedom from discrimination clause in Article 21; the right to dignity in Article 24; the freedom of conscience, expression, assembly, and association in Article 29; and the protection of cultural and customary values in Article 37. The anti-sodomy laws appear to violate all four of these constitutional provisions and, as such, should be overturned.

B. Article 21: Equality and Freedom from Discrimination

Article 21 of the Ugandan Constitution provides the most straight forward attack on the anti-sodomy laws. Article 21 states, in part:

> (1) 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.
> (2) Without prejudice to clause (1) of this article, a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.
> (3) For the purposes of this article, "discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.[213]

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210. *See, e.g.*, Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) (1981); Toonen v. Australia, U.N. Human Rights Comm., Commc'n No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (1994), *available at* http://www.unhcr.org/refworld/docid/48298b8d2.html.

211. For example, Dr. James Buturo, the Minister of Ethics and Integrity, stated that homosexuality is a "strange, ungodly, unhealthy, unnatural, and immoral way of life." *Uganda: Buturo Vows to Fight Homosexuality*, GMBNEWS, Oct. 8, 2007, http://www.gbmnews.com/articles/1635/1/Uganda-Buturo-vows-to-fight-homosexuality/Page1.html.

212. *Id.* Derogatory statements such as these, as in Ireland and Australia, would make any gay person fear what would otherwise be routine contact with government authorities, because he could never expect to receive "fair" treatment at the hands of a government that has taken an official position against gay people.

213. UGANDA CONST. art. 21(1)–(3).

This provision has been applied on numerous occasions in the Ugandan Constitutional Court and was recently employed in *Law Advocacy for Women in Uganda v. Attorney General* to successfully overturn a series of laws that were discriminatory against women.[214] In *Law Advocacy*, the petitioner challenged a series of laws found within the Penal Code Act and the Succession Act that contained different penalties and privileges for men and women.[215] Under the Penal Code Act, a married woman committed adultery if she had sexual relations with *any* man that was not her husband, whereas a married man committed adultery only if he had sexual relations with a *married* woman who was not his wife.[216] Under the Succession Act, several provisions favored men over women when a family member died intestate.[217] Although the Ugandan Constitutional Court's opinion was terse, it made clear that both of these Acts were inconsistent with Article 21(1)–(3) of the Ugandan Constitution because they made a distinction based on the sex of the party involved.[218]

In two other cases, Uganda's Constitutional Court failed to find that laws violated Article 21 of the Ugandan Constitution; however, in both cases a concurring Justice concluded that the laws did violate the Constitution. First, in *Tumukunde v. Attorney General & Another*, the constitutional court was asked to determine whether an elected member of Parliament, who was also a Ugandan soldier, could be penalized under military law for making public statements over the radio that were prejudicial to the good order and discipline in the army.[219] The petitioner claimed that the law discriminated between members of Parliament who were civilians and those who were in the military. While the court held that the rights provided by Article 21 must be enjoyed "within the confines of the law," Justice of Appeal Alice Mpagi-Bahigeine disagreed in an opinion that concurred in part and dissented in part.[220] Justice Mpagi-Bahigeine wrote:

> [O]nce an army representative . . . is allowed to subscribe to the oath of member of Parliament, he/she is put in a situation where he or she is faced with two masters to serve, the army code of conduct or the oath of member of Parliament. Who is the su-

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214. Const. Petitions Nos. 13/05/ & 05/06 [2007] UGCC 1 at 10–11 (Uganda), *available at* http://www.saflii.org/ug/cases/UGCC/ 2007/1.rtf.

215. *Id.* at 6–7.

216. *Id.* at 6.

217. *Id.* at 13–14.

218. *Id.* at 13.

219. Const. Petition No. 6 of 2005 [2005] UGCC 1 (Uganda), *available at* http://www.saflii.org/ug/cases/UGCC/2005/1.rtf.

220. *Id.* at 21, 26 (Mpagi-Bahigeine, J., concurring in part and dissenting in part).

> preme master? The oath of member of Parliament. The petitioner becomes a legislator just like any other civilian member of Parliament having descended into that arena. Consequently the instructions to be a listening post and pressing charges against him would conflict with and violate articles 20, 21 and 29 of the Constitution. The oath to uphold the Constitution has an overriding effect over any thing else.[221]

In *Darlington Sakwa & Another v. Electoral Commission & 44 Others*, the Ugandan Constitutional Court was asked to invalidate a law as discriminatory under Article 21 because, among other things, it required all candidates for Parliament who held a government position to resign their position ninety days before an election unless they were existing members of Parliament.[222] The petitioners claimed that the law impermissibly discriminated between government employees who were members of Parliament and those who were not members of Parliament.[223] In a unanimous decision, the court found that the law did not violate the Constitution, but did so without evaluating the Act under Article 21.[224] In a concurring opinion, Justice of Appeals Amos Twinomujuni disagreed procedurally with the court's handling of the case and posed alternative points for consideration of the constitutionality of the law.[225] Under his own hypothetical questions, Justice Twinomujuni evaluated the law under Article 21, among other provisions, and found it to be unconstitutional.[226] Specifically, he found that because the law allowed Parliamentarians to retain their positions and continue to use government resources for their campaign, while other government officials running for the same positions were forced to resign, the law violated Article 21(1) because not all persons were treated equally under the law.[227]

Whereas *Law Advocacy* presents a very straight forward application of Article 21 to find a law unconstitutional because of discrimination based on the sex of a party, Justice Twinomujuni's concurring opinion in *Sakwa* presents a far more expansive version of Article 21. The concurrence in *Sakwa* found that a law contravened Article 21, even when

221. *Id.* at 44–45.

222. Const. Petition No. 8 of 2006 [2006] UGCC 3 at 1–2 (Uganda), *available at* http://www.saflii.org/ug/cases/UGCC/2006/3.rtf.

223. *Id.*

224. *Id.* at 23–24.

225. *Id.* at 35 (Twinomujuni, J., concurring).

226. *Id.*

227. *Id.* at 35–40.

it did not make a distinction based on one of the enumerated impermissible classes outlined in Article 21(2).[228]

The anti-sodomy laws make a clear distinction, at least in their application, between heterosexuals and homosexuals. While the letter of the law proscribes both homosexual and heterosexual sodomy, in reality only homosexuals are harassed because only homosexuals, and specifically homosexual men, are presumed to commit sodomy during the course of a sexual relationship. Therefore, based on this presumption, practically speaking, sodomy is only criminalized when it occurs between homosexuals, but is permissible when it occurs between heterosexuals. Following the expansive view of Article 21(1) that Justice Twinomujuni articulates in *Sakwa*, such a law is clearly in violation of the Constitution because it does not apply equally to heterosexuals and homosexuals.

Alternatively, Article 21(2), which forbids discrimination based on sex, could be interpreted in light of the UN Human Rights Committee's decision in *Toonen* under the ICCPR. In *Toonen*, the Committee ruled that the reference to "sex" in Articles 2(1) and 26 of the ICCPR refers both to gender as well as to sexual orientation.[229] The text of Article 21(2) of the Ugandan Constitution is quite similar to Article 26 of the ICCPR. Both articles forbid discrimination against race, color, sex, religion, ethnic origin, and political beliefs, among other characteristics.[230] Because Uganda is a signatory to the ICCPR, it would be reasonable to interpret the Ugandan Constitution in light of rulings on a similar measure, especially when one notes that the Ugandan Constitution was enacted in 1995, one year after *Toonen* was decided. If sexual orientation is included within the category "sex" as an impermissible classification for discrimination in Article 21(2), the anti-sodomy laws are clearly in derogation of the Ugandan Constitution. Alternatively, if the court does not accept the argument that under Article 21(2) the word "sex" includes sexual orientation as well as gender, one could also argue that the anti-sodomy laws discriminate on the basis of sex alone because the criminality of a sexual act committed by a man turns on the gender of his sexual partner. In other words, if a sexual act committed by a man is de facto legal when committed with a woman, but illegal when committed with a man, the law itself discriminates based on the gender of the sexual partner.

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228. *Id.*

229. Toonen v. Australia, U.N. Human Rights Comm., Commc'n No. 488/1992, ¶ 8.7, U.N. Doc. CCPR/C/50/D/488/1992 (1994), *available at* http://www.unhcr.org/refworld/docid/48298b8d2.html.

230. UGANDA CONST. art. 21(2); ICCPR, *supra* note 24, art. 26.

Similarly, one could argue that because it is not illegal for two women to engage in any type of sexual act, but two men are always penalized for engaging in sexual intercourse, the law discriminates based on sex. This argument was used by the Supreme Court of Hawaii in *Baehr v. Lewin* in 1993.[231] In *Baehr*, the court was asked to determine the constitutionality of a section of the Hawaiian marriage law that allowed the state to deny marriage licenses to couples solely because they were of the same sex.[232] The court held that the law was to be presumed unconstitutional, as its classification was based on the "suspect category" of sex; to be upheld, the classification had to be supported by "compelling state interests" that were "narrowly drawn to avoid any unnecessary abridgements of the applicant couples' constitutional rights."[233]

This argument has one of the strongest chances of success in the Ugandan Constitutional Court because it does not rely on any linguistic acrobatics to apply the constitutional provision to the anti-sodomy laws. Although the State will likely argue that the protection of public morals and public health requires such an anti-sodomy law, the court may see beyond this argument to realize that this law has little to do with the protection of the public and everything to do with an animus of the majority against a gay minority. The court should recognize that the anti-sodomy laws punish consenting adults engaging in a private act that has no influence on public welfare—there is no fear of coercion, nor are minors involved. The court must also recognize that to allow homosexual sex under the law is not to formally sanction homosexuality; it is merely to allow consenting adults to choose their actions without fear of criminality. Nor could the State convincingly argue that these laws are meant to protect public health. Because the government does not even recognize homosexuals as a major at-risk group in its National Strategic Plan for HIV/AIDS, there is little to suggest that these laws have any relationship to public health.[234]

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231. 852 P.2d 44 (Haw. 1993).

232. *Id.* at 48–49.

233. *Id.* at 67. Note that the *Baehr* court remanded the issue of whether or not compelling state interests existed to justify the law and the issue of whether or not the law was narrowly tailored so as not to infringe unduly upon the rights of homosexual couples. The *Baehr* court did not specifically strike down the law as unconstitutional. However, for the purposes of this Note, the method of analysis used in *Baehr* provides a useful template on which to structure an argument regarding the constitutionality of Uganda's anti-sodomy laws.

234. *See* REPUBLIC OF UGANDA, UGANDA AIDS COMM'N, MOVING TOWARD UNIVERSAL ACCESS: NATIONAL HIV & AIDS STRATEGIC PLAN 2007/8–2011/12, at 6 (2007), *available at* http://siteresources.worldbank.org/INTHIVAIDS/Resources/375798-1151090631807/2693180-1151090665111/2693181-1155742859198/UgandaNSP25Oct07.pdf (mentioning homosexuality only once by referencing HIV/AIDS among the military: "Rarely, transmission may happen due to homosexual acts and intravenous drug use").

C. *Article 24: Respect for Human Dignity*

Article 24, titled "Respect for human dignity and protection from inhuman treatment," provides that "[n]o person shall be subjected to any form of torture or cruel, inhuman or degrading treatment or punishment."[235] While the title of this article promises "a respect for human dignity," the language of the Penal Code Act itself seems more concerned with crime and punishment than with a general respect for human dignity in all contexts. Still, this article holds promise. Dr. Sylvia Tamale, Dean of the Makerere University Faculty of Law, suggests that Article 24 could be asserted to protect LGBTI individuals from their routine suffering "at the hands of homophobic communities and law enforcement agents" and to combat what she calls "[f]orcible regulation of sexuality."[236] As Judge Sachs of the South African Supreme Court noted in *National Coalition*, penalizing people for a part of their identity leads to a profound loss of their dignity and self-worth.[237] This argument is universal—the same loss of dignity that occurred in South Africa occurs in Uganda because of the criminalization of sexuality, in direct contravention of the promised respect for dignity in Article 24 of the Ugandan Constitution.

D. *Article 29: Protection of Freedom of Conscience, Expression, and Association*

Perhaps the least direct attack on the anti-sodomy laws would come under Article 29, which protects the freedom of expression, conscience, and association. Article 29 states, in part:

> Protection of freedom of conscience, expression, movement, religion, assembly and association.
> (1) Every person shall have the right to—
> (a) freedom of speech and expression which shall include freedom of the press and other media;
> (b) freedom of thought, conscience and belief which shall include academic freedom in institutions of learning;
> . . . .
> (d) freedom to assemble and to demonstrate together with others peacefully and unarmed and to petition.[238]

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235. UGANDA CONST. art. 24.
236. Sylvia Tamale, *Law & Politics*, *in* HOMOSEXUALITY: PERSPECTIVES FROM UGANDA 24, 58 (Sylvia Tamale ed., 2007).
237. *Nat'l Coal. for Gay & Lesbian Equality v. Minister of Justice of S. Afr.* 1998 (12) BCLR 1 (CC) at 127–29 (S. Afr.) (Sachs, J., concurring); *see supra* Part III.B.
238. UGANDA CONST. art. 29.

Using the right to freedom of expression to challenge the anti-sodomy laws would also likely need to attack the government's use of the anti-sodomy laws to silence radio shows and prevent service organizations from providing programs targeted towards LGBTI individuals. Such censorship directly contravenes Article 29(1)(a) and (b). This type of an attack would not be able to do away with the anti-sodomy laws themselves, but it would solve many of the ancillary problems that have risen in conjunction with the anti-sodomy laws. In *Tumukunde*, the Ugandan Constitutional Court made it clear that Article 29 is a right that may be circumscribed by other laws. In upholding a military law that restricted the ability of a parliamentarian, who was also a soldier, to speak freely, the court stated: "The rights and freedoms provided under [Article 29] of the Constitution must be enjoyed within the confines of the law. . . . The petitioner should . . . not have chosen those methods he used to defend the Constitution and fulfill his obligations as a member of Parliament. He should have employed appropriate ones."[239] The government could make the same argument here. While there is a right to free expression, that right must be exercised within the confines of the law. Because sodomy is illegal, any promotion of sodomy can be considered an inappropriate method of expression. Of course, this argument seems inapposite when one considers that people are allowed to discuss other illegal acts, such as murders and robberies without fear of government reprisal. Why should discussion of issues relevant to the LGBTI community be any different?

E. Article 37: Right to Culture and Similar Rights

Article 37 also provides a viable attack on the anti-sodomy laws, although it is unclear whether "culture" and "tradition" are terms of art as employed in the Ugandan Constitution. Article 37 states: "Every person has a right . . . to belong to, enjoy, practise, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others."[240] One could argue that homosexuality is a culture or tradition that must be protected under Article 37; by banning sodomy, the State has denied the ability of homosexual individuals to maintain their culture. While the State may counter that banning sodomy does not deny an individual the right to be homosexual and associate with other homosexuals, this argument ignores two major issues. The first is that while a sexual act does not define a group as homosexual or heterosexual, that sexual act is an important part of expressing

239. Tumukunde v. Attorney Gen. & Another, Const. Petition No. 6 of 2005 [2005] UGCC 1, 21 (Uganda), *available at* http://www.saflii.org/ug/cases/UGCC/2005/1.rtf.

240. UGANDA CONST. art. 37.

oneself as part of a group; to deny homosexuals the right to intercourse with their partners is to deny them a fundamental aspect of their culture. Secondly, although the anti-sodomy laws themselves may only ban one aspect of homosexuality, the culture of discrimination that emanates from this law denies homosexuals the right to live their lives in peace. This should be seen as unacceptable under Article 37.

F. Points for Further Research

As I stated at the outset, my ability to research and write intelligently on Ugandan law is hampered by my location and training in the United States. As such, Part IV of this Note should be read only as a framework for further research rather than as a definitive guide to Ugandan law on this topic. The most fruitful constitutional arguments will come from an attack using the freedom from discrimination promised in Article 21; as such, this is an area of law that should be researched more thoroughly. Specifically, it would be interesting to see what types of protections have been allowed by the Ugandan Constitutional Court under Article 21 and how wide-ranging they have been. If more claims like the concurring opinion's expansive interpretation of Article 21 in *Sakwa* can be found, a claim based on equality of treatment under laws for homosexuals and heterosexuals could easily be made. Also, any claims based specifically on sex discrimination could prove fruitful for further argumentation.

With respect to the other rights discussed in this Part, I have not been able to find any cases that discuss the meaning of these rights and what their limitations may be. Before any argument is made that these rights should protect the LGBTI community, the Ugandan Constitutional Court should conduct a comprehensive review of the interpretation of these laws.

Finally, further research should be made as to how the constitutional court will treat foreign and international sources of law. As the previous Sections of this Note discuss, there exists a large number of foreign states and treaty organizations that have eliminated anti-sodomy laws as a derogation of human dignity, due process, and privacy rights. The Ugandan Constitutional Court may be swayed by these decisions to the extent that it has relied upon foreign sources of law in the past.

CONCLUSION

The fight for gay rights in Uganda is destined to be a long battle. Even if a constitutional challenge succeeds in overturning the anti-sodomy laws, there will still be significant private discrimination

against the LGBTI community. Uganda is a very conservative nation that is not likely to suddenly accept alternative sexual orientations merely because sodomy is no longer criminalized. In that sense, the legal battle to eradicate the anti-sodomy laws in Uganda must be viewed as a small step in a much larger movement. This movement must attack not only the legal foundations of discrimination in Uganda, but it must teach Ugandans that gay people are just people and should be treated as one would treat everyone else. Furthermore, the LGBTI community must not be satisfied with the elimination of laws that discriminate against the LGBTI community, but it must further fight for active protection of the community through laws that prohibit public and private discrimination on the basis of sexual orientation.

Perhaps the LGBTI community can learn lessons from Uganda's successful campaign to combat HIV/AIDS and reduce the stigmatization of those who have contracted it. As Jackie Asiimwe-Mwesige, Deputy Program Manager of the Civil Society Capacity Building Programme explained, once people realized that HIV/AIDS touched every family and people saw that anyone could be affected by HIV/AIDS, Ugandan culture, as a whole, began to accept HIV/AIDS and became more open to discussing and combating it on a personal level.[241] If the LGBTI community could similarly push Ugandans to consider what they would do if they found out that their child or sibling or parent were gay, perhaps Ugandans would realize that discriminating against the LGBTI community is not a responsible, moral, or human response to people who are different than themselves.

Because Uganda is such a deeply religious society, this campaign might find success if done through the church. While the main nongovernmental opposition to the gay rights movement has come from Pastor Martin Ssempa, an important religious figure, other religious figures may be more willing to ally themselves with the LGBTI community. Father Lawrence Kanyike, for example, a Catholic Priest at Makerere University, told me that gay people need to be treated in a more Christian manner: they should be accepted for who they are.[242] While he does not preach about acceptance of LGBTI individuals from his pulpit out of fear of "promoting" homosexuality, he told me that he would speak out against abuse of this community if he knew about it.[243] By working within the churches and through figures such as Father Kanyike, per-

241. Interview with Jackie Asiimwe-Mwesige, Deputy Program Manager, Civil Soc'y Capacity Bldg. Programme, in Kampala, Uganda (Jan. 10, 2008).

242. Interview with Father Lawrence Kanyike, Catholic Priest, Makerere Univ., in Kampala, Uganda (Jan. 16, 2008).

243. *Id.*

haps the movement will be able to make cultural strides where it has failed to do so in the past.

The gay rights movement in Uganda is young, but very strong. Victor Mukasa, a transgender lesbian and leader of the gay rights movement in Uganda and throughout Africa, recently sued the Ugandan government in the Ugandan Constitutional Court for violating her right to privacy stemming from a search of her apartment and the detainment of her friend for the sole reason that Mukasa was known to be gay. She told me that she sued the government to "show that we are citizens and we have rights. I did it to seek justice . . . . Because I am gay and lesbian you cannot treat me like this."[244] In what was perhaps a surprise to the government and the gay rights activists, the constitutional court ruled in favor of the petitioners, ruling that the government's conduct violated a number of constitutional provisions.[245] While the ruling itself did not address the anti-sodomy laws—this was a case of two lesbian women—the ruling shows that the Ugandan Constitution is a viable vehicle for attacking the anti-sodomy laws. The Minister of Ethics and Integrity lamented afterward that the constitutional protections to privacy and freedom from torture prevent the state from investigating the truth of individuals suspected of participating in same-sex relationships.[246]

In 2007, the LGBTI movement held its first ever press conference with a number of activists appearing without any type of mask on, telling the entire country that they were gay.[247] While this sparked a backlash, it also initiated a dialogue that can be seen in the flurry of news stories and editorials appearing in the daily newspapers in Uganda. This multi-faceted approach to promoting gay rights in Uganda—using the law as a tool to strike down practices that are unconstitutional and using the media and other events to attack private perceptions of the gay community—is what will eventually allow the LGBTI community to peacefully exist in Uganda. Each piece of the movement may have some effect on its own, but only through a combination of different tactics and persistence will the gay rights movement succeed.

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244. Interview with Victor Mukasa, *supra* note 1.

245. *See* Ultimate Media, *Uganda Government News: Ugandan Homosexuals Win Historic Case*, UGPULSE.COM, Dec. 23, 2008, http://www.ugpulse.com/articles/daily/news.asp?ID=7454.

246. *See Uganda Government News: Government Will not Appeal Pro Gay Ruling*, UGPULSE.COM, Dec. 24, 2008, http://www.ugpulse.com/articles/daily/news.asp?ID=7469 (reporting that the Minister said that the Penal Code Act clearly outlaws homosexuality—even though it does not). Hence, even at the highest levels of Ugandan government, there appears to be a misunderstanding about the scope of the laws surrounding sodomy. This makes the termination of such laws all the more important.

247. *See Uganda Rejects a Gay Rights Call*, BBC NEWS, Aug. 17, 2007, http://news.bbc.co.uk/2/hi/africa/6952157.stm.

This Note outlines what has the potential to be a very successful attack on the legal and social underpinnings of much of the discrimination that takes place in Uganda. By removing the anti-sodomy laws, the LGBTI community and its supporters will be able to expand their work more openly, and without fear of government reprisal. By establishing that anti-sodomy laws violate the Ugandan Constitution, international norms, and fundamental human rights, the perception of gay people will inevitably improve within Uganda. Of course, this legal attack could fail. The treaties to which Uganda is a signatory may hold little sway over a country so staunch in its beliefs; the emerging international consensus has really only reached the West, having barely touched Africa; the Constitution may only protect rights that the constitutional court is willing to accept. But such a failure would not be fatal.

The movements for gay rights in other countries have also been long and have suffered legal setbacks. In the United States, for example, a challenge to anti-sodomy laws failed in 1986 but was successful in 2003. In the interim period, American culture became more accepting of the LGBTI community. While the situation in the United States is not perfect today, it is a far cry from the discrimination that existed just thirty years ago.

Success may have its problems as well. As the backlash against the August 2007 press conferences in Uganda demonstrates, there is often an equal and opposite reaction to any victory that can be claimed in such a contentious arena. A legal victory overturning the anti-sodomy laws today may lead to a constitutional amendment enshrining these penal laws within the Constitution or explicitly denying any equal rights protection based on sexual orientation. In reaction to a few recent court victories for gay marriage, this exact type of backlash was exhibited in movements throughout the United States to constitutionalize, in state constitutions, the definition of marriage as being exclusively between a man and a woman. The potential for such a backlash, however, cannot act as a wall that prevents activism; it must be seen as yet another challenge for the movement to overcome. The question of gay rights in Uganda is not a question of "if," but a question of "when."