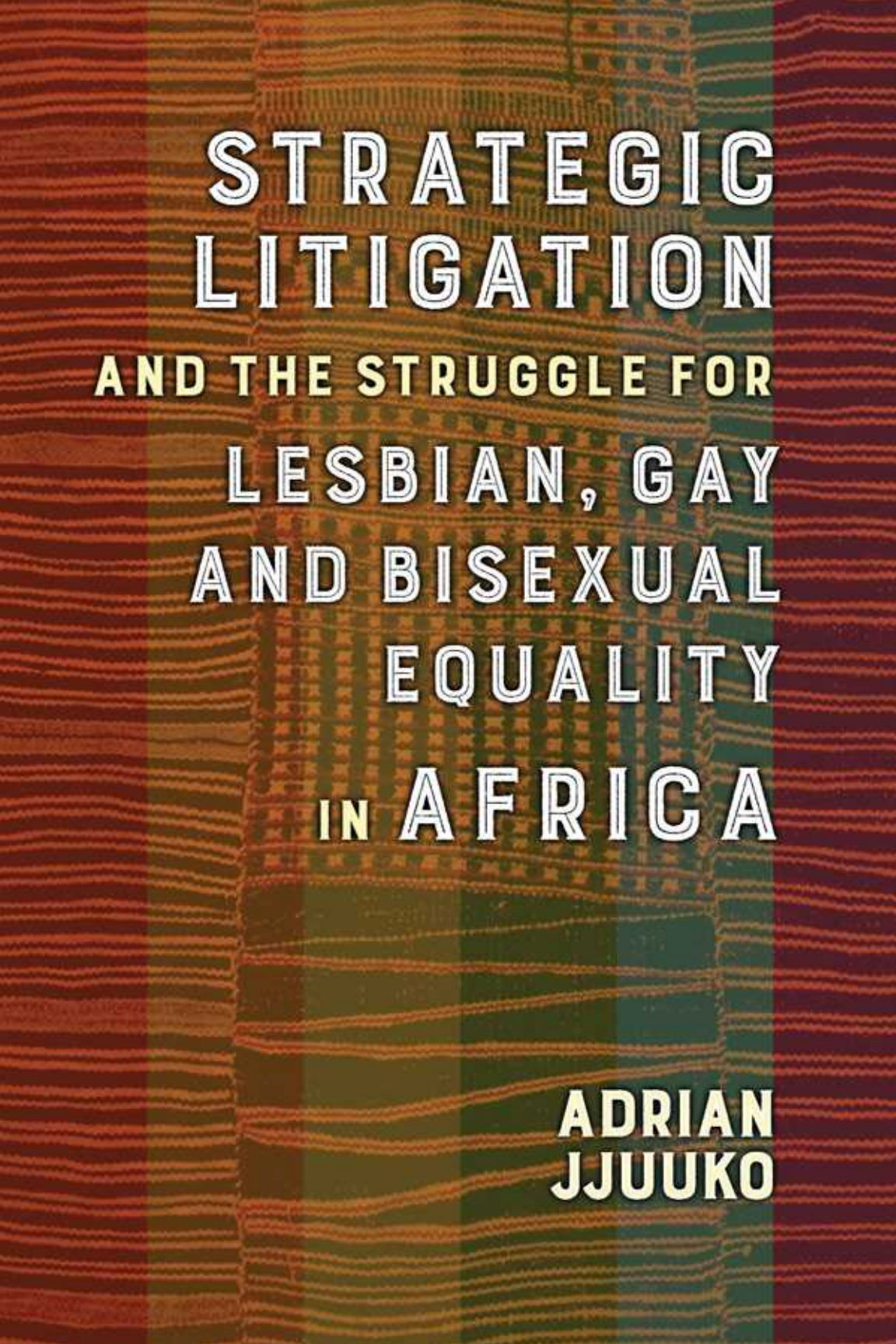
STRATEGIC LITIGATION
AND THE STRUGGLE FOR
LESBIAN, GAY AND BISEXUAL EQUALITY IN AFRICA
ADRIAN JJUUKO

Strategic Litigation and the Struggle for Lesbian, Gay and Bisexual Equality in Africa

Adrian Jjuuko

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Dedication

To *Omumbejja* Adonia Zalwango,
for being the new shining light in our lives.

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Foreword

By Siri Gloppen

This volume reflects Adrian Jjuuko's unique insights into strategic litigation as part of the struggle for lesbian, gay and bisexual equality in Africa.

Adrian Jjuuko is an exceptional scholar. A rare combination of intellectual brilliance, commitment and hard work. The book is born of this. It reflects his incisive analytical skills, anchored in solid knowledge of the law and jurisprudential developments in the field. His ventures into political theory, philosophy, and the social sciences give the analysis additional clarity and empirical grounding. And, perhaps most of all, his analysis gains immensely in depth and relevance from more than a decade of practice as a litigator and human rights activist, assisting the LGBTIQ community in Uganda in numerous ways though his organisation HRAPF. As the perceptive reader will notice, he has himself brought a number of the cases discussed in the book, and in other cases he has assisted.

To balance activism, professional engagement and academic scholarship is challenging – obviously at a practical and personal level, and particularly with management duties and family responsibilities thrown into the mix – but more relevant for the reader of this book, it is a challenge from the perspective of rigorous research. While the combination of academia, activism and legal practice gives unique access and insights, professional prestige and activist commitment to core strategies may come in the way of sober and stringent analysis. But it is never a problem for Adrian Jjuuko in this book. Rather he uses his dual embeddedness in social activism and academia to pose the hard questions more succinctly, and uncompromisingly follow them through.

The question at the heart of the book is an existential one for a human rights lawyer: is litigation a useful strategy to advance lesbian, gay and bisexual equality in Africa? The careful and nuanced analysis across five jurisdictions – South Africa, Botswana, Kenya, Uganda and Nigeria – provides answers that will be of use to judges and legal practitioners as well as to activists working to advance LGBTIQ rights in Africa and other difficult social contexts, and all who seek to understand or assist in the struggles. Adrian Jjuuko systematically, in detail, but always with a clear narrative that makes it easy to follow even for the lay reader, lays out the litigation that has unfolded in the five countries in the past two decades and how the law has changed over this period – or not in each of the cases. He also draws on a wealth of extant empirical material to systematically discuss the extent to which the countries have seen social change along different dimension, and he carefully discusses the extent to which this can be attributed to the litigation, or is likely to have happened in any case as a result of broader trends. Building on this, he disentangles and carefully

discusses the external factors that influence the chances of achieving social change through litigation – and the risks of provoking backlash – and skillfully lays out the how factors inherent to the litigation process itself contributes to the chances of success in court and beyond. Finally, in what I find the most inspiring of all the chapters in the book, he endeavors into a broad discussion of how activists can advance the struggle for lesbian, gay and bisexual equality in Africa – with many lessons for both other regions and fields of activism.

With this book, Adrian Jjuuko contributes both empirically and theoretically to the broader scholarship on strategic litigation and under which circumstances it is likely to bring significant social change as opposed to empty 'hollow hope' legal victories – or cause political backlash. The integration of theory and empirical research also renders it a great teaching resource that my own students will benefit from in the years to come, as I have done.

Acknowledgments

The journey for the development of this book started with my active involvement in LGBT strategic litigation in Uganda in 2009. In that year, I filed my first case challenging a provision of the Equal Opportunities Commission Act. The experiences and frustrations from then made me reflect on the utility of LGB strategic litigation in stimulating social change. Further clarity came from my conceptualisation of my Doctor of Laws study topic in 2016.

I wish to acknowledge and thank the following persons for their role in shaping the trajectory of this book:

My LLD supervisors, Prof Frans Viljoen of the Centre for Human Rights, University of Pretoria, and co-supervisor, Prof J Oloka Onyango of the School of Law, Makerere University, for their dedicated supervision, mentorship, inspiration and guidance throughout the LLD journey and during the course of the development of this book.

Prof Siri Gloppen of the Centre for Law and Social Transformation, University of Bergen, Norway who graciously wrote the foreword to this book. She guided me to my study area, and introduced me to the work of actors working in this field who attend the annual Bergen Exchanges on Law and Social Transformation. In the same breath, I acknowledge the support of the Norwegian Research Council through the 'Sexual and Reproductive Rights Lawfare: Global Battles Project, hosted by the Centre for Law and Social Transformation for the financial contributions towards the development and publication of this book.

My colleagues who selflessly assisted me during the different phases of developing this book: Linette du Toit and Justine Balya. They at various times helped in data collection, reading through first drafts and providing comments, proofreading final drafts and helping me to align the book to style guidelines.

Human Rights Awareness and Promotion Forum (HRAPF), the organisation that I work for, allowed me time to develop this book as I continued to do my work as Executive Director.

All the numerous persons from whom I picked ideas and perspectives – including persons I interviewed - all of whom are duly acknowledged in various sections of this work, and those who contributed to the writing of this book in different and innumerable ways.

Finally, my immediate family – Fridah, Adrian Junior, Adonis, Addison, Baby Adonia, Thaddeus, Harriet, Rhita, Charity, Caleb, Jamila, Prince and Kurusumu who shared in the journey all the way.

Summary

The use of strategic litigation via the courts of law to stimulate social change in Common Law Africa in respect of the manifestly controversial issue of equality for lesbian, gay, and bisexual (LGB) persons is on the rise. Paradoxically, such development is taking place against the backdrop of active homophobia.

In this book, the desired social change is understood as bringing about a situation where both the law and the general public treat LGB persons in the same way that heterosexuals are treated. In the past twenty-three years (1997-2019), a total of 36 strategic cases have been filed by LGB activists in Common Law Africa, namely Botswana, Eswatini, Kenya, Malawi, Mauritius, Nigeria, South Africa, and Uganda. Of these countries, only activists in Botswana, Kenya, Nigeria, South Africa, and Uganda have had at least one court victory, and these are the study countries. The majority of these cases (20) have been successful. These victories have resulted in legal change in favour of LGB persons, especially in South Africa and Botswana.

At the same time, these legal changes have thus far not led to significant social change in any of the countries. Instead, there has been active backlash, counter-mobilisation, and relatively high levels of violence against LGB persons in all five selected countries. Each country has its own experiences with social change, which often do not seem to rhyme with court victories.

This book asserts that Common Law African countries are not inherently homophobic and thus unable to achieve significant social change, but rather that a diversity of factors determine the extent to which LGB strategic litigation is likely to lead to significant social change in situations of active homophobia and many of these are lacking in these countries. Exogenous factors (contextual circumstances outside the control of litigants), in particular the state of democracy, the level of judicial independence, the nature of the economic system, the level of economic development, and the social-religious conditions in the country are better predictors of social change through LGB strategic litigation than endogenous factors (i.e. issues related to the particular litigated case such as the nature of organising and the nature of strategy adopted, as well as lawyers engaged).

However well-organised and successful a strategic case is, it would do little to contribute to social change if the exogenous factors do not align. This book argues that activists in Common Law Africa have to design LGB strategic litigation in such a way as to fit with the exogenous conditions in their countries if strategic litigation is to spur social change. It concludes by identifying the main considerations that need to be taken into account as LGB litigation strategies are being designed and developed.

Acronyms

ACHPR	African Charter on Human and Peoples' Rights
APRM	African Peer Review Mechanism
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CSE	Comprehensive Sexuality Education
EACJ	East African Court of Justice
EOC	Equal Opportunities Commission (Uganda)
HRBA	Human Rights-Based Approach
ICCPR	International Covenant on Civil and Political Rights
IDAHOT	International Day against Homophobia and Transphobia
ILO	International Labour Organisation
LGB	Lesbian, Gay, and Bisexual
LGBTI	Lesbian, Gay, Bisexual, Transgender and Intersex
MSM	Men who have sex with men
NEPAD	New Partnership for African Development
OAS	Organisation of American States
PIL	Public Interest Litigation
PQD	Political Question Doctrine
SADC	Southern African Development Cooperation
SOGI	Sexual Orientation and Gender Identity
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNAIDS	Joint United Nations Programme on HIV/AIDS
UNDP	United Nations Development Programme
UPR	Universal Periodic Review
WHO	World Health Organization

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Introduction

Background

On 11 June 2019, the High Court of Botswana handed down a landmark ruling in which it found the country's anti-sodomy laws unconstitutional. There was euphoria among lesbian, gay, and bisexual (LGB) activists in Botswana and Africa as this case indicated that change was possible. Fears had crept up among activists as less than a month earlier, on 24 May 2019; the High Court of Kenya had upheld a similar law, ruling that it did not contravene the Constitution. Two countries with similar laws and legal systems, two courts at the same level, and two contrasting decisions within less than a month of each other. This state of affairs highlights not only the increased use of strategic litigation as an avenue for vindicating LGB rights in Common Law Africa, but also the continued controversy and divisions over this strategy.

LGB activists have over the past twenty-three years (1997-2019) brought 34 cases before the courts of law in Botswana, Eswatini, Kenya, Malawi, Mauritius, Nigeria, South Africa, and Uganda. Activists in Uganda also filed a case in the federal courts in the United States of America, as well as at the regional East African Court of Justice (EACJ), making it 36 cases in total concerning LGB rights. By the end of 2019, five of these countries – Botswana, Kenya, Nigeria, South Africa and Uganda – with 30 cases between them, had at least one courtroom victory, and these are the selected study countries for this book.

Successes in litigation have led to recognition of same-sex marriages in South Africa; decriminalisation of consensual same-sex relations in South Africa and Botswana; defeating further criminalisation and securing access to the Equal Opportunities Commission in Uganda; allowing the registration of LGB organisations in Kenya and Botswana; upholding the right to liberty for an LGB person in Nigeria; extending immigration rights for partners in committed same-sex relationships, allowing adoption of children by same-sex couples, establishing a uniform age of consent for heterosexual and same-sex sexual activity, and affirming inheritance rights for partners in same-sex relationships in case of intestacy in South Africa; affirming the equal protection of LGB persons in the Constitution, and protecting against hate speech as well as the spread of of anti-LGB sentiments by American evangelicals in Uganda; and declaring anal examinations unconstitutional in Kenya. This is quite significant legal change within a period of 23 years.

Nevertheless, there have been some resounding defeats, with the most recent one being the loss in the decriminalisation case in Kenya. Earlier, activists in Uganda had lost the challenge to the refusal to register the LGBT network,

Sexual Minorities Uganda (SMUG), and also lost a challenge to the stopping of an LGB skills training workshop by the Minister of Ethics and Integrity. In Nigeria, an LGBT organisation was denied registration and a challenge to the Same Sex Marriage (Prohibition) Act (SSMPA) dismissed on grounds of the petitioner having no standing. These defeats can be seen as backlash for the initial victories, as the case of Uganda shows, and counter-mobilisation as anti-LGB groups actively defend and intervene in cases as the examples from Kenya show. All in all however, the victories far outweigh the losses, indicating that as regards courtroom victories, LGB strategic litigation works.

Surprisingly however, all these court victories and legal changes have barely been able to transform into social change for LGB persons in the selected Common Law countries. They have neither been able to result in enduring legal protections for LGB people except to some extent in South Africa, and neither have they spurred broad acceptance by the state and the community. South Africa has so far made the most progress towards social change, followed by Botswana, and then Kenya, while Uganda and Nigeria are generally making little progress. LGB people in all these countries face violations of their rights, especially from non-state actors, which violations are rarely addressed by the state. Despite the differing levels of success in the courts of law, there is active backlash and counter-mobilisation, with new laws aimed at further criminalisation of same-sex relations being passed or mooted. This makes it clear that LGB strategic litigation has so far not led to the desired social change in a substantive way. This book therefore examines the use of LGB strategic litigation with respect to the five countries, and how this has been able to act as a catalyst for social change.

The fact that all these countries are at different stages in the journey towards social change shows that African countries are not exceptional – the same factors that operate in them also operate in countries in other regions, and thus the difference may lie in how these factors operate within each country. Some of these factors are exogenous to the cases filed while others are endogenous. This implies that however well designed a case is, it may not succeed both in court and in spurring social change if the conditions are not right – if the exogenous factors do not align. Activists have a huge role in influencing how these factors operate, and it is the premise of this book to point out these factors and how they can be made to align in order to ensure that successful LGB strategic litigation meaningfully influences social change in the different Common Law African countries.

Methodology

This book is a result of research conducted between 2017 and 2019 employing qualitative research methods. Data was mainly collected through semi-structured interviews and document analysis. Semi-structured interviews

were used to collect primary data on the trends of strategic litigation in Common Law Africa, as well as the perceptions on how strategic litigation on LGB equality has contributed to social change, and what other methods are being used beside strategic litigation. Lawyers, activists, LGB persons and judges were targeted as key respondents for these interviews. Document analysis was mainly used to collect secondary data, and of particular importance were reports of organisations working on LGB issues in the selected countries; scholarly writings on strategic litigation, democracy, the principle of separation of powers and the role of the judiciary; scholarly writings on the use of public interest litigation generally, and other relevant aspects.

Since the study involves human subjects, some of whom were vulnerable LGB persons, ethical clearance was obtained from the Research Ethics Committee of the Faculty of Law, University of Pretoria before undertaking field research. The author ensured that the respondents were well informed about the study, its aims, and how it could benefit or otherwise affect them. Interviews were entirely voluntary and no monetary incentive was given to the participants. The consent of the respondents was sought before their names and affiliations were revealed in this study and, for those who requested anonymity, their names have been left out, while the identities of those LGB persons who are not activists are not at all revealed, but pseudonyms are rather used.

Structure of the book

The book opens with an introduction, which provides the background to the study, its main hypothesis and the methodology used for the collection of the data. It also presents the structure of the book.

The book is divided into seven chapters, each covering a specific theme. The chapters build upon one another as follows:

Chapter 1 focuses on the concept of social change and how strategic litigation contributes to social change. It discusses the concerns around strategic litigation: the fact that it could be considered to be illegitimate, courts being incapable of effecting social change, and the negative effects of strategic litigation on community organising and on other strategies for achieving social change in favour of LGB persons. It then discusses how strategic litigation contributes to social change with respect to LGB rights, and mainly focuses on situations where there is active homophobia and low levels of democratisation as are prevalent in the selected countries in Common Law Africa..

Chapter 2 discusses the usage of strategic litigation for the vindication of LGB rights in the past twenty-three years in the selected countries with focus on the specific cases litigated. It classifies the cases in accordance with their subject matter and their outcomes.

Chapter 3 critically examines the legal changes that have happened in the selected Common Law countries in Africa where strategic litigation has taken place in the past 23 years, comparing the period before strategic litigation and that after the advent of strategic litigation as a strategy. It examines the role played by strategic litigation in bringing about those changes, and the role played by other strategies.

Chapter 4 discusses the extent of social change in the different Common Law African countries. It looks at social change from the political, social, and economic perspective. To determine the extent of social change, the chapter juxtaposes the legal change identified in chapter 3 with the political, social and economic changes. The chapter then discusses the extent to which this social change can be attributed to LGB Strategic litigation.

Chapter 5 discusses the factors exogenous to the litigation that influence the extent to which strategic litigation contributes to social change on LGB rights, and formulates conditions under which strategic litigation can succeed in creating social change. The examples used are drawn from the selected countries.

Chapter 6 discusses factors endogenous to the case and how these affect the extent to which strategic litigation contributes to social change even with active homophobia, hostility, and the current social-political environment.

Chapter 7 discusses how LGBT activists can engage with the exogenous factors and control the endogenous factors as they engage in strategic litigation in the Common Law African countries. The chapter also discusses how 'African' strategies can be employed in the struggle for LGB equality.

ONE

LGB Strategic Litigation and Social Change

1.1 Introduction

The utility of litigation in enabling social change on controversial issues has been a subject of debate among legal scholars for some time now. This debate largely centres around two main issues – whether litigation is in reality capable of influencing social change, and if so, whether it is a legitimate avenue within the bounds of democracy to do so. This chapter briefly engages in this debate, with a more nuanced approach that focuses on African countries rather than the American and sometimes European examples that have dominated the debate. This chapter then goes into details to discuss the application of the different strands of this debate to LGB strategic litigation. LGB issues are some of the most controversial in Africa at this time, and therefore the arguments for and against the use of litigation as an avenue of enabling social change also change to reflect this reality. If strategic litigation already faces challenges to influencing social change where there is no great controversy, how does it fare in light of the more controversial issue of LGB rights?

1.2 Social change defined

Lauer defined social change as 'alterations in social phenomena at various levels of human life from the individual to the global.'[1] Goodwin defined it as 'any substantial shift in a political, economic, or social system.'[2] In terms of social change meant for purposes of redressing inequalities and overturning disadvantage, Dovidio regards change from a position of inequality to one of equality and from one of disadvantage to one of equal opportunities as what constitutes social change.[3]

To tell that social change has happened, one considers a specific period of time and studies the changes in terms of social actions, interactions, attitudes, human relationships, perceptions, and cultures.[4] The other important aspect is the dimension of change. For change to be regarded as social change, it has

1 RH Lauer *Perspectives on social change* (1977) 4.
2 R Goodwin *Changing relations*: *Achieving intimacy in a time of social transition* (2009) 2.
3 See for example, J Dovidio *et al* 'Commonality and the complexity of "we": Social attitudes and social change' (2009) 13 *Personality and Social Psychology Review* 3.
4 WE Moore *Social change* (1974) 22.

to be significant, not at the level of an individual but rather the society as a whole or at least a significant portion of it,[5] or it must be a change involving 'modification of basic institutions during a specific period.'[6] Rosenberg refers to this as 'significant social reform.'[7] Discussing what sort of change in terms of the law would amount to significant social reform, he stated that change affecting large groups of people as well as altering 'a whole set of bureaucracies or institutions nationwide' would qualify as significant social reform.[8] However, the changes do not have to be big on their own; it is the aggregate effect that matters.[9] In simple terms, therefore, social change can be defined as significant alterations, over time, in social actions, interactions, attitudes, human relationships, perceptions, and cultures. More specifically, in terms of addressing inequalities, social change refers to significant alterations over time in the socio-legal status of marginalised persons and groups.

Social change may be positive or negative, or very fast or very slow, but it is always happening.[10] Sometimes, it is difficult to measure social change or even to know that it is taking place. Of course, where it is a revolutionary change, the changes are obvious but where it is evolutionary, 'major changes in the magnitude or direction of societies may be very slow in developing and perhaps not become apparent for generations.'[11] There is, therefore, need to consistently measure the changes over time. At the same time, not all change may be moving in the same direction, and there are possibilities of the immediate change appearing retrogressive but, when considered over a long period of time, it is actually positive change.

There are factors that influence the occurrence, direction, and speed of social change. Among these are changes in technology; actions of influential individuals, leaders or elites; changes in the law; and major natural disasters. By influencing these factors, one can be able to influence social change either positively or negatively. Specifically for changes in the law, it is expected that when the law changes, members of society have to act accordingly in order to align their behaviour and actions with what the law then requires. As Tocqueville stated: 'A law can modify the social state that seems most definitive and most firm, and with it, everything changes.'[12] It is however not merely the change in the law that creates social change, but rather the change in the law having

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

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

7 n 5 above.

8 As above.

9 See Moore (n 4 above) 22..

10 Giddens (n 6 above) 43.

11 Above, 16.

12 A Tocqueville '*Democracy in America*' Vol. 3, Historical-critical *edition, Nolla, E* (ed) *trans Schleifer J* (2010) 427-450.

the ability to cause a change in societal attitudes and perceptions.[13] Other factors that cause social change to happen may fall out of the legal process and lie in political processes such as election cycles and the coming into office of influential leaders. During such times, political leaders usually make changes depending on what they think will obtain more votes for them, or what in their view would be good for society. Therefore, changes in the law are just one of the factors that determine the extent to which social change occurs.

Stoddard pointed out that there are some laws that are 'rule shifting', and those that are 'culture shifting.'[14] In his analysis, rule shifting laws are those that touch specific groups and not everyone, that do not proscribe conduct and indeed have limited impact, while culture shifting laws are those that affect large groups of people and cannot be ignored. He pointed out that for a change in law to be 'culture shifting' rather than merely 'rule shifting,' it must be 'a change that is very broad or profound;' there must be 'public awareness of that change;' there must be '[a] general sense of the legitimacy (or validity) of the change;' and there must be 'continuous enforcement of the change.'[15] In his view, for a change to be broad or profound, it should be able to affect a large number of people in a profound way.

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

1.3 Strategic Litigation and social change generally

Roscoe Pound famously pointed out that the law should be used to change society through a process of social engineering.[16] Indeed, one of the ways of doing social engineering is through strategic litigation, as it can lead to a change in the law and consequently influence social change. Strategic litigation relies on the powers of the third arm of government, the judiciary, to bring about a change in laws. The judiciary has powers in a democracy to nullify laws made by the legislature and to validate executive actions, thus effectively making law.[17] When laws are changed, then society's conduct can be arranged in accordance with the new legal order, thus leading to social change.

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

14 Above, 972-973.

15 Above, 978.

16 See generally R Pound *Social control through law* (1942).

17 J Oloka-Onyango *When courts do politics: Public interest law and litigation in East Africa* (2017) 10.1-12; also see generally M Gomez *In the public interest: Essays on public interest litigation and participatory justice* (1993).

Strategic litigation has been defined as 'the use of litigation and other legal and non-legal methods to seek legal and social change.'[18] Strategic litigation is employed in contexts where there is a situation of social marginalisation and there is a need for deliberate and careful planning aimed at long-term change that will improve the situation of marginalised groups. Strategic litigation is therefore a type of Public Interest Litigation (PIL) where cases are filed before courts of law as part of a defined, organised and long-term strategy and are backed up by other legal and non-legal approaches, usually aimed at creating change in laws and policies and creating legal precedents, thereby enabling change in the lives of a specific group of people or the public as a whole.[19]

Litigation leads to social change both directly and indirectly – directly when there is a victory in court involving the nullification of a law, the ordering of the legislature to pass another law or the interpretation of a law that effectively changes that law, and indirectly, when changing the law in its turn has ramifications for the wider society.[20] Handler highlights the importance of court victories by showing that various social movements relied on success in the courtroom to stimulate social change.[21] Keck also highlights that despite the backslash that court victories sometimes spur, the gains from a win in court cannot be understated.[22] Even Rosenberg, who generally argues that courts cannot create social change, recognises that winning is the first step towards creating change.[23]

Indirectly, the power and aura of the courts in itself implies that even simply bringing a case to court will be enough to create what Galanter refers to as 'radiating effects.'[24] The decisions of courts have both special effects, which apply to the individual concerned, and general effects, which affect the population at large, and the application of all these forces may radiate into social change.[25] In this regard, even a loss may not be very bad as the fact that the matter was brought before court will increase awareness of the injustices

18 CC Barber 'Tackling the evaluation challenge in human rights: Assessing the impact of strategic litigation organisations' (2012) 16 *The International Journal of Human Rights* 411-435, 412.

19 This definition is also inspired by the description of strategic litigation in respect of marriage equality in the US by Koppelman. See A Koppelman 'The limits of strategic litigation' (2008) 17 *Law & Sexuality: A Review of Lesbian, Gay, Bisexual and Transgender Legal Issues* 1.

20 O Onyango 'Human rights and public interest litigation in East Africa: A bird's eye view' (2015) 47 *The George Washington International Law Review* 763, 766.

21 See JF Handler *Social movements and the legal system: A theory of law reform and social change* (1978) 22.

22 TM Keck 'Beyond backlash: Assessing the impact of judicial decisions on LGBT rights' (2009) *43 Law and Society Review* 151, 156–57

23 Rosenberg (n 5 above) 31.

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

25 Above, 121.

that are inherent in that particular law,[26] and the judgment will also generate debate on the particular issue, thus creating the desired political momentum for change.[27] Court decisions also affect different people differently and therefore can spur different reactions.[28]

Another way that loss can contribute to social change is when it spurs protests and social movements among those dissatisfied with the court's decision,[29] which can lead legislatures to act.[30] It will also most likely lead to appeals and further strategies on how to overturn the law, thus bolstering the social movement.[31] Additionally, failed cases have the capacity to inspire copycat suits which are filed by other people using the example of the initial one, in a bid to pile more pressure, and thereby forcing eventual victories or changes.[32] Finally, bringing a matter to court, even if it fails, can spur negotiations, which can eventually lead to social change. These negotiations can be two fold, that is, those between the judges as they formulate their decision, which may lay the ground for future success,[33] and those between the applicants and public officials, which may eventually lead to the desired change happening.[34] Therefore, court action is important in spurring or influencing social change, whether there is a victory or not.

1.3.1 Advantages of using courts to advance social change

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

The power of the courts to nullify laws or declare executive actions unconstitutional

The higher courts in most Common Law countries have the powers to declare laws unconstitutional, and either make alterations themselves or order the legislature or the executive to make the necessary alterations. This special power of the courts is in line with the principle of checks and balances where the different organs of the state act as checks on the other organs' powers.

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

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

28 McCann (n 26 above).

29 SA Scheingold *The politics of rights: Lawyers, public policy, and political change* (1974) 131.

30 JL Sax 'Defending the environment: A strategy for citizen Action' (1972) 47 *Indiana Law Journal* 157.

31 As above.

32 Y Lu *Public interest litigation and political activism in China* (2008) 16-17 http://publications.gc.ca/collections/collection_2008/dd-rd/E84-24-2008E.pdf (accessed on 20 May 2017).

33 CH Mendes *Constitutional Courts and Deliberative Democracies* (2013) 4.

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

Although this power is controversial and in some instances regarded as anti-democratic,[35] it is an inbuilt protection in the democratic system[36] and in practice, courts do indeed nullify statutes and reverse executive actions in all Common Law jurisdictions considered in this study.

The binding power of the decisions of the courts

In all jurisdictions considered in this study, court decisions bind every party to the case, including the state. Decisions of superior courts are binding on the lower courts. The courts have the powers to find any party that does not act in accordance with the orders of the courts to be in contempt. The Common Law doctrine of precedent ensures that decisions of the higher courts bind lower courts. According to Lord Reid,

> A decision of the House of Lords [the then highest court in England] is final not because it is right but because no one can say it is wrong- except writers in legal journals.[37]

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

The ability of strategic litigation to lead to political mobilisation

Courts are a legitimate way of engaging the state on any issue. It is always clear that the actions are in support or further propagation of the court case, and so people can engage and use the case as a rallying point. In this way, court action has the potential to mobilise people around a cause in a legitimate and legal way.[38]

1.3.2 Limitations in using courts to create social change

There are identified and well-recognised challenges in using courts to create social change. Although each of these limitations has valid counter-arguments, they remain largely valid. Some of them are:

Illegitimacy of courts

Courts can only be effective when they have sufficient legitimacy to be respected.[39] Courts' powers to overturn laws made by popularly-elected legislatures and to overturn the actions of a democratically-elected executive

35 For this argument see for example AM Bickel *The least dangerous branch: The Supreme Court at the bar of politics* (1962) 16-17, and S Holmes 'Precommitment and the paradox of democracy' in J Elster and R Slagstad (eds) *Constitutionalism and democracy* (1988) 195.

36 JH Ely *Democracy and distrust: A theory of judicial review* (1980) 153.

37 See L Reid 'The judge as law maker' (1972) 12 *Journal of Society of Public Law Teachers* 22.

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

39 See TR Tyler 'Psychological perspectives on legitimacy and legitimation' (2006) 57 *Annual Review of Psychology* 375.

are anti-democratic and thus illegitimate. This is the 'counter-majoritarian difficulty' first articulated by Bickel. Bickel contended that unelected judges should not nullify statutes made by elected representatives as they are not answerable to the people, and the people are powerless to overturn the courts' decision.[40] Others have since argued that it should be the people with the ultimate power to interpret the Constitution.[41] Since this is not practical, however, it would only make sense that the legislature, which is composed of elected representatives of the people, should be the one with the powers to interpret the Constitution and drive constitutionalism, rather than unelected judges.[42] This argument of illegitimacy has real implications where the other organs refuse to respect the courts' decisions or where the people act like the decision has no legitimacy. In such cases, no positive social change will occur and instead, there will be backlash.

The response to this argument is that a power that is part of the system of democracy cannot be undemocratic and illegitimate. The judiciary's powers are part of the system of checks and balances, which is the modern manifestation of Montesquieu's separation of powers doctrine. It is a power meant to protect the constitution against majoritarian impulses – the tyranny of the majority.[43] For other countries, the difficulty also has limited application as the courts are deliberately given wide powers within the constitutions to nullify statutes or review executive actions as part of an agreed compromise. This was the case with the South African Constitutional Court which was created as a way of compromise to enable a peaceful transition from apartheid. [44]

In less established democracies however, courts are usually illegitimate not because of their positioning within the democratic systems, but rather because they are seen as foreign impositions introduced by the colonialists to facilitate exploitation and subjugation through colonialism.[45] Even post-independence, they are usually much more aligned to the executive in nascent democracies and are therefore seen as being against the people, as the case was for the Indian courts during the time of Indira Gandhi,[46] and indeed for most African countries. The response to this strand of the illegitimacy argument would be

40 See Bickel n35 above,16-17.

41 LD Kramer *The people themselves: Popular constitutionalism and judicial review* (2004) 128, 144.

42 R West 'Progressive and conservative constitutionalism' (1990) Georgetown Public Law and Legal Theory Research Paper No. 11-46.

43 Tocqueville n 12 above; and JS Mill *On liberty* (1859) 7.

44 For a discussion of this also see generally, RN Daniels & J Brickhill 'The counter-majoritarian difficulty and the South African Constitutional Court' (2006) 25 *Penn State International Law Review* 371. I

45 Oloka-Onyango (n 17 above) 26-34.

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

that once the courts start to behave in a way that protects the public – as the Indian courts did after Indira Gandhi – then the legitimacy will return as this is not inherent illegitimacy but rather one that is dictated by circumstances. There are various other factors, beyond the institutional positioning of the courts, which could potentially undermine their legitimacy. Considerations such as the absence of sufficient judicial independence which manifests in politicisation of the courts, the absence of an independent judicial selection process, corruption within the judiciary as well as inefficiency and resource constraints[47] could all limit the effectiveness of the use of courts to bring about social change.

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

Courts cannot directly create social change as they cannot enforce their own decisions.[48] Alexander Hamilton called them the 'least dangerous branch' because they 'have no influence on either the sword or the purse.'[49] Handler states that courts almost become impotent when confronted with difficult problems of enforcement. Where the executive or the legislature is not willing or where it is difficult to act, then it becomes challenging to have the required change through the courts.[50] Handler called this the bureaucratic contingency.[51] For the case of India, Baxi highlights that the very active courts have to deal with the deliberately slow enforcement by the executive and the legislature.[52]

Rosenberg considers this from the perspective of lack of the requisite judicial independence. In his view, courts lack the independence to implement their decisions as they have to rely on the other two organs for power and money.'[53] He identifies this as 'Constraint II'- that '[t]he judiciary lacks the necessary independence from the other branches of government to produce significant social reform'.[54] According to Baxi, judges are appointed by the executive and in some ways must pay allegiance to it. Even if they later follow a mind of their own, they can never be completely severed from the system and therefore usually act with constraint.[55] These challenges are real for countries in Common Law Africa, as the courts are usually intimidated and in some cases warned off by the executive, or their decisions reversed by the legislature.[56] Therefore,

47 See generally JB Diescho 'The paradigm of an independent judiciary: Its history, implications and limitations in Africa' http://www.kas.de/upload/auslandshomepages/namibia/Independence_Judiciary/diescho.pdf (accessed 25 March 2016).

48 Rosenberg (n 5 above).

49 A Hamilton *et al The Federalist Papers* (1961) 465.

50 See JF Handler *Social movements and the legal system: A theory of law reform and social change* (1978) 22.

51 Above 18-19.

52 U Baxi, 'Judicial discourse: Dialectics of the face and the mask' (1993) 1 *Journal of the Indian Law Institute*, 10-12.

53 Rosenberg (n 5 above) 3.

54 Rosenberg (n 5 above) 15.

55 Baxi (n 52 above) 1.

56 For the case of Uganda, see generally, International Bar Association 'Judicial independence undermined: A report on Uganda' 2007.

if the courts need to rely on the other organs to enforce their decisions, it would be wrong to claim that the courts can lead to social change without the support and respect of the other organs. It could as well be that the courts should be left out of the equation, and the other organs directly lobbied as, according to Rosenberg, 'Political organising, political mobilization, and voter registration are the best if not the only hope to produce change.'[57]

This argument is met with the counterargument that courts usually make decisions and orders that can be implemented. Where they give extensive and complicated orders, they usually have the capacity to monitor the actions of the other organs as the case is in India,[58] South Africa[59] and the USA.[60] For countries like Uganda where judicial independence is not guaranteed, courts usually make declarations rather than detailed orders, or in some cases avoid decisions on substantive grounds and instead use procedural lapses to nullify laws, as was done in the case of *Prof. Oloka-Onyango & 9 Others v Attorney General (Anti-Homosexuality Act* case) in Uganda.[61] Courts also have powers to punish those who refuse to comply with their orders, including imposing criminal sanctions on them, as the case is for contempt of court.[62]

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

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

> The bounded nature of constitutional rights prevents courts from hearing or effectively acting on many significant social reform claims and lessens the chances of popular mobilisation.[63]

This limitation implies that many issues cannot be brought before the courts, and yet these are the very issues that require resolution. Handler is also of the opinion that framing issues as constitutional rights limits their wider emotional

57 Rosenberg (n 5 above) 431.

58 J Cassels 'Judicial activism and public interest litigation in India: Attempting the impossible?' (1989) 37 *The American Journal of Comparative Law* 505.

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

60 For example in *Brown v Board of Education of Topeka*, 349 U.S. 294 (1955) – (*Brown II* case), the Supreme Court issued detailed orders on what had to be done to implement the decision in *Brown v Board of Education of Topeka*, 347 US 483 (1954) (*Brown* case) where the Court declared racial segregation in the education system to be unconstitutional, and threatened sanctions on those who did not comply, as well as requiring reporting back on steps taken.

61 Constitutional Petition No. 008 of 2014 (*Anti-Homosexuality Act* case).

62 See M Langford, C Rodriguez-Garavito & J Rossi 'Introduction: From jurisprudence to compliance' in M Langford, C Rodriguez-Garavito & J Rossi *Social rights judgments and the politics of compliance: Making it stick* (2017) 3, 10.

63 Rosenberg (n 5 above) 13.

appeal, and therefore weakens the case and quest for the realisation of the claims.[64] Scheingold warns against the 'myth of rights,' which divert attention from the political roots of social problems and simply narrows them down as rights claims.[65]

The response to this argument would be that many constitutions actually contain a provision recognising rights that are not expressly mentioned in the constitution,[66]and that judiciaries have also adopted the concept of implied rights, where rights can be read into other rights even where they are not expressly stated. The concept of implied rights has been employed in many countries to recognise rights that are not expressly protected. In Uganda, the right to a livelihood was implied under the right to life in the case of *Salvatori Abuki v Attorney General*.[67] Indian courts have also implied a number of rights in a bid to protect the environment.[68] This would allow all arguments to be framed as rights issues to be decided upon by the courts.

Unfriendly court processes and procedures

The courts themselves are not set up to create or inspire social change, as they are rigid, and not user-friendly. This is based on the nature of the claims that can be made in courts of law, and the superior way in which the judiciary behaves and acts. The courts have a number of rules and ways of framing cases that are rigid, for example filing plaints or applications in a particular way, which usually requires the use of lawyers, thus limiting many who would want access but lack the necessary resources. The decisions and orders are also made in abstract terms that are not necessarily easy to interpret and make use of by the persons for whom they are meant. This implies that even positive decisions may not be understood and may not be implemented because of the language used in the judgment. For African Common Law countries, this challenge is further exacerbated by the low levels of literacy in many of the countries, and the disconnect between the judiciary and the more acceptable and familiar forms of justice, since the western model judiciary was simply imposed as part of the colonial system.[69]

This argument can in part be met with the response that PIL is inherently designed to be easier, and court processes are usually simplified to enable it.

64 Handler (n 21 above) 33.

65 Scheingold (n 29 above) 3-10.

66 For example article 45 of Uganda's Constitution; article 19 of Kenya's Constitution; and section 39 of the Constitution of South Africa.

67 Constitutional case No. 2 of 1997.

68 *Sunil Batra v Delhi Administration* AIR 1978 SC 1675, (right to a healthy life under the right to life) and in *Maneka Gandhi v Union of India* 1978 AIR 597, 1978 SCR (2) 621 (right to dignity under the right to life).

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

Social movements also employ cause lawyers who understand the court processes and practices, and thus are able to utilise the court system and to ensure implementation such that the judgments have meaning for those who may not easily appreciate the court decisions and what they mean.[70] This argument would, however, be weak for the African context, as there are very few specialised lawyers focusing on PIL.[71]

Litigation deflects social movement energies

Strategic litigation is an elitist strategy, which usually requires all available efforts and resources to be focused on it and alternative actions or strategies to be neglected.[72] All the planning goes into litigation and people's hopes are raised, waiting for an answer from the courts. Even when there is a win, the door to more engagement and advocacy may be closed and thus no real social change is effected. Ultimately, the social movement has been weakened.[73] It is also usually spearheaded by professionals and may fail to accurately and holistically reflect the views of the affected groups.[74]

The response to these criticisms has been to point out that litigation *per se* is a form of social mobilisation. Having elites in the movement is not necessarily a problem but rather an advantage as they convert social concerns into claims that can stand the constitutional test,[75] and they are also people with greater social influence and authority.[76] On the issue of draining important resources, Handler considers the ability of litigation to enhance the image of the movement, attract influential members and leaders, and even lead to the mobilisation of resources from other persons or groups.[77]

Therefore, strategic litigation remains a recognised and important avenue for creating social change. The arguments against it are largely valid, but as Cummings and Rhode observe, just because strategic litigation has these shortcomings does not imply that political mobilisation as an alternative is free from the same defects.[78] In this regard, Hunter recommends that the choice to use litigation or other processes depends on time and opportunity, and so a prescriptive approach must be avoided.[79] For the case of Common Law Africa

70 See for example the work of Scheingold & Sarat in A Sarat & S Scheingold, eds Cause lawyering and the state in a global era 2001; A Sarat & S Scheingold *The cultural lives of cause lawyers* (2008).

71 Oloka-Onyango (n 17 above) 180.

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

73 Scheingold (n 29 above) 3-10.

74 Gloppen, n 27 above.

75 D NeJaime 'Constitutional change, courts and social movements' (2012) 111 *Michigan Law Review* 897.

76 JM Balkin *Constitutional redemption: Political faith in an unjust world* (2011) 182.

77 Handler (n 21 above) 209

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

79 N Hunter 'Lawyering for social justice' (1997) 72 *New York University Law Review* 1009, 1017.

however, the options may not be as neatly available as they are in the context of the USA and those of other developed countries due to the difference in history and the differences in how people perceive courts in a country with legal pluralism and limited democracy. Therefore in such cases, the inability of courts to create social change may not be inherent but rather as a result of the prevailing political, social and economic conditions which causes courts to be out of touch with the realities on the ground for the people.

1.4 The power of strategic litigation to spur social change on LGB issues

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

Strategic litigation has been said to be the best, if not the only strategy, to achieve social change in circumstances of active homophobia and hostility.[80] The reasons for this opinion are:

Courts have the power to nullify laws passed by the legislature

This argument was already made in support of using the courts generally to create social change. However, in light of existing conditions of homophobia, the courts' powers to nullify statutes become even more important in the protection of the rights of LGB persons. Protection of minorities in a democracy is usually done through incorporating a Bill of Rights in the Constitution, thus making it part of the supreme law, and subjecting all other laws to it. The judiciary, particularly the higher courts, are given powers to interpret the Bill of Rights, and in this regard subject all other laws and actions to the standards set out in the Constitution. Courts are constitutionally bound to protect minorities[81] and so, even if a statute is popular, once it violates the rights of minorities, the courts have an obligation to nullify such a statute. This is why strategic litigation is said to be a great avenue through which to enforce the rights of disadvantaged and marginalised persons.[82]

80 See generally, E Zackin 'Popular constitutionalism's hard when you're not very popular: Why the ACLU turned to courts' (2008) 42 *Law & Society Review* 367–95. Handler (n 21 above) 22.

81 Ely (n 36 above) 153.

82 See for example S Deva 'Public interest litigation in India: A critical review' (2009) 1 *Civil*

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

Even if they may not want to, courts are bound to receive, hear and decide LGB cases. They may delay the case, but ultimately it has to be decided. For example, the Ugandan case of *Jjuuko Adrian v Attorney General*[83] spent eight years in court (2009-2016) before being decided, which was a much longer period than the average period that constitutional cases spend in court, even in a country with a big case backlog problem. The case concerned access of minorities, including LGB persons, to the Equal Opportunities Commission. One would not be faulted for thinking that the subject matter of the case was one of the reasons why the judgment was not given upon its first hearing in 2010, and the case had to be heard again six years later in 2016.[84] Also, such cases must be decided on constitutional grounds and in situations where the constitution is clear, there may be very little for even the most homophobic judge to use to fail to apply the constitution as it is. This explains why many LGB cases have been successful in the Common Law African countries under consideration even with the high levels of homophobia.

Court action gives legitimacy to community mobilisation and organising

In situations of homophobia, court action may be the only legitimate way of organising and mobilising, as many other actions may be illegal or put LGB persons at far greater risk of being harmed. In Uganda, for example, organising strategy meetings or group meetings freely would not be easy without a case going on. Whereas no single meeting to discuss a case has been stopped, at least nine events organised for and/or by LGB persons were stopped in the period between 2007 and 2019.[85] In Botswana and Kenya, LGB groups were denied registration and thus the freedom to operate before the court decisions,[86] however, no single court hearing has been stopped, or people turned away. This is therefore an important power that can give legality to the activities of groups that are mobilizing for realisation of LGB rights.

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

Courts are bound under the Constitution to protect all persons using constitutional principles.[87] This appeals more to unpopular and marginalised

Justice Quarterly 19-40, 33-37.

83 Constitutional Petition No. 1 of 2009.

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

85 One of the latest events to be closed down was the IDAHOBIT celebrations at Sexual Minorities Uganda offices on 17 May 2018. See 'Minister Lokodo halts Uganda's 2018 IDAHOBIT event' *Kuchu Times* 17 May 2018 https://www.kuchutimes.com/2018/05/minister-lokodo-halts-ugandas-2018-idahobit-event (accessed 19 August 2018).

86 See *Attorney General v Thuto Ramogge & 19 Others* (2014) CACGB-128-14 (*LEGABIBO Registration* case)); *NGO Coordination Board v EG & 5 others*, (*NGLHRC Registration* case).

87 Ely (n 36 above).

groups that may not be able to appeal to public opinion.[88] Indeed, in many cases, there may be no option of engaging the populist bodies.[89] In many Common Law African countries where homophobia is rife, LGB persons have only been able to have their rights recognised and protected through the judiciary and not any of the other state organs. This is not by choice, but rather because that was the only option left as the other bodies turned them away, or could not even be accessed.[90] In Uganda, for example, soon after the first court decision upholding the rights of LGBT persons to privacy and dignity,[91] a member of the ruling party tabled the Anti-homosexuality Bill proposing severe curtailment to LGB rights.[92] The Bill was widely supported by Members of Parliament and by members of cabinet. The judiciary was thus the only option of the three organs of state left for the LGB groups to oppose the Bill, which they eventually made use of with success.[93] The judiciary was also the only option available to LEGABIBO in Botswana and to the National Gay and Lesbian Human Rights Commission of Kenya (NGLHRC) to ensure that these organisations could finally be registered.[94]

Courts are independent and are not bound by majority decisions and opinions

The reason why judges are generally not elected and have security of tenure is to ensure the independence of the judiciary. As such they are generally not afraid of losing their positions when they make unpopular decisions, and so they are ideally not bound by popular opinion, or by executive action. Although courts do indeed take cognisance of public opinion,[95] and sometimes are swayed by it, they are not bound by it.[96] Courts have for example ruled in favour of LGB persons in all of the Common Law African countries under study, and there have been no direct repercussions. As such they are in a good position to make positive judgments that can influence social change.

1.5 Inhibitions of strategic litigation as a catalyst for social change on LGB issues

Despite the clear advantages of the judiciary, the previously identified challenges of using strategic litigation apply with even greater force when it

88 Zackin, n 80 above, 9.

89 N Hunter 'Lawyering for social justice' (1997) 72 *New York University Law Review* 1009, 1017.

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

91 *Victor Mukasa & Yvonne Oyo v Attorney General* (2008) AHRLR 248.

92 The Anti-Homosexuality Bill, 2009 originally proposed among others the death penalty for 'aggravated homosexuality' which was defined to include repeat offenders.

93 See generally, A Jjuuko, n 90 above.

94 *LEGABIBO Registration case* (n 86 above); *NGLHRC Registration case* (n 86 above).

95 For example in the South African case of *S v Makwanyane & Anor* 1995 3 SA 391 (CC), the Constitutional Court recognised that public opinion was in favour of the death penalty.

96 Above. The court nevertheless ruled contrary to public opinion.

comes to the pursuit of LGB rights in a situation of homophobia, and as such, merit further discussion.

Illegitimacy of courts

The issue of illegitimacy of courts frequently arises in situations of unpopular decisions that go against general public opinion. This is because people may question where the courts get the power to make decisions that are against popular opinion. It is then that issues such as corruption in the judiciary, the mode of appointment of judges, and the qualifications and past records of judges come up. In Common Law African countries where homosexuality is regarded as taboo, this issue raises its head all the time. Instead of positive change, what is commonly seen is backlash against the courts and LGB persons. So, this is a real concern. Indeed, Stoddard, a key actor in the struggle for LGB rights in the USA, noted that the US Supreme Court's decisions in such unpopular cases are usually seen as 'illegitimate, high-handed, and undemocratic – another act of arrogance by the nine philosopher-kings sitting on the Court.'[97] Indeed, to avoid such accusations, many times the courts decide to steer clear of controversial issues. For example, in the case of *Prof. J Oloka-Onyango & 9 Others v Attorney General* (*Anti-Homosexuality Act* case)[98] in Uganda, the courts steered away from the question of the constitutionality of the provisions of the law and opted to decide the case on the issue of quorum. Therefore, it might be better to lobby the popular bodies than resort to 'illegitimate' courts. As Stoddard advises, there is a need for the LGB community to engage in one-on-one mobilisation and engagement with those who can create change within the executive and the legislature if meaningful social change is to happen.[99] They can also engage in the political process by giving block support to politicians who support their interests.[100]

Inability of courts to enforce their own decisions

The courts are unable to enforce their own decisions, more so when the legislature and the executive are against such decisions, and in situations of homophobia, decisions on LGB rights are most likely not to be enforced. This is because the courts neither have their own money or the power to enforce their decisions. They therefore have to rely on the executive or the legislature to implement their decisions. This means that in situations where the above two organs are unwilling to act, the courts' decisions will largely go unenforced and they will not have much recourse, with the exception of complaints or further orders, which may also go unheeded. However, it is important to note that courts have other mechanisms such as contempt of court proceedings, and imposing criminal sanctions upon those who fail to heed their orders.[101]

97 Stoddard (n 13 above) 977.

98 n 61 above.

99 Stoddard (n 13 above) 966, 977.

100 See generally M Tushnet *Taking the Constitution away from the courts* (1999).

101 M Langford *et al* 'Introduction: From jurisprudence to compliance' in M Langford *et al*

These may to some extent be applied when the legislature or the executive fail to act, and the ability and willingness of the courts to use these procedures would ensure that their decisions are respected and enforced even when the legislature and the executive are reluctant to do so. In the USA, when there was backlash and resistance after the Supreme Court's decision in the *Brown* case which declared segregation of schools on the basis of race unconstitutional,[102] the Court issued further orders, which required compliance with its orders 'with all deliberate speed.'[103] The Court explained what the schools had to do to comply as well as what the government had to do, and required the state to report back, therefore leaving no space for non-action. This implies that courts may in certain circumstances be able to ensure enforcement of their judgments using the powers granted to them by the constitutions.[104]

Unsuccessful cases may completely block the way for change

Judges will sometimes decide cases in line with public opinion.[105] Activists, working on unpopular issues therefore face a real risk of losing cases at the highest levels and thus permanently, or for some time closing the way through unfavourable precedents. An example is the case of *Kasha Jacqueline Nabagesera & 3 Others v The Attorney General and Hon. Rev. Fr Simon Lokodo* (*Lokodo* case) in Uganda, where the High Court extended the criminal prohibition of sodomy to apply to all persons who do actions that are seen to be 'aiding and abetting' those engaging in acts of sodomy.[106] This decision has been relied on by the High Court again to find that the refusal to register Sexual Minorities Uganda as a company by the URSB was justified by the constitutional prohibition of same-sex marriage and by the criminalisation of same-sex relations under section 145 of the Penal Code.[107] In Kenya, the High Court ruled that anal examinations were constitutional,[108] and this was a bad precedent that was only saved by the Court of Appeal overturning it on appeal. [109] Although the rest of the decisions are being appealed, and can thus be overturned, they are currently the law in these countries and so the courts below, which are actually the magistrates' courts where criminal trials of LGB people take place, are bound to follow them. These are bad precedents that change the law for the worse. This is therefore negative rather than positive change.

(eds) *Social rights judgments and the politics of compliance: Making it stick* (2017) 3-5.

102 n 60 above.

103 *Brown II case,* n 60 above.

104 Langford *et al* (n 101 above).

105 Rosenberg (n 5 above).

106 High Court Miscellaneous Cause No. 33 of 2012.

107 *Frank Mugisha, Dennis Wamala & Ssenfuka Warry Joanita v Uganda Registration Services Bureau*, Miscellaneous case No. 96 of 2016.

108 *COL & GMN v Resident Magistrate Kwale Court & 4 Others* Civil Appeal 56 of 2016 (2018) e KLR (*COL* case).

109 Above.

Lack of sufficient judicial independence

In the context of Common Law Africa, judicial independence from the executive and the legislature is a real issue. Judges are appointed by the executive and approved by the legislature. Furthermore, the executive usually attacks courts when they make decisions that are not in line with what the executive wanted, and legislatures have passed legislation reversing court decisions. In such a situation, decisions that may greatly alienate the executive and the legislature, and also greatly divert from public opinion, may not be delivered.[110] LGB issues are among such issues. This can perhaps explain why litigation for recognition of same-sex marriages is yet to be undertaken among the selected African countries with the exception of South Africa, where they were legalised through court action,[111] and eventually through the legislature. The lesson from South Africa also shows that running ahead of public opinion may not lead to much social change as the courts have to be seen to be in touch with reality.[112]

Backlash

Backlash becomes a real concern in situations of homophobia. Instead of creating positive social change, successful court cases will simply spur the community to protest and challenge the courts, harm the activists or take other drastic actions to reverse the victories. This is the backlash thesis as elaborated by scholars like Klarman[113] and Rosenberg.[114] In the USA, the victory in the *Brown* case, which declared segregation of schools on the basis of race unconstitutional, was met with strong backslash with active resistance from both state governments and citizens.[115] On LGB rights, the case of *Lawrence v Texas,* which decriminalised sodomy, was also not received well.[116] On same-sex marriages, all the important cases between 1993 and 2003 were met with backlash in the form of legislative amendments and electoral upsets.[117] In Uganda, the victory in the *Victor Mukasa* case contributed to the introduction of the repressive Anti-Homosexuality Act,[118] and the victory in the *Anti-Homosexuality Act* case saw an increase in violations against LGBT persons.[119] Backlash is, therefore, a real concern and threat.

110 The *Anti-Homosexuality Act* case is an example, as is *Human Rights Awareness and Promotion Forum v Attorney General of Uganda,* EACJ Reference No. 6 of 2014.

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

112 A Klarsfeld (ed) *International handbook on diversity management at work: Country perspectives on diversity and equal treatment* (2010) 259.

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

114 Rosenberg (n 5 above) 339-429.

115 See Klarman (n 113 above) 385, 441-442; MJ Klarman 'Brown and Lawrence (and Goodridge)' (2005) 104 *Michigan Law Review* 431-89, 482.

116 Klarman (2005), above.

117 Rosenberg (n 5 above).

118 *Lawrence v Texas*, 539 US 558

119 See generally, The Consortium on Monitoring Violations Based on Sex Determination,

Court action deflecting movement energies

When litigation becomes the main strategy to achieve social change in situations of homophobia, it deflects social movements' energies as all efforts are geared towards the cases, and it stifles other approaches. The movement is taken over by elites, usually lawyers and civil society organisations, and the whole movement comes to be defined through litigation[120] ignoring other more radical ways of social mobilisation.[121] Although strategic litigation is litigation plus other strategies, all the other strategies tend to come in to support litigation and not the other way around. In Uganda, litigation has come to dominate the strategy of the movement.[122] In South Africa, after winning victories through litigation, the fight for equality largely ran aground,[123] while in Kenya, litigation now seems to be the leading strategy. One of the reasons why litigation becomes the main strategy is because it is safer since one is legitimately engaging with the state, it is less aggressive and thus can be tolerated by the state and it is also highly visible, which works to raise awareness of the issues litigated upon.

1.6 What would social change look like in respect of LGB rights?

To measure social change regarding LGB rights, one does not only consider legal change, but also changes in the political, social and economic conditions of LGB persons in an approach that differs only slightly from Goodwin's definition of social change.[124] Specifically for LGB rights, Kretz has identified seven different stages that a country has to go through to be said to have achieved significant social change. These are: 'total marginalization', where there are bans on advocacy and visibility of LGB persons; then 'criminalization of status and behaviour', which makes both the sexual act and the LGB identity criminal acts; then 'decriminalization' which is when the criminal laws are repealed; then 'codification of Anti-Discrimination laws,' where discrimination is prohibited in the laws; then 'establishment of positive rights' which is about accessing rights and benefits that are given to other persons in

Sexual Orientation and Gender Identity 'The Uganda report of violations based on sexual orientation and gender identity' (2014) available at https://hrapf.org/index.php/resources/violation-reports/48-uganda-violations-report-october-2014/file (accessed 3 March 2018).

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

121 M Kessler 'Legal mobilization for social reform: Power and the politics of agenda setting' (1990) 24 *Law & Society Review* 121, 137-38; Handler (n 21 above) 25-26; Tushnet (n 100 above), 146.

122 A Jjuuko, n 90 above.

123 As above.

124 Goodwin focuses on the political, economic and social changes. (Goodwin, n 2 above, 2.) This study however, being concerned with the law, also includes changes in the law as a separate category.

the same situation, for example married couples; then 'full legal equality' which is a situation where there is not more legal distinction between gay persons and others; and finally, 'cultural integration' which requires widespread social acceptance of LGB persons: significant social change.[125] Therefore, positive legal change would be said to occur if the country in question was moving from the first step to the seventh, and magnitude would be determined by the period within which the changes occur.

1.7 Conclusion

Strategic litigation is an important avenue for seeking social change. It holds great potential for the realisation of LGB rights through stimulating and influencing social change. This potential lies in the fact that courts are bound to hear cases and they have indeed done so, but they also seem to be the most readily available avenue to engage on LGB issues. More so, there have been huge gains from the courts in Common Law Africa and in regions elsewhere in the world. However, although strategic litigation holds considerable potential to realise social change in favour of LGB persons, current conditions in the selected Common Law African countries need to be taken into deeper consideration as the strategy is employed. The selected African Common Law countries have high levels of homophobia, and in such situations, courts cannot function optimally as they lack the support of the executive, the legislature, and the general public. They may thus feel constrained to rule in line with prevailing opinion, but even when they affirm the rights of LGB persons, these rights may never be realised. The judgments may attract backlash against the courts and the LGB community, as the situation in Common Law Africa already shows. Therefore, employing strategic litigation in the current circumstances in Common Law Africa with a view to influencing social change has to be carefully considered, with each case and its potential impact weighed independently, as court action might still be the only meaningful way to influence social change in situations of active homophobia.

125 A Kretz 'From 'kill the gays' to 'kill the gay rights movement': The future of homosexuality legislation in Africa' (2013) 11 *Northwestern Journal of International Human Rights* 207, 211-216.

TWO

The Nature of LGB Litigation in the Selected Common Law African Countries

2.1 Introduction

Litigation in favour of lesbian, gay and bisexual (LGB) persons has been going on in the selected Common Law African countries in different forms in the past twenty-three years. Starting in South Africa in 1997, it spread to Botswana, Uganda, Kenya, and Nigeria in that order and by the end of 2019, each of these countries had at least one courtroom victory. This chapter analyses the different LGB strategic litigation cases in these countries and the trends that can be discerned therefrom over the past twenty-two years. It starts with an analysis of the number, nature and outcomes of these cases, and then discusses the decisions made in the cases in more detail. The cases are classified on the basis of their subject matter, that is, cases that challenge discriminatory laws; those that challenge the actions of state actors and those that challenge the conduct of non-state actors. Cases challenging discriminatory laws are by far the most common, and accordingly, they have been further subdivided basing on the nature of the laws being challenged.

2.2 Number of LGB strategic cases

Not all cases that have been undertaken on LGB issues in the selected countries are discussed in this chapter. This is for a number of reasons, the first being that only strategic cases are considered. For a case to be regarded as strategic for purposes of this book, it has to have been filed as part of a defined, organised and long-term strategy, and must be backed up by other legal and non-legal approaches, with the aim of creating positive change in laws, and in the lives of a specific group of people or the general public.[1] However, where cases were filed by persons who are not part of the organised LGB movement and who seek their own private remedies, it can be regarded as a strategic case, provided it was later joined or actively supported by the organised LGB groups and thus incorporated into the long term strategy. Secondly, the book only focuses on cases that were deliberately brought before domestic courts of record and before

1 See definition in Chapter 1, section 1.3, above.

international courts by members of the LGB community or their allies, or cases where the LGB community was forced to defend a case in court that challenged their legal status. Thirdly, in terms of timeframes, only cases filed in courts of law by the end of 2019 are considered. A case is filed when it has been received by the court and allocated a case number, and it does not matter whether it was decided or not. On the other hand, a case is regarded as completed when a court has made the final decision, regardless of whether an appeal is pending or not, or when it is withdrawn. For on-going appeals, the decision of the lower court is what is considered as the 'case,' and the fact that an appeal is on-going is noted. Cases in which appeals were finalised, count as one case, and it is the decision of the final appellate court that counts. Cases which were heard and decided together are also counted as one case.

Using the above criteria, the number of LGB strategic litigation cases in the selected Common Law African countries for the period 2007-2019 are as follows:

Table 1: Number of LGB strategic cases in Common Law Africa| by the end of 2019 and their outcomes

Country	Filed cases	Completed cases	Successful cases	Unsuccessful cases	Withdrawn cases	Pending cases	Cases with ongoing appeals
South Africa	12	12	11	1	0	0	1
Uganda	8	8	4	4	0	0	2
Nigeria	4	4	1	2	1	0	2
Botswana	3	3	2	1	0	0	1
Kenya	3	3	2	1	0	0	2
Total	**30**	**30**	**20**	**9**	**1**	**0**	**8**

In terms of the total number of cases filed, South Africa stands out with 12 cases out of the total 30 cases, accounting for 40% of all cases filed. Uganda follows with 8 (approximately 26.7%), then Nigeria with 4 (approximately 13.3% each) and then Botswana and Kenya with 3 cases each (approximately 10%). There are two ongoing appeals in Kenya, Nigeria and Uganda, and one in Botswana and South Africa.

Out of the 30 completed cases on LGB rights, 20 have been successful and 9 have been unsuccessful, and one was withdrawn.

In terms of courtroom successes, South Africa has a 92% success rate (with 11 out of 12 cases), Botswana and Kenya 66% (with 2 out of 3), Uganda 50% (with 4 out of 8 cases), and Nigeria 25% (with 1 out of 4 cases). This shows that at the level of courtroom success, there have been more successes in South Africa, followed by Botswana and Kenya, then Uganda, and finally Nigeria.

Therefore, LGB strategic litigation in the selected countries has to a large extent been successful as far as courtroom victories are concerned.

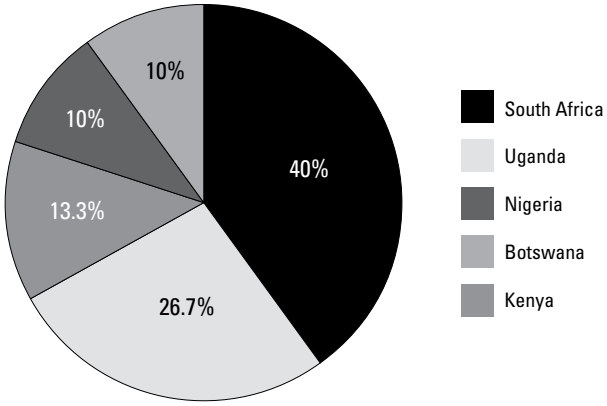

Figure 1: Distribution of strategic litigation cases per country

2.3 Nature of cases and their outcomes

The strategic litigation cases so far filed in the five countries can be categorised into: cases challenging discriminatory laws; cases challenging actions of state officials; and those challenging actions of non-state actors. Of the 30 cases, those challenging discriminatory laws are the majority at 19, followed by those challenging actions of state officials at eight, and finally those challenging actions of non-state actors at three as shown in the table below:

Table 2: Completed LGB cases in Common Law Africa categorised

Categories of cases	Number of filed cases
Challenging discriminatory laws	19
Challenging actions of state officials	8
Challenging actions of non-state actors	3
Total	**30**

2.3.1 Cases challenging discriminatory laws

Challenging discriminatory laws has been the major pre-occupation of LGB activists in the selected countries. Out of the 30 completed cases during this period, 19 challenge discriminatory statutes, regulations or the common law. The majority of these cases (15) have been successful, two were lost on the merits, one was dismissed on grounds of mootness, and one withdrawn. These cases shall be categorised in accordance with the nature of the laws that they challenged, as follows:

Criminalisation of consensual same-sex relations

Decriminalisation of same-sex relations has been the most significant aim of litigation on LGB rights in the past 23 years in the five selected countries. Out of the 19 cases challenging discriminatory laws, four (21%) concern this issue. Decriminalisation of same-sex relations has been the subject of litigation in Botswana, Kenya, and South Africa. In Botswana and Kenya, two such cases have been filed so far, while one has been filed in South Africa. All the cases have been finalised. Two of them (in South Africa and Botswana) were successful, while three were unsuccessful (two in Kenya and one in Botswana), with three pending appeals (two in Kenya and one in Botswana).

The latest successful case is *Letsweletse Moshidiemang v Attorney General*.[2] (*Botswana Decriminalisation* case),[3] which was decided by the High Court of Botswana on 11 June 2019. The Court found that sections 164(1) and (c) of the Penal Code which criminalised having 'carnal knowledge against the order of nature' and attempts to have 'carnal knowledge against the order of nature' respectively were unconstitutional. The Court based on the rights to privacy, liberty, dignity and freedom from non-discrimination as protected in the Botswana Constitution to hold so. Liberty was defined as going beyond physical restrictions to the law interfering in matters that it should not, while dignity went to the root of the person's being. The Court regarded sexual orientation as something that went to the most intimate aspects of a persons' life and that criminalisation of same-sex relations affected enjoyment of basic rights. The Court stated that the grounds for non-discrimination within the Constitution were not closed, and declared that sex included 'sexual orientation'. Inclusion of sexual orientation among the grounds for protection against discrimination in the Employment Act was used as an example of how this is an acceptable extension. Discussing the earlier case of *Kanane v The State* (The *Kanane* case)[4] the Court stated that the time had now come to decriminalise same-sex relations.[5] The Court also declared that it was not in public interest to criminalise consensual same-sex relations. The Court deleted the words 'in private' from section 167 which criminalised indecency, as they interfered with the privacy, dignity and the right to equality and non-discrimination of LGB persons. This decision was appealed by the Attorney General and had not been decided by the end of 2019.[6]

2 *Letsweletse Moshidiemang v Attorney General*, MAHGB-000591-61.

3 Penal Code of Botswana, Chapter 08.01.

4 [2003] 2 BLR 67 (CA). For a complete discussion of how the Court of Appeal in that case dealt with this issue, see generally EK Quansah 'Same-sex relationships in Botswana: Current perspectives and future prospects' (2004) 4 *African Human Rights Law Journal* 201-217.

5 *Kanane* case above, para 171.

6 A Keetshabe 'Press statement by the Attorney General regarding the High Court Decision of Letsweletse Motshidiemang vs Attorney General (Legabibo – V) Mahgb – 000591 – 16' https://www.mmegi.bw/index.php?aid=81659&dir=2019/july/05 (accessed 19 October 2019).

This was only the second time that a court had decriminalised same-sex relations in Common Law Africa, the first time being in the South African case of *National Coalition for Gay and Lesbian Equality v Minister of Justice* (*Sodomy* case).[7] In that case, which was decided on 9 October 1998, the National Coalition for Gay and Lesbian Equality (NCGLE) challenged the common law offence of commission of an unnatural sexual act, section 20A of the Sexual Offences Act which criminalised sexual acts between men in public, as well as the reference to the offence of sodomy in the schedules to the Criminal Procedure Act, 1977 and the Security Officers' Act, 1987 as unconstitutional. This was on the basis that they violated the rights to equality, dignity and privacy as protected under the South African Constitution. The High Court of the Witwatersrand had held that the impugned provisions were unconstitutional because they unfairly discriminated against persons on the basis of both gender and sex.[8] The Constitutional Court unanimously confirmed the judgment of the High Court. The offences were declared invalid with immediate effect. On non-discrimination, in a majority judgment written by Ackermann J, the Court based its decision primarily on the non-discrimination clause in the South African Constitution, which listed 'sexual orientation' among grounds upon which people cannot be discriminated against.[9] On the right to dignity, the Court stated that criminalisation makes every LGB person a criminal and thus validates marginalisation and discrimination even if the provision was not actively enforced. The Court stated that the value and worth of all individual members of society was at the centre of the right to dignity.[10] On the right to privacy, the Court was emphatic that criminalisation was an intrusion into the most private aspects of human life: consensual sexual relationships.[11] The Court did not find a justification for the limitation.[12] In a separate opinion, Sachs J linked both the right to dignity and the right to privacy to the right to equality.[13]

One month before the *Botswana Decriminalisation case* was decided on 24 May 2019, the High Court of Kenya delivered its decision in the combined case of *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)* (*Kenya Decriminalisation* case).[14] The petitions challenged the constitutionality of sections 162(a) and (c) as well as section 165 of the Penal Code in as far as they criminalise consensual same-sex relations among adults. The Court held that the laws were not

7 1998 (6) BCLR 726 (W); 1999 1 SA 6 (CC).
8 *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* 1998 (6) BCLR 726 (W).
9 The *Sodomy* case (n 7 above) paras 20-25.
10 n 7 above, para 28.
11 Above, para 32.
12 Above, para 57.
13 Above, paras 108-138.
14 Consolidated petitions 50 of 2013 and 234 of 2016.

discriminatory as they did not apply only to LGB persons, and that the petitioners had not proved that the laws violate their rights. It was further held that the rights to privacy and dignity were not absolute and could be limited, and therefore these rights have to be read in line with article 45 of the Constitution, which restricted marriage to men and women.

The second lost case was the *Kanane* case, which was decided by the Botswana Court of Appeal on 30 July 2003. It was the first strategic case on LGB rights to be brought before the Botswana courts. It arose out of the arrest of Utjiwa Kanane, who was accused of having anal sex with another man. He was convicted by the High Court. The Court of Appeal held that section 164 and section 167 of the Penal Code were not unconstitutional. According to the Court, the Constitution of Botswana did not provide explicit protection against discrimination on the basis of sexual orientation, and prevailing public opinion in the country favoured the continued criminalisation of consensual same-sex acts. The Court distinguished the *Sodomy* case[15] in South Africa, arguing that the South African Constitution expressly prohibited discrimination on the basis of sexual orientation, while that of Botswana did not. On the issue of public opinion, the Court relied on Parliament's recent adoption of the Penal Code Amendment Act No. 5 of 1998 with the sodomy provisions, and recently expressed majority sentiments in Botswana, which were in favour of criminalisation.

Therefore, same-sex relations have been decriminalised in two African Common Law countries through court action, while in one other country, similar cases have failed. Botswana's courts have ruled twice on the matter, with an adverse decision initially and a progressive decision eventually.

Expanded criminalisation of consensual same-sex relations and 'promotion of homosexuality'

Expanded criminalisation of consensual same-sex relations is a term used to refer to the introduction of new laws criminalising consensual same-sex relations and any other actions supporting LGB persons without repealing the existing criminal laws.[16] Among all the Common Law African countries, only Nigeria and Uganda have experienced expanded criminalisation, and both have brought cases to challenge it, albeit with different results. There are two cases concerning expanded criminalisation in both countries.

The earliest case in this category and the only one that is successful is Uganda's *Prof. J Oloka-Onyango & 9 Others v Attorney General* (*Anti-Homosexuality*

15 n 7 above. This case had been decided five years prior to this decision and it was ground-breaking.

16 For a deeper analysis of this term and how it has manifested so far see A Jjuuko & M Tabengwa 'Expanded criminalisation of consensual same sex relations in Africa: Contextualizing the recent developments' in N Nicol et al (eds) 'Envisioning global LGBT human rights: (Neo)colonialism, neoliberalism, resistance and hope' 2018, 63, 65-69.

Act case),[17] which was decided by the Constitutional Court of Uganda on 1 August 2014. In this case, a group of persons led by Makerere University Constitutional Law professor, J Oloka-Onyango, challenged the constitutionality of the Anti-Homosexuality Act 2014 (AHA). The suit was based first on the ground that the law was passed without the constitutionally mandated quorum in parliament, and then on grounds that the provisions of the Act violated a number of constitutionally guaranteed rights, including the rights to equality, privacy, and freedom from inhuman and degrading treatment. The Court declared the AHA unconstitutional on the grounds that the Act was passed without quorum and thus in violation of Article 88 of the Constitution which requires quorum to be as provided for under the Rules of Procedure made under Article 94 of the Constitution. The Court relied on affidavit evidence to find that, on a balance of probabilities, there was no quorum in the House at the time the vote on the Bill was taken. The Speaker of Parliament was found to have acted illegally and unconstitutionally in failing to ascertain quorum when the matter was brought to her attention. The Court held that there was no need to consider the other set of grounds, as the issue of quorum was sufficient to dispose of the matter.

The other cases were unsuccessful.

On 27 September 2016, the East African Court of Justice (EACJ) rendered its decision in Uganda's *Human Rights Awareness and Promotion Forum (HRAPF) v Attorney General of Uganda and the Secretariat of the Joint United Nations Programme on HIV/AIDS (UNAIDS)* (*HRAPF* case).[18] The case challenged certain provisions of the Anti-Homosexuality Act and the passing of that Act into law on the grounds that these were contrary to the good governance and rule of law principles of the Treaty for the Establishment of the East African Community. The Anti-Homosexuality Act (AHA) went beyond the existing Penal Code criminalisation of 'carnal knowledge against the order of nature' to introduce the new offence of 'homosexuality', which was defined to go beyond sexual intercourse to actions such as touching with intent to commit homosexuality.[19] It also criminalised 'aiding and abetting' homosexuality,[20] and the 'promotion' of homosexuality, which included any actions done to support LGBT persons, including funding and publication.[21] The case was instituted at the same time as the *Anti-Homosexuality Act* case and the Constitutional Court of Uganda nullified the Act before the EACJ heard this case. The EACJ thus decided that the case was moot as the AHA had been nullified by the Constitutional Court of Uganda by the time the

17 Constitutional Petition No. 008 of 2014 (Constitutional Court of Uganda).
18 Reference 6 of 2014 (East African Court of Justice).
19 Anti-Homosexuality Act 2014, section 2.
20 Above, section 7.
21 Above, section 13.

case was decided. The Court considered the public interest exception to the general rule against deciding moot cases and found that the evidence on record was not sufficient to 'establish the degree of public importance attached to the practice of homosexuality in Uganda.'[22]

The earlier case was the Nigerian case of *Teriah Joseph Ebah v Federal Government of Nigeria* (*Ebah's* case),[23] decided on 22 October 2014. In this case, a Nigerian based in the UK challenged the Same Sex Marriages (Prohibition) Act, 2013 on the basis that it was discriminatory and violated freedom of association and expression. The Act criminalises same sex marriage with a punishment of ten years' imprisonment and also bans LGBT organising. The case was based on the Fundamental Rights (Enforcement Procedure) Rules 2009 (the FREP Rules). The applicant argued that the Act was inconsistent with Nigeria's Constitution, which guarantees freedom from discrimination in section 42(1)(A)&(B) and freedom of association and right to liberty in sections 40 and 35 of the Constitution. He also sought to challenge the Act as violating similar obligations under Articles 2 and 3 of the African Charter on Human and Peoples Rights. The High Court upheld the respondent's preliminary objection and dismissed the suit on the basis that the applicant had no standing to bring the case. The judge held that the applicant could not bring the case on behalf of the "Gay Community in Nigeria" as there was no such community in Nigeria, and the applicant himself did not describe himself as gay. An appeal is still pending.[24]

The last case is a withdrawn case: It is *The Registered Trustees of the Initiative for Equal Rights & 18 0rs vs. The Federal Republic of Nigeria & Anor,*[25] which was filed in the Abuja High Court in 2017. It challenged the Same Sex Marriages (Prohibition Act) 2013 (SSMPA),[26] which prohibited same sex marriages, and went ahead to criminalise organising on LGBT rights. The argument that the Act was unconstitutional as it violated the right to equality and dignity of the person. The case was however withdrawn by activists in order for them to restrategise.[27]

Employment

Two successful cases have been brought concerning employment and both are from South Africa. The latest is *Satchwell v President of the Republic of South Africa and Another* (*Satchwell* case),[28] decided on 25 July 2002. In this case, a lesbian judge who was in a permanent same-sex relationship brought a case challenging the constitutionality of sections 9 and 10 of the Judges'

22 *HRAPF* case (n 18 above) at para 60.
23 Suit FHC/ABJ/CS/197/2014 (*Ebah* case).
24 Skype Interview with Advocate Mike Ebah, 9 September 2019.
25 FHC/L/CS/1179/17.
26 Same-sex Marriage (Prohibition) Act, 2013 (Nigeria).
27 Skype Interview with Advocate Mike Ebah (n 24 above).
28 2004 1 BCLR 1 (CC) (17 March 2003).

Remuneration and Conditions of Employment Act,[29] (the Act), and Regulations 12(2) and 13(2) of the 2002 Regulations to the Act.[30] These provisions only covered 'spouses' and therefore excluded partners of persons in permanent same-sex relationships with reciprocal duties to each other. The Pretoria High Court ruled that the provisions were unconstitutional on the basis that they discriminated against persons on the grounds of sexual orientation.[31] The case came before the Constitutional Court for confirmation, and the Court found that these provisions were indeed discriminatory on the grounds of sexual orientation, which is a protected ground under section 9(3) of the Constitution. It found the discrimination to be unfair, and the respondents did not claim that it was justified.[32] The Court noted that the recognition of only marriage as giving rise to obligations excluded 'many relationships which create similar obligations and have a similar social value.'[33]

The earliest case in this category is the *Langemaat* case,[34] decided on 4 February 1998 by the Pretoria High Court. This case was brought by a female police officer who was in a permanent same-sex relationship with her female partner, whom she wanted to register on the South African Police Medical Scheme. The Chairman of the Scheme had refused to register the partner on the basis of Regulation 30(2)(b) of the South African Police Services Regulations, and Rule 4.2 of the rules made under the Regulations, which defined dependents as legal spouses and children. The Court considered the question as to whether the relationship between the partners created a legal duty to support each other. It concluded that there such a duty where parties undertook mutual obligations to each other and shared a common home and marriage. The Court declared the regulations and rules of the scheme to be unconstitutional and invalid on the basis that they were discriminatory and ordered the chairperson of the scheme to reconsider the decision. The decision has however been criticised for not expressly relying on the constitutional provisions of discrimination on the basis of sexual orientation but rather on Roman-Dutch law.[35]

Parental rights to children and adoption

There are two successful cases on this issue, both from South Africa. The latest case is *J & B v Director-General, Department of Home Affairs, Minister of Home Affairs, and President of the Republic of South Africa*, [36] decided

29 47 of 2001.

30 Government Notice No. R. 894 published in Government Gazette 23564 of 5 July 2002.

31 *Satchwell v President of the Republic of South Africa and Another* 2001 (12) BCLR 1284 (T).

32 Above, para 21, per Madala J.

33 Above, para 24.

34 1998 (3) SA 312 (T).

35 See generally R Louw 'Langemaat v Minister of Safety and Security 1998 (3) SA 312 (T): A gay and lesbian victory but a constitutional travesty' (1999) 15 *South African Journal on Human Rights* 393.

36 (2003) AHRLR 263 (SACC) 28 March 2003.

by the Constitutional Court of South Africa on 28 March 2003. The case was filed by two women in a permanent relationship, who had given birth to twins using sperm from an anonymous donor and the ovum of one of the partners. On registration of the parents however, only the birth mother was registered since section 5 of the Children's Status Act of 1987, which concerns artificial insemination, only recognised children who are born to a married couple. They challenged the provision before the Durban High Court on grounds that it was discriminatory on the basis of marital status as well as sexual orientation. The High Court found the provision to be unconstitutional on the grounds of marital status, 'and probably sexual orientation,' as well as social origin and birth for the case of the children.[37] The case came up to the Constitutional Court for confirmation. The Court held that section 5 of the Children's Status Act[38] was discriminatory on the basis of sexual orientation. It further held that such discrimination was unfair with respect to permanent same-sex life partners and could not be justified. The Court therefore read down the provision by deleting words that restricted recognition to married couples. The Court referred to the *Du Toit & Another v Minister of Welfare and Population Development & Others* (*Du Toit* case),[39] which it considered analogous to the instant one.

The *Du Toit* case[40] was brought by a judge and her partner who had been denied joint adoption and only one of them made the adoptive parent. This was done under the provisions of sections 17(a), 17(c) and 20(1) of the Child Care Act, 74 of 1983 and section 1(2) of the Guardianship Act, 192 of 1993, which provided for the joint adoption and guardianship of children by married persons only. The matter was brought before the Pretoria High Court, which found that the provisions were discriminatory on the grounds of sexual orientation.[41] The Constitutional Court confirmed the High Court's ruling. It found that the provisions were discriminatory on the grounds of sexual orientation as they excluded persons in permanent same-sex relationships and were also in violation of the right to dignity in respect of the first applicant, who was denied parental rights. The Court further held that the denial of adoption rights to persons in stable same-sex relationships was not based on whether or not they were fit to adopt children, but rather on their unmarried status, which was directly based on their sexual orientation.[42] Regarding the right to dignity, the Court found that in respect of the first applicant, the denial of adoption also meant the denial of her rights as a parent solely on

37 *J and Another v Director General, Department of Home Affairs and Others* 2003 (5) BCLR 605 (D).
38 Act No. 82 of 1987.
39 2002 ZACC 20.
40 Above.
41 *Du Toit and Another v Minister of Welfare and Population Development and Others* 2001 (12) BCLR 1225 (T).
42 Above, para 26.

the basis of her sexual orientation, which was demeaning.[43] The Court did not find any reasonable justification for the limitation. It therefore read into the statute words to make it applicable to two persons of the same-sex in a permanent relationship.

Access to justice

Only one case has so far been brought concerning access to justice laws. This is *Adrian Jjuuko v Attorney General* (*Equal Opportunities Commission* case)[44] from Uganda, decided by the Constitutional Court on 10 November 2016. This case was instituted in 2009. It challenged section 15(6)(d) of the Equal Opportunities Commission Act which denied persons who engage in behaviours that are regarded as 'immoral or socially unacceptable' access to the Commission. The Constitutional Court struck out the provision on the ground that it violated the right to a fair hearing. The Court observed that the right to a fair hearing was at the heart of the Equal Opportunities Commission, since this body was established to redress imbalances and ensure equal opportunities for all persons.[45] If the persons mentioned in section 15(6)(d) appeared before the Commission, they would likely be excluded from any form of hearing, which clearly restricts the right to a fair hearing. The Court also found that the provision violated the constitutional provisions on the inherent nature of rights and the right to equality and freedom from discrimination. On discrimination, the Court noted that the provision excluded a group of persons simply on the basis of the fact that they were regarded as 'immoral, harmful and unacceptable'.[46] The Court considered the limitation clause and concluded that the limitation was not acceptable or demonstrably justifiable in a free and democratic society. It therefore nullified the provision.

Estate support for a surviving spouse

There are two successful cases on this issue, both from South Africa. The latest case is *Gory v Kolver NO & Others* (the *Gory* case),[47] decided on 23 November 2006. The deceased and the applicant were in a permanent same-sex relationship with reciprocal duties to each other. The parents of the deceased claimed to be the administrators to his estate. The applicant challenged section 1(1) of the Intestate Succession Act[48] that did not recognise the right of partners in permanent same-sex relationships to inherit automatically, as a spouse would when their partner died without a will, as being discriminatory on the grounds of sexual orientation. The High Court found the exclusion of same-sex persons in permanent relationships to be discriminatory on the grounds of sexual orientation and therefore unconstitutional. The Constitutional Court

43 Above, para 29.
44 Constitutional Petition No. 1 of 2009.
45 Above, line 215-264.
46 Above, line 375.
47 2007 3 BCLR 249 (CC).
48 81 of 1987.

confirmed that the law was unconstitutional as it was discriminatory on the grounds of sexual orientation. To reach this conclusion, the Court built on the earlier cases, which had dealt with the recognition of obligations arising out of same-sex relationships in relation to spouses.[49] There was no justification for the differential treatment of spouses from persons in permanent same-sex relationships as far as intestate succession was concerned. The Court read the words 'or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support' into section 1(1) after the word 'spouse,' wherever it appeared.

The *Gory* case was made after the court had ordered for the legalisation of same-sex marriages in *Minister of Home Affairs and Another v Fourie and Another; and Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* (*Fourie* case)[50] and seven days before the Civil Unions Act became law.[51] The judges therefore had to address the issue of what would happen after same-sex marriages became legal, as at that point, cohabiting unmarried same-sex couples would have far more rights than heterosexual couples similarly situated, which indeed is what happened.[52] The Court concluded that it was up to parliament to remedy this.[53]

The second case is *Du Plessis v Road Accident Fund*,[54] decided by the Supreme Court of Appeal (SCA) on 19 September 2003. In this case, the applicant had been in a permanent same-sex relationship with the deceased, who had taken on the duty to care for him after he (the applicant) had become disabled. They had both bequeathed property to each other. The applicant wanted to claim from the Road Accident Fund for loss of support and funeral costs. However, the Fund argued that Common Law only recognised a spouse and therefore denied him the benefits. The applicant applied to the High Court challenging the Common Law position. The High Court dismissed the application, and denied leave to appeal.[55] The plaintiff applied for leave to appeal before the Supreme Court of Appeal and this was granted. The Supreme Court of Appeal found the Common Law to be out of line with the Constitution, as it discriminated on the basis of sexual orientation. The Court developed the South African Common Law by extending a spouse's action for loss of support in cases of deaths arising out of accidents to persons in permanent same-sex relationships where the partner was owed a contractual duty of support. The Court explored the developments in other countries and found a shift towards recognising obligations arising out of same-sex relationships, which were not

49 *Gory* case n 47 above, para 19.
50 2005 ZACC 19.
51 The Civil Unions Act came into force on 30 November 2006.
52 See P de Vos and J Barnard, *Same-sex marriage, civil unions and domestic partnerships in South Africa: Critical reflections on an ongoing saga* 2007 (124) SALJ 795, 823.
53 n 50 above, paras 30-31.
54 2004 1 SA 359 (SCA).
55 *Du Plessis v Road Accident Fund* (73992/13) [2015] ZAGPPHC 992.

marriages.[56] The Court therefore held that the legal duty of maintenance owed by the deceased to the plaintiff deserved to be protected.[57]

Immigration

The only case on the issue of immigration is the South African case of *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* (the *Immigration* case),[58] decided on 2 December 1999. This was the third case to be brought before the courts on LGB rights, following the *Sodomy* case, and the first applicant was the also the NCGLE. The case challenged the constitutionality of section 25(5) of the Aliens Control Act,[59] which allowed the issuance of an immigration permit to a spouse of a South African citizen or permanent resident but excluded persons in same-sex relationships as they were not regarded as spouses. The Cape of Good Hope High Court found the provisions to be discriminatory on the basis of sexual orientation.[60] The case came before the Constitutional Court, which confirmed the invalidity of the provision, finding it discriminative on the basis of sexual orientation. According to the Court, the word 'spouse' could not be interpreted as including a permanent South African resident who was in a permanent same-sex life partnership with a foreign national. In that regard, the constitutionality of the provision had to be considered in light of the constitutional provisions on non-discrimination. The Court referred to the *Sodomy* case and the analysis that the Court made in that instance. It found that section 25(5) unfairly discriminated against gays and lesbians on the grounds of sexual orientation and marital status. The discrimination was unfair and could not be justified. The Court decided to insert the words 'or partner, in a permanent same-sex life partnership,' after the word 'spouse,' through the technique of 'reading in'.

Same-sex marriages

South Africa is the only country in Common Law Africa with a case concerning same-sex marriages. This is the *Fourie* case.[61] It was decided on 1 December 2005. These were in reality two different cases. The first case was brought by a lesbian couple in a permanent same-sex relationship who contended that the Common Law definition of marriage, which states that marriage was a union of one man with one woman to the exclusion, while it lasts, of all others, was discriminatory on the basis of sexual orientation. The second case was brought by the Gay and Lesbian Equality Project, which challenged section 30(1) of the Marriage Act. This section of the Act provided the marriage formula and

56 Above, para 32.
57 Above, para 33.
58 2000 1 BCLR 39.
59 96 of 1991.
60 *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 1999 (3) BCLR 280.
61 n 51 above.

it was argued that it was discriminatory on the grounds of sexual orientation as it did not cover same-sex couples. In the first case, the Pretoria High Court refused to make the declaration as in its view, marriage in the law was between a man and a woman.[62] The Constitutional Court also denied direct access.[63] The case came before the SCA, which ruled that the Common Law definition of marriage constituted unfair discrimination against same-sex persons.[64] The case came before the Constitutional Court for confirmation. It was at this stage that the second case was joined to the first one. The Constitutional Court found the Common Law definition of marriage and section 30(1) of the Marriage Act[65] to be inconsistent with the equality and dignity provisions of the Constitution in as far as they made no provision for same-sex couples to enjoy the status, entitlements and responsibilities they accord to heterosexual couples. Sachs J, writing the majority judgment, traced the different cases that had recognised obligations arising out of same-sex life partnerships, taking into account the history of discrimination against same-sex persons in South Africa and the need for inclusion, equality and respect for all persons. Exclusion of same-sex couples from the benefits and responsibilities of marriage was a serious matter that needed to be addressed. Religious objections to same-sex marriages were held to be left for religion to address rather than state laws: religions would be free to determine whether to celebrate same-sex marriages or not. The laws were declared invalid with the declaration suspended for 12 months to enable Parliament to address the discrimination as the matter of same-sex marriages was controversial and there were many differing opinions. As such, it was best suited to be addressed by Parliament.

Same-sex marriages cases are not common in Common Law Africa, and even in South Africa, the case was filed as a last resort by a couple that wanted to get married. Same-sex marriage was one of those rights that were thought to be the most difficult to obtain and were thus at the bottom of then law professor Edwin Cameron's bucket list.[66] In Uganda and Kenya, same sex marriages are prohibited – in Uganda expressly in the Constitution, while in Kenya, through restricting marriage to persons of the opposite sex. In Nigeria, the SSMPA prohibits same sex marriages. They are thus not within the purview of current litigation efforts in Common Law Africa.

Cases on laws on age of consent to sexual relations

The issue of differing ages of consent for same-sex persons and heterosexual persons came up in one South African case, *Geldenhuys v National Director of*

62 *Fourie and Another v Minister of Home Affairs and Another (The Lesbian and Gay Equality Project intervening as amicus curiae)*, Case No 17280/02 (2002).
63 *Fourie v Minister of Home Affairs* 2003 (5) SA 301 (CC).
64 *Fourie and Another v Minister of Home Affairs and Another* (232/2003) [2004] ZASCA 132.
65 No. 25 of 1961.
66 See E Cameron 'Sexual orientation and the Constitution: A test case for human rights' (1993) 110 *South African Law Journal* 450.

Public Prosecutions & Others,[67] decided on 26 November 2008. The applicant, who had been convicted of having sexual relations with male children below the age of 19 under sections 14(1)(b) and 14(3)(b) of the Sexual Offences Act,[68] challenged these provisions before the SCA for being unconstitutional as they made a distinction between heterosexual sex and homosexual sex. The provisions criminalised both men and women for having 'unlawful carnal intercourse' with girls under the age of 16 and boys under the age of 19. Despite the fact that the Constitutional Court had invalidated section 20A of the Sexual Offences Act, which concerned same-sex conduct between men under certain circumstances, in the *Sodomy* case, these provisions remained on the law books until they were repealed by the Criminal Law (Sexual Offences and Related Matters) Act,[69] which provided for a single age of consent for both girls and boys in heterosexual as well as homosexual relationships.[70] The case thus concerned convictions that were entered before the above provisions of the Sexual Offences Act were repealed. The Court observed that the different ages of consent show that same-sex relations were still viewed as deviant, disgraceful or being of lesser value, and that is why a higher age of consent was imposed.[71] The distinction was found to be unfair, with no reasonable justification, and the Court declared the provisions invalid effective 27 April 1994, when the Interim Constitution came into force.

South Africa still is the only country with a case on ages of consent, but in this respect it is unique as it was the only country that had differing ages of consent for same-sex relations and relations among persons of the same sex.

Cases challenging discriminatory laws are thus the most common category of cases in the selected countries. This may be because most of the countries are yet to decriminalise consensual same-sex relations. On the other hand, decriminalisation in South Africa paved way for challenging many of the laws that stood in the way of LGB equality in that country.

2.3.2 Cases challenging actions of state officials

Another area where LGB activists have resorted to the courts is in challenging the actions of state officials who violate LGB rights. There were eight such cases by the end of August 2019. Four of these were successful, while four were not. Activists in Uganda lead the way in this area and have brought three out of the eight cases before the courts, while two have been brought in Kenya, two in Nigeria, and one in Botswana.

67 2009 5 BCLR 435 (CC).
68 23 of 1957.
69 Amendment Act 32 of 2007.
70 See section 3 of the Act and the case of *Masiya v Director of Public Prosecutions* [2007] ZACC 9.
71 n 67 above, para 36.

The most recent successful case is the Kenyan case of *COL & Another v Chief Magistrate Ukunda Law Courts & 4 Others* (The *COL* case)[72] decided on 22 March 2018. It dealt with the issue of forced medical examinations – including anal examinations – of persons charged under section 162(a) of the Penal Code of Kenya, which provision criminalises carnal knowledge against the order of nature. The petitioners, who were arrested and charged under section 164 of the Penal Code of Kenya, were ordered to undergo medical examinations including an anal examination and HIV and Hepatitis B tests. Their test results were publicly declared. The High Court of Kenya held that the right against self-incrimination does not exclude the taking of samples from persons for the purposes of criminal investigations, and that on the right to dignity, there was a need to balance that right with the need for criminal investigations since, according to the Court, the only way to ascertain whether one had had sexual intercourse *per anum* was to examine the anus for signs of recent sexual activity.[73] The Court of Appeal at Mombasa held that the order for medical examination was not made lawfully, as the court did not properly exercise its jurisdiction. In this case, the appellants had been picked up in a bar while ordering drinks and there was nothing to suggest that they were engaging in sexual acts. The unlawful order therefore violated the right to dignity, privacy and self-incrimination of the appellants. On dignity, the court specifically stated that 'regardless of one's status or position or mental or physical condition, one is, by virtue of being human, worthy of having his or her dignity or worth respected.'[74] The Court held that the right to privacy extended to not forcing someone to undergo a forced medical examination. On limitation, the court held that the order to undergo medical examination was limited to only the Sexual Offences Act and could not extend to the Penal Code Act under which the accused were charged.[75] As such, the order for medical examination, whether consented to or not, went against the principle against self-incrimination, which amounted to a violation of the right to a fair trial.[76]

The second case is the Nigerian case of *Ifeanyi Orazulike v Inspector General of Police & Abuja Environmental Protection Board.*[77] The case was decided on 26 February 2016. The applicant, the Executive Director of the International Centre for Advocacy on the Right to Health (ICARH) and an LGB activist, was arrested at his birthday party in his office by state officials and detained for 4 hours at the premises of the Abuja Environmental Protection Board. The case challenged the arrest and detention on the basis that they were in violation of his rights to personal liberty, freedom of movement and dignity contrary to

72 Civil Appeal 56 of 2016 [2018] eKLR.
73 *COL & GMN v Resident Magistrate Kwale Court & 4 Others* Petition No. 51 of 2015 (2015) eKLR.
74 Above, para, 26.
75 Above, Para 31.
76 Above, Para 33.
77 No. FHC/ABJ/CS/799/2014.

section 34, 35, and 41 of the Constitution of the Federal Republic of Nigeria, 1999. The High Court found the detention unconstitutional and ordered the respondents to pay damages to the applicant and to publicly apologise.

The next successful case is *Attorney General v Thuto Ramogge & 19 Others* (*the LEGABIBO Registration* case)[78] decided on 16 March 2016 by the Court of Appeal of Botswana. In this case, the Registrar of Societies had refused to register the organisation Lesbians, Gays and Bisexuals of Botswana (LEGABIBO) on the basis that the name was undesirable. 20 individuals, mainly members of LEGABIBO, brought the matter before the High Court which ruled in their favour, finding that the refusal to register was unconstitutional as it violated the right to freedom of assembly and association, which is protected under section 13 of the Constitution.[79] The state appealed and the Court of Appeal confirmed that the refusal to register the organisation Lesbians, Gays, Bisexuals of Botswana (LEGABIBO) because its objectives included protection of LGB persons was a violation of the right to freedom of assembly and association under section 13 of the Constitution. The Court confirmed that 'all persons' as used in section 3 indeed included homosexuals, and that the *Kanane* case did not purport to exclude them from the ambit of 'all persons.' [80] The provision allowed limitations to these rights if such limitations were done under the 'authority of any law' or were 'reasonably required' for, among others, public morality, and were 'reasonably justifiable in a democratic society'.[81] The Court observed that the Societies Act did not make reference to 'public morality' and so this was not something the Registrar or the Minister had to consider. While the prevention of crime was indeed a legitimate concern, the objectives of LEGABIBO were about doing advocacy for legal reform, which was the legitimate right of every citizen.[82] The Minister's act was found to be unconstitutional and unreasonable.

The next case was the case of *NGO Coordination Board v EG & 5 others*,[83] decided on 22 March 2019. This was an appeal from the decision of the High Court in the case of *Eric Gitari v Attorney General & Another*,[84] the first case on LGB rights in Kenya. In that case, the National Non-Governmental Organisations Coordination Board refused to register the applicant's organisation. This was on the basis that the organisation sought to protect gays and lesbians and yet same-sex conduct was criminalised in Kenya. The objectives of the proposed organisation included 'protecting the rights of LGBTI persons'. The Board relied on regulation 8(3)(b) of the

78 CACGB-128-14.
79 *Thuto Ramogge & 19 Others v The Attorney General* MAHGB-000175-13.
80 Above, para 56-57.
81 Above, para 58.
82 Above, para 61-67.
83 Civil Appeal No. 145 of 2015.
84 Petition 440 of 2013 [2015] eKLR.

NGO Regulations of 1992[85] which gave discretion to the registrar to refuse to reserve a name that is regarded as 'repugnant to or inconsistent with any law or is otherwise undesirable'. The High Court of Kenya found that this refusal constituted a violation of the rights to equality and freedom of association. It also found that the term 'every person' in article 36 of the Constitution meant every individual regardless of their attributes, including sexual orientation. As such, all persons – regardless of how reprehensible their behaviour was – were entitled to the same rights. The respondents appealed. The Court of Appeal upheld the decision of the High Court, finding that the case was properly before the court and that the petitioner was entitled to freedom of association regardless of his sexual orientation.

The earliest successful case in this category was the Ugandan *Victor Mukasa & Yvonne Oyo v Attorney General* (*The Victor Mukasa* case)[86] decided by the High Court of Uganda on 22 November 2008. It was the first case to be filed in the struggle for the recognition of LGB rights in Uganda. It was brought by Victor Mukasa, the then most visible face of the LGB movement in Uganda,[87] and Yvonne Oyoo, a guest who had been found at Mukasa's house. The house of Mukasa was raided by local council authorities, who forced their way into the house, took various materials they found, and arrested Oyoo. They took her to the office of the Local Council 1 chairperson. While there, she was referred to as 'creature' by the chairperson, and denied access to toilet facilities, causing her to urinate on herself. She was later taken to the police station where she was forced to undress before police officers, ostensibly to establish her sex. The Officer in charge of the station then went ahead and fondled her breasts. She was released without any charges being preferred and the police refused to hand over all the materials taken from the first applicant's house. The applicants challenged the constitutionality of the actions of the local council authorities and the police. The state argued that their actions were intended to protect the applicants from mob violence, as they were lesbians. The High Court declared that the actions of the police in forcing their way into the first applicant's house and taking away her documents and the abuse of the second applicant while at the police station – all because they were suspected to be lesbians – was a violation of the first applicant's right to property and the second applicant's right to freedom from inhuman and degrading treatment. According to Joe Oloka-Onyango, this case, being the first case, was significant for both what it said and for what it did not say.[88] The judge recognised that homosexuals are entitled

85 NGOs Co-ordination Regulations *1992*.

86 (2008) AHRLR 248.

87 See A Jjuuko 'The incremental approach: Uganda's struggle for the decriminalisation of homosexuality' in C Lennox & M Waites (eds) *Human rights, sexual orientation and gender identity in the Commonwealth: Struggles for decriminalisation and change* (2013) 381, 391.

88 See J Oloka-Onyango 'Debating love, human rights and identity politics in East Africa: The case of Uganda and Kenya' (2015) 15 *African Human Rights Law Journal* 28, 37-38.

to the same rights as every other Ugandan when she stated that the case was not about homosexuality but about human rights.[89] The case also showed that harassment and mistreatment of persons based solely on their sexual orientation could not be accepted in a free and democratic society.

There have been four lost cases, two in Nigeria and two in Uganda. The most recent case is the Nigerian case, *Pamela Adie v The Corporate Affairs Commission.*[90] The case challenged the actions of the respondent in refusing to register the name of a proposed association – Lesbian Equality and Empowerment Initiatives (LEEI), whose objective was to advocate for the rights of LGBT persons. The rejection was on the basis that the name was misleading and contrary to public policy and violated the SSMPA. The judge agreed with the defendant that the refusal to register the name was based on constitutional and statutory provisions and therefore valid. The judge also added that the rejection was not a violation of the right to freedom of expression since the applicant was already using the organisation to express herself before she applied for registration. On a positive note however, the judge emphasised that indeed the applicant was entitled to the right to freedom of expression, except that in this case this right was not violated.

The next case is the Uganda case of *Frank Mugisha, Dennis Wamala & Ssenfuka Warry Joanita v Uganda Registration Services Bureau* (*SMUG Registration* case)[91] decided on 27 June 2018. It challenged the refusal by the URSB to reserve the name 'Sexual Minorities Uganda' contending that this was justified by section 145 of the Penal Code Act criminalising consensual same-sex relations. The applicants argued that the refusal of registration violated the constitutional rights to freedom from discrimination and freedom of association, while the two year delay to make and communicate a decision on registration constituted a violation of the right to a fair hearing. The URSB argued that the name 'Sexual Minorities Uganda' was undesirable and unregistrable under section 36 of the Companies Act, 2012 as the proposed company was to advocate for the rights and well-being of people engaged in activities criminalised under section 145 of the Penal Code Act, including lesbians and gay persons. The High Court held that the refusal of the URSB to reserve SMUG's name, and consequently to register the proposed company, did not contravene the Constitution of Uganda, as the rights that the applicants claimed were subject to limitation under article 43 of the Constitution. The article subjects rights to the public interest. It was held

89 Whereas this statement was obviously an evasion of the issue of homosexuality by the judge since it was obvious that homosexuality was the 'elephant in the room,' (B Kabumba 'The Mukasa judgment and gay rights in Uganda' (2009) 15 *East African Journal of Peace and Human Rights* 221), here it is treated as a positive statement since the judge was able to recognise that LGB persons were entitled to the same rights as everyone else. See J Oloka-Onyango, n 88 above, 36.

90 *Pamela Adie v Corporate Affairs Commission*, suit no: FHC/ABJ/CS/827/2018

91 Miscellaneous case No. 96 of 2016

that the proposed company was formed to promote prohibited and criminal acts, since article 31(2)(a) of the Constitution, as amended by section 10 of the Constitution (Amendment) Act, 2005, prohibits same-sex marriages, and section 145 of the Penal Code Act prohibits 'having carnal knowledge against the order of nature.' It was further held that the proposed company's objectives go against the values and norms of the Ugandan people and are prejudicial to the public interest. The Court agreed with the judgment of Musota J in the case of *Kasha Jacqueline Nabagesera & 3 Others v The Attorney General and Hon. Rev. Fr Simon Lokodo* (The *Lokodo* case),[92] in which he held that it is also prohibited to encourage or assist the commission of an offence or to conspire to do so with others. The Court further criticised the position in the case of *Jacqueline Kasha Nabagesera & 2 Others v Rolling Stone Ltd. & Giles Muhame* (the *Rolling Stone* case)[93] that section 145 of the Penal Code is about specific acts and not generally about 'being gay'. An appeal was pending before the Court of Appeal before the end of 2019.[94]

The earliest case was the Ugandan *Lokodo* case,[95] decided on 24 June 2014. The case was brought by the organisers of an LGB skills workshop, which was raided and stopped by the second respondent, who was the Minister of Ethics and Integrity, with the help of police officers. The other applicants were participants in the workshop. The respondents argued that the second respondent was not personally responsible as he was acting in his official capacity, and that the rights of the applicants could be limited in the public interest for purposes of protection of morals under the limitation clause in the Constitution since they were promoting homosexual activities, which are criminalised in the Penal Code Act. The High Court held that stopping an LGB workshop by the Minister of Ethics and Integrity based on the criminalisation of same-sex conduct in Uganda was a justifiable limitation to the right to freedom of association. Musota J noted that the second respondent was acting in his official capacity and was thus not personally liable. Furthermore, the protection of morals was a legitimate reason for limiting the applicants' rights, and as such the criminal law could be used to restrict human rights. The judge emphasised that not only persons directly involved in the commission of the offence are liable for it, but also those who directly or indirectly encourage or assist in its commission or who conspire with others to commit it, regardless of whether the substantive offence is actually committed or not. Accordingly, those persons who are engaged in activities that encourage members of the LGB community to engage in criminal conduct are condoning an illegality. By the end of 2019, an appeal in this case was still pending hearing and decision.[96]

92 High Court Miscellaneous Cause No. 33 of 2012 (High Court of Uganda).
93 Miscellaneous Cause No. 163 of 2010 (High Court of Uganda).
94 *Kasha Jacqueline Nabagesera & 3 Others v The Attorney General and Hon. Rev. Fr Simon Lokodo*, Civil Appeal No. 223 of 2018.
95 n 92 above.
96 Civil Appeal No. 195 of 2014.

2.3.3 Cases challenging actions of non-state actors

Another category of cases are those challenging the actions of non-state actors. There have so far been three such cases, of which two have been successful, and one was dismissed on grounds other than sexual orientation. Two of the cases concerned religion and the other one concerned hate speech.

The latest successful case concerns religion and it is from South Africa. This is *Gaum and Others v Van Rensburg NO and Others* (the *Gaum* case)[97] where 11 members of the Dutch Reformed Church challenged the church's General Synod's decision of November 2016 which reversed the 2015 decision that had recognised civil unions and allowed ministers to solemnise such unions if they so wished, as well as allowing non celibate gay persons to be ministers. The applicants argued that the decision was discriminatory and unconstitutional. The Gauteng High Court agreed and set the 2016 decision aside as invalid. This was on the basis that it went contrary to the church's own rules and was therefore discriminatory and thus unconstitutional. The Court recognsied the power of the church to make its own rules but stated that the courts can interfere when there is prejudice to basic rights contained in the Bill of Rights. The Court further held that the church had not established that the decision 'was a worthy and important societal goal.' The decision was in line with majoritarian views but did not consider minority protection. This case is on appeal.

The other successful case is the *Rolling Stone* case[98] from Uganda. In this case, the applicants were featured in a newspaper publication, which had published photos, names and addresses of real and presumed LGB persons and called for their hanging. They argued that this publication violated their rights to privacy and freedom from inhuman and degrading treatment and therefore, among other things, sought an injunction to stop further publication. The High Court held that the publication was a violation of the applicants' rights to freedom from inhuman and degrading treatment and to privacy. Musoke Kibuuka J also noted that the application was not about homosexuality, but rather about whether the publication infringed on the rights of the applicants, something that resonates with the judgment in the *Victor Mukasa* case. He held that the publication threatened the applicants' right to dignity. By calling for their hanging, the respondent extracted the applicants from the other members of the community who are regarded as 'worthy' of human dignity, noting that if a person is only worthy of death, then that person's human dignity is placed at the lowest ebb.[99] He further noted that publishing the applicants' faces and addresses for the purposes of fighting 'gayism' (sic) threatened their right to privacy, a right they are entitled to. The judge also commented on the scope of section 145 of the Penal Code Act, noting that it is '… narrower than gayism (sic) generally. One

97 Case 40819/17
98 n 93 above.
99 Above, 8-9.

has to commit a prohibited act under section 145 to be regarded a criminal.'[100] The Court therefore issued an injunction barring the newspaper from further publication of such details and awarded damages to each applicant.

The last case was the Ugandan case of *Sexual Minorities Uganda v Scott Lively*[101] (*Scott Lively* case). This was an appeal by the defendant in the case of *Sexual Minorities Uganda v Scott Lively*.[102] The defendant, American evangelist Scott Lively, appealed against the wording of the judgment in the case filed against him by Sexual Minorities Uganda.[103] In that case, the judge while dismissing the case nevertheless condemned his actions as constituting crimes against humanity. The appeal was dismissed on 10 August 2018, on the basis that the winning party had no right of appeal, more so against words that were dicta, not forming the gist of the decision.The appeal arose from the decision of the US District Court in Springfield Massachusetts on 5 June 2017 in the most recent loss in this category. In this case, Sexual Minorities Uganda had sued Pastor Lively under the Alien Tort Statute for his role in promoting persecution of LGB persons in Uganda. Lively had allegedly taken part in a conspiracy to persecute LGB persons in Uganda. He visited Uganda and played a role in the introduction and passing of the AHA in Uganda, having met with legislators and spoken at an anti-gay conference in 2009 organised by the Family Life Network in Kampala. He also kept in communication with key persons behind the AHB/AHA. The Court held that there was not enough evidence to invoke the Court's jurisdiction under the USA's Alien Tort Statute (ATS).[104] In coming to this conclusion, the court relied on the Supreme Court decision in *Kiobel v Royal Dutch Shell Limited*,[105] where the Court emphasised the canon against extraterritoriality of US laws and noted that, since the ATS went against this principle, it could only be invoked where there was a sufficient connection to USA soil. No such substantial connection to the USA existed in the instant case, as the defendant only wrote a few emails from the USA and carried out all the other actions from Uganda. The judge, however, made the important observation that the actions of the accused in promoting hate against LGB persons amounted to crimes against humanity.

The earlier lost case was the South African *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being and Another De Lange* case,[106] decided on 24 November 2015. The Constitutional Court held that the issue of whether or not the dismissal of the applicant, a Methodist minister, on the basis of her intended marriage to another woman amounted to unfair

100 Above, 9.
101 No. 17-1593 (United States Court of Appeals for the First Circuit)
102 254 F. Supp. 3d 262 (D. Mass. 2017).
103 *Sexual Minorities Uganda v Scott Lively*, No. 17-1593 (United States Court of Appeals for the First Circuit) (Scott Lively case).
104 Alien Tort Statute (28 U.S.C. § 1350; ATS).
105 569 US 108 (2013).
106 2016 1 BCLR 1 (CC).

discrimination had been abandoned in the lower courts, and so could not be raised at the Constitutional Court level. The Court emphasised the principle of constitutional subsidiarity, which required that the unfair discrimination claim should have been taken to the Equality Court first. It also held that the applicant's failure to file a notice as to the unfair discrimination issues deprived others, including religious groups, of the opportunity to intervene as parties or as *v*. The appeal was thus dismissed.

Cases concerning non-state actors are also quite many in Common Law Africa. They happen both where there are no criminal laws prohibiting same-sex relations, such as in South Africa, and also where these criminal provisions exist. The reason for this is that decriminalisation removes the justifications for violation of the rights of LGB persons, while at the same time, where there is criminalisation, challenging actions done in the name of the law may be the more strategic way to go, and this what has been described as the incremental approach.[107]

2.4 General observations on LGB strategic litigation in Common Law African countries

From the above summary of cases, a number of observations can be made about the number, nature and outcomes of LGB strategic cases in Common Law Africa. These are:

Exponential rise in the number of LGB strategic cases in the last 23 years

A total of 30 strategic cases on LGB rights were filed by LGB activists and lawyers in the five selected Common Law African countries between the period 1997 and 2019. Before 1997, there was no single decided strategic case on LGB rights in any of these countries. Strategic litigation started only after the countries concerned underwent the 'third wave of democratisation,'[108] which introduced bills of rights in constitutions and vested courts with the power to interpret these bills of rights.[109] This created a new avenue of engaging, not just on LGB rights in particular, but on human rights in general.[110] Therefore, the LGB recourse to the courts is not an isolated development, but rather one that has affected all other interest groups too, as a direct result of increased democratisation and constitutional development in Common Law Africa. This period also coincided with the first Supreme Court successes on LGB rights in countries like the USA.[111] As a consequence of these victories, the LGB

107 A Jjuuko, n 87 above.

108 This term was popularised in by Huntington. See S Huntington *The third wave: Democratization in the late twentieth century* (1991). For Africa, see K Prempeh 'Africa's 'constitutionalism revival': False start or new dawn?' (2007) 5 *International Journal of Constitutional Review* 469-487, 470.

109 Prempeh, above 471.

110 Oloka-Onyango traces the historical development of PIL in East Africa and shows that there have been huge shifts in the use of PIL over time and generally PIL is used more regularly and effectively today than before. See J Oloka-Onyango *When courts do politics: Public Interest law and litigation in East Africa* (2017), 101-110.

111 The successful streak of eight cases in the US starting with *Romer v Evans* 517 US 620,

rights lobby in many of these countries started providing support to activists in Africa. The registered successes were therefore not a 'Common-Law Africa only' development. At the international level, the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity, codifying international law principles were also drafted and adopted in 2006 by a group of international scholars, UN officials, and activists.[112] The LGB lobby was also making progress at the UN, and in 2011, the first UN Human Rights Council Resolution on LGBT rights was passed,[113] another in 2014,[114] then in 2016,[115] and most recently in June 2019.[116] The government of the USA also firmly joined the struggle for LGB rights, and during the presidency of Barack Obama, LGB and Transgender (LGBT) rights was a key feature of USA's foreign policy.[117] Uganda's AHB was also a key issue internationally, including at the United Nations,[118] and international support for litigation in Uganda and other countries increased.[119]

in 1996, through *Lawrence v Texas*, 539 US 558 in 2003 to *Obergefell et al. v. Hodges, Director, Ohio Department of Health, et al.* 576 US (2015) in 2015) galvanised US LGB organising and support of other groups outside the US.

112 Yogyakarta Principles: http://www.yogyakartaprinciples.org/ (accessed 3 March 2018). These have now been updated with the Yogyakarta Principles plus 10 (YP+10) – Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles, adopted 10 November, 2017 *http://yogyakartaprinciples.org/principles-en/yp10/* (accessed 31 August 2018).

113 United Nations Human Rights Council resolution 'Human rights, sexual orientation and gender identity' A/HRC/RES/17/19' 17 June 2011' https://daccessods.un.org/TMP/4965864.71796036.html (accessed 3 March 2018).

114 As above.

115 United Nations 'Protection against violence and discrimination based on sexual orientation and gender identity' A/HRC/RES/32/2' 30 June 2016 http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/RES/32/2 (accessed 3 March 2018).

116 See ILGA World 'UN renews crucial mandate for protection against violence and discrimination based on sexual orientation and gender identity' https://ilga.org/UN-renews-crucial-IESOGI-mandate-sexual-orientation-gender-identity (accessed 27 August 2019)

117 For example, in the Presidential Memorandum on LGB rights, December 2011. See White House 'Presidential Memorandum – International Initiatives to Advance the Human Rights of Lesbian, Gay, Bisexual, and Transgender Persons' 6 December 2011. https://obamawhitehouse.archives.gov/the-press-office/2011/12/06/presidential-memorandum-international-initiatives-advance-human-rights-l (accessed 3 March 2018). Also on 9 December 2011, then US Secretary of State, Hillary Clinton made the 'LGBTI rights are human rights' speech in Geneva before representatives from other countries, showing clearly that the US government was firmly behind LGBT rights. See Amnesty International 'Clinton to United Nations: "gay rights are human rights" ' https://www.amnestyusa.org/clinton-to-united-nations-gay-rights-are-human-rights/ (accessed 3 March 2018).

118 See for example, United Nations 'Report of the Working Group on the Universal Periodic Review: Uganda' 22 December 2011 https://daccess-ods.un.org/TMP/5137775.54035187.html (accessed 3 March 2018). Also see United Nations 'Report of the Working Group on the Universal Periodic Review: Uganda' 27 December 2016 https://daccess ods.un.org/TMP/4898009.30023193.html (accessed 3 March 2018).

119 See A Jjuuko 'International solidarity and its role in the fight against Uganda's Anti-Homosexuality Act' in K Laror *et al* (eds.) *Gender, sexuality and social justice:*

The other factor that spurred litigation on LGB rights in Common Law Africa was the influential example of South Africa. After successfully lobbying for the inclusion of sexual orientation as a protected ground in the Final Constitution, South African activists made use of the provisions in the new Constitution, which facilitated PIL actions. Within 10 years they had successfully challenged all the discriminatory laws on LGB rights. This ensured that other discriminatory practices such as discrimination in employment, restrictions on gay persons joining the army and on LGB persons donating blood were lifted even without the need for litigation. These successes in ensuring formal equality within a short period of time using litigation as a strategy, helped to inspire and give impetus to activists in other countries to also use the courts to achieve equality. The judgments from the highly respected Constitutional Court of South Africa also gave judges elsewhere precedents to follow when making decisions, and indeed all the major cases on LGB rights in Common Law Africa make reference to applicable South African precedents.

Ongoing LGB strategic litigation

A second clear trend in LGB strategic litigation in the selected countries in Common Law Africa is that it is still continuing. In all the countries, including South Africa, litigation is still current and ongoing as the 2019 *Gaum* case shows. In Kenya, the *NGLHRC Registration* case has now reached the Supreme Court. There are no cases Nigeria and Uganda that have reached the highest courts so far, but cases are pending with the potential to reach the highest courts. There is only one case in Botswana that reached the Court of Appeal. New cases have been filed and many others are pending.

Relatively high levels of courtroom successes in LGB strategic cases

On the whole, the data demonstrates high levels of success in LGB strategic litigation cases. Despite the relatively high levels of homophobia in Africa, the majority of the decided cases in Common Law African countries, either intentionally or not, affirm LGB rights. Of the 30 completed cases over the period under review, only nine were lost,[120] and yet even these had some positive aspects.[121] There are, however, major differences in the different countries despite the high success levels. Out of the countries that are studied, only activists in South Africa have been able to achieve more than one major victory expressly based on non-discrimination on the grounds of sexual orientation. This is largely due to the fact that the South African Constitution, unlike those of the other four countries examined, expressly protects against

What's law got to do with it? (2016) 126-134, 132.

120 These are: The *Kanane* case in Botswana; The *Lokodo* case; the *SMUG Registration* case; the *HRAPF* case; and the *Scott Lively* case in Uganda; the *Ebah* case; the *Pamela Adie* case; in Nigeria; the *Gaum* case in South Africa; and the *Decriminalisation* case in Kenya.

121 For example the HRAPF case was the first time a regional court heard an LGBT case, and the Scott Lively case, which established that hate crime against LGBT persons could be punishable under the US' Alien Torts Statute.

discrimination on the grounds of sexual orientation. All cases based on this ground have succeeded. Indeed, only two of the twelve South African cases considered (the *Langemaat* case and the *De Lange* case) were not based on this provision. The latter is the only unsuccessful case in LGB strategic litigation in South Africa. Botswana and Kenya have also had success, but these were not based expressly on discrimination on the basis of sexual orientation as the constitutions in these countries do not prohibit discrimination on the grounds of sexual orientation. The successes in Kenya and Botswana have been more on account of the activism and progressive interpretation of the various provisions of the laws by the judges. Indeed, the judgments could easily have gone the other way. Such is clear in Uganda, where the Constitution also does not expressly protect against discrimination based on sexual orientation. None of the four successful cases was decided expressly based on sexual orientation grounds, and indeed the biggest strategic litigation victory, the nullification of the Anti-Homosexuality Act, did not come as a result of a judgment based on human rights grounds, but rather as one based on flaws in the procedural aspects of passing the Act. In two of the three other victories (the *Victor Mukasa* case and the *Rolling Stone* case) the judges, rather needlessly, made it clear that their decisions were not about homosexuality, but about human rights. In the *Equal Opportunities case*, the judges did not mention sexual orientation even once, despite the fact that evidence of the law being enacted because of the need to exclude 'homosexuals' was given. In three of the lost cases outside South Africa, (the Decriminalisation cases in Kenya, *Lokodo* case in Uganda and the *Kanane* case in Botswana), the fact that sexual orientation was not a protected ground against discrimination was expressly used as the basis of the judges' adverse decisions.

The death of the counter-majoritarian difficulty?

Common Law Africa shows that even the most controversial and popular statutes can be nullified without the counter-majoritarian difficulty reigning. This is despite the criticisms that activists should be hesitant to ask courts to nullify statutes passed by democratically elected legislatures as this is counter-majoritarian. Incidentally in the majority of cases, courts have obliged. It is only in the *Fourie* case in South Africa where courts showed deference to the legislature as regards same sex marriages, something for which the Constitutional Court has been continuously criticised as it led to marriages between persons of the same sex being regarded as civil unions rather than marriages.[122] Indeed, courts in that country have gone ahead to read or remove phrases into statutes without referring the matter to the legislature. In the rest of the countries, the counter majoritarian difficulty does not even arise in the judgments and courts take it for granted that they have the power and legitimacy to nullify statutes. In Uganda, the nullification

122 See De Vos and Barnard (n 52 above).

of the Anti-Homosexuality Act by the courts led to efforts by the Members of Parliament to retable the bill, but none of them criticised the judges' decision or considered it illegitimate. In Botswana, the nullification of the sodomy laws by the Court was met with a declaration by the state that the case would be appealed, but not a criticism of the powers of the court to nullify statutes. As such, the counter-majoritarian difficulty may truly have met its death in Common Law Africa.

South African exceptionalism

The dominance of South Africa in the area of LGB strategic litigation is something important to note. South Africa has the highest number of cases on LGB issues and also has the highest completion rate, with all 12 cases completed, and the highest success rate at 90.9%. All except one case were entirely successful. Compared to all the other countries examined, South Africa clearly stands out. The reason for this lies in the fact that the South African Constitution expressly protects against discrimination on the grounds of sexual orientation, while those of all the other countries do not. Judges therefore find it easier to rule in line with this express protection even where there is homophobia. For countries like Botswana and Kenya where courts have also ruled in favour of LGB rights based on the Constitution, the protection has had to be implied and derived from the non-discrimination clause, rather than having the clause directly applied. South Africa's legal transformation, which saw a change from apartheid to democracy, also had a role to play, as it became clear that all people deserved protection at least within the constitutional framework, and a human rights culture was adopted and embraced at a national level. Nothing of this scale has yet happened in the other countries.

The state of criminalisation determines the nature of cases filed

Nineteen out of the 30 cases are challenges to discriminatory laws, and six of these were concerned with decriminalisation. Decriminalisation of consensual same-sex relations is usually the first step towards removing the legal barriers to the equality of LGB persons, and all countries that have made progress start with achieving decriminalisation, including South Africa. It was only after decriminalisation that South Africa was able to challenge all the other discriminatory laws. Therefore, the biggest struggle in the past 20 years has been the issue of decriminalisation. Activists in Botswana have managed to decriminalise through court action, while those in Uganda managed to have a law expanding criminalisation nullified. Those in Kenya have so far failed. The cases filed in each of these countries reflect the stage at which the struggle for decriminalisation is. Activists in Uganda have filed eight cases, and none of them challenges the existing criminal laws, which laws have been routinely used by the courts as the reasons why they cannot vindicate rights. South Africa started straight away with decriminalisation and won, and that

opened the way for all other cases. Activists in Botswana also started with decriminalisation and lost, but later they were forced to consider it again after a 'wild cat' suit was filed in court. Now that decriminalisation has been achieved there, many cases on different matters are expected. Activists in Nigeria have the same challenge as those in Uganda. Those in Kenya however have made more progress on all other issues except decriminalisation. All these trends point to the fact that decriminalisation is an important step in the struggle for LGB equality, and something that activists ought to focus on, but within the practicalities of their country situations.

2.5 Conclusion

The discussion above highlights an increase in the number of LGB strategic cases in Common Law Africa, from none before 1997 to 30 by the end of 2019. This makes strategic litigation an established strategy employed by LGB activists in Common Law Africa. The majority of the cases concern statutes and laws that violate the rights of LGB persons, and yet courts have not been shy to nullify such statues. Botswana has now followed South Africa after 25 years and has become the second country in Africa to nullify an anti-sodomy statute through court action. The counter-majoritarian difficulty seems to have little relevance in this discussion, despite its great importance in the USA. The fact that less than half of the Common Law African countries are engaged in LGB strategic litigation is also worrying, showing that the strategy is only a preserve of a few countries, and this raises the necessity of examining further reasons behind this trend. It is also interesting to note that strategic litigation seems to increase rather than dissipate once the first case has been filed despite backlash and countermobilisation, which are key features of litigation in all the different countries. The fact that LGB persons are willing to face the backlash is critical to the continuance of litigation efforts in the different countries.

THREE

LGB Litigation and Legal Change in the Selected Common Law African Countries 1997-2019

3.1 Introduction

LGB strategic litigation is alive and well in the selected Common Law African countries, and it is increasingly gaining in popularity as more cases continue to be filed. All this litigation is ultimately aimed at ensuring that LGB persons are treated the same way as other persons both in law and practice, or what is referred to as 'significant social change.' This chapter focuses on the legal changes that have happened in the selected countries since the year 1997. It examines the changes that have taken place in laws and policies in the different countries since that year. The chapter makes an effort to identify the changes that can be attributed to strategic litigation in all countries. Since legal change is just one aspect of social change, the findings in this chapter will be juxtaposed with those in the next chapter to make conclusions in that chapter on how far LGB strategic litigation has been able to influence social change in the selected countries.

3.2 Measuring legal change

Ideally, positive decisions on LGB rights made by the highest courts of a country ought to direct policy-making in favour of LGB persons. This is because of the coercive nature of the law.[1] Policies that emerge as a result of strategic litigation would in turn lead to an improved political, social and economic environment for LGB persons, or, on the flipside, lead to backlash from the government in the form of damaging political pronouncements and the adoption of even stricter anti-LGB laws.[2] On the one hand, negative decisions may have the effect of legitimising discrimination against LGB

1 J Oloka-Onyango 'Human rights and public interest litigation in East Africa: A bird's eye view' (2015) 47 *The George Washington International Law Review* 763, 766.

2 GN Rosenberg *Hollow hope: Can courts bring about social change?* (2008) 339-429, MJ Klarman *From Jim Crow to civil rights: The Supreme Court and the struggle for racial equality* (2006) 385, 441-442; and MJ Klarman 'Brown, racial change, and the civil rights movement' (1994) 80 *Virginia Law Review* 7.

persons, while on the other hand, they may spur further agitations and demands for equality, including drawing sympathy from the public.[3] All these things help to create both negative and positive social change through direct and indirect impact.[4]

Kretz suggests a spectrum of seven levels along which social change as regards LGBT rights happens, and six of these are mainly about legal change.[5] Kretz's spectrum is however rather simplistic in as far as it proposes a linear model of change which moves from one stage to another, and is mainly from a western perspective, which gives a lot more prominence to the written law rather than unwritten rules of conduct and behaviour upon which African concepts like 'ubuntu' operate. In African societies, it may not matter much whether there is criminalisation in the written law or not, provided society does not accept a practice. This explains why there is little difference between conditions in a country that criminalises same-sex relations like Zimbabwe and one that has never criminalised like Burkina Faso. The slight difference in the socio-cultural norms of different African societies may, for instance, explain why there is considerably more violence against LGB persons in South Africa, which has all rights written down in the laws, than in Uganda, which still criminalises same-sex relations and is to outside observation very hostile to LGB equality.

Considering the fact that assessment of legal change is largely a legalistic exercise based on the western understanding of legal change, this chapter uses Kretz's spectrum where applicable to assess the extent of legal change, particularly moving from Stage 2 – 'criminalisation of status and behaviour' to Stage 6 – 'establishment of positive rights'. Just like social change, legal change is measured by looking at three aspects: the occurrence of change, the direction of change, and the magnitude/rate of the change.[6] These three parameters are therefore used to show the extent of legal change during the past 23 years in the selected countries insofar as the legal recognition of LGB persons is concerned.

3.3 The legal changes on LGB rights in the selected Common law Countries in the past 23 years

There is no doubt that considerable legal change has happened in the laws of the different Common Law African countries where there has been strategic litigation since 1997. No single country still has the same exact legal position on LGB rights as they had before 1997. These changes are both positive and

3 SA Scheingold *The politics of rights: Lawyers, public policy, and political change* (1974) 131.

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

5 A Kretz 'From 'kill the gays' to 'kill the gay rights movement': The future of homosexuality legislation in Africa' (2013) 11 *Northwestern Journal of International Human Rights* 207, 211-216. The steps are already discussed in Chapter 1.6 above.

6 GL Priest 'Measuring legal change' (1987) 3:2 *Journal of Law, Economics, & Organization* 193, 203.

negative, with some countries having adopted very negative changes in the law, while others have embraced the positive. The country with the most positive changes is South Africa, which has made progress on almost every legal issue concerning LGB rights, while the one with the least progress is Nigeria, with more negative changes in the law than positive ones. Botswana and Kenya are making considerable positive progress, while Uganda is more or less stagnating. In terms of magnitude, some of the changes are drastic and revolutionary, while in other countries the changes are far slower. South Africa again leads in terms of drastic legal change while the other countries are experiencing slower change.

3.3.1 Same-sex marriages

Marriage is a very important institution from which emanates a number of rights and obligations, including the right to maintenance, succession, joint adoption of children and post-divorce rights.[7] However, the traditional Common Law understanding of marriage regards it as a union between a man and a woman, and this therefore excludes same-sex couples from all the accruing benefits. This is 'not a small and tangential inconvenience,'[8] but rather an important matter that greatly affects the social status and lives of those excluded.

By 1997, no single country in Common Law Africa formally recognised same-sex marriages, whether officiated within the country or solemnised elsewhere.[9] The formal marriage laws in all these countries only recognised marriages between persons of opposite sexes,[10] and regarded marriages between persons of the same-sex as invalid. By the end of 2019, some changes in respect of this status had happened in all the countries. On one extreme, exemplified by South Africa, same-sex marriages had become legalised, while at the other extreme, exemplified by Uganda, same-sex marriages had been specifically prohibited in the Constitution. Nigeria also prohibited same-sex marriages in a statute, while Kenya limited marriage to men and women in the Constitution. It is only Botswana that has had no wide sweeping changes in this regard.

In South Africa, before the 1996 Constitution, section 30(1) of the Marriage Act, 1961[11] contained the marriage formula, which referred to husband and wife,

7 See P de Vos and J Barnard 'Same-sex marriage, civil unions and domestic partnerships in South Africa: critical reflections on an ongoing saga' (2007) 124 *South African Law Journal* 795, 804.

8 Per Sachs J in the South African case of *Minister of Home Affairs and Another v Fourie and Another; and Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* 2005 ZACC 19 paras 552G-553C. (*Fourie* case), para 71.

9 This is with the exception of customary marriages, some of which were woman to woman marriages and were recognised. See discussion on woman to woman marriages in Kenya below.

10 Customary marriage laws were subtler with some customs in countries like Kenya allowing woman to woman marriages, but without this ever receiving official recognition.

11 No. 25 of 1961

and was in line with the Common Law definition of marriage.[12] This position of the law was found to be unconstitutional in the case of *Fourie and Another v Minister of Home Affairs and Another* (the *Fourie* case) as it discriminated against same-sex couples, thus violating the prohibition of discrimination based on sexual orientation in section 9 of the Constitution.[13] However, the Constitutional Court suspended its declaration of invalidity for 12 months to give the legislature time to come up with legislation to redress the inconsistency. The legislature did so and the Civil Unions Act,[14] which allowed same-sex persons to marry in all but name, was passed.[15] It in effect introduced two systems where one could either contract a marriage under the Marriage Act, which is still heterosexual, or contract a civil union, which accommodates both opposite sex and same-sex couples.[16] Some scholars have criticised the law for not according marriage to same-sex couples, and for allowing marriage officers to conscientiously object to officiating civil partnerships and not marriages, implying that marriages are 'superior' to civil partnerships.[17] Despite the criticism, this was a huge and revolutionary change, moving from no same–sex marriages to recognition that same-sex persons could enter into permanent relationships with all the rights and obligations that accrue from a marriage. These partnerships have been formally recognised in laws that provide for married persons, including section 1(vii)(b) of the Domestic Violence Act 1998[18] and section 1 of the Revenue Laws Amendment Act 2000.[19]

On the other extreme end, Uganda amended its Constitution in 2005 to specifically prohibit same-sex marriages.[20] This amendment did not reflect all the people's views and opinions, as these were not sought.[21] Mujuzi demonstrates that this amendment was a way of completing the task begun in 1994 when the Constituent Assembly (CA) failed to prohibit same-sex marriages as the idea of same-sex marriages was 'laughable.' As a corollary,

12 See JD Sinclair & J Heaton) *The law of marriage* (1996) 311-312.
13 (232/2003) [2004] ZASCA 132.
14 Act No. 17 of 2006.
15 The civil union at least formally embodies all the positive and negative aspects of marriage. See De Vos & Barnard (n 7 above) 820.
16 See the judgment of Binns-Ward J in *KOS and Others v Minister of Home Affairs and Others*, Case number: 2298/2017 (High Court, Western Cape Division, Cape Town) 6 September 2017. Also see De Vos & Barnard (n 7 above) 795.
17 De Vos & Barnard (n 7 above) 821-824. Skype interview with Prof David Bilchitz, Director of the Southern African Institute for Advanced Constitutional, Human Rights, Public and International Law, University of Johannesburg, 10 July 2018.
18 Act No. 116 of 1998.
19 Act No. 50 of 2000.
20 This was in section 10(b) of the Constitutional Amendment Act (No.2) 21 of 2005, which introduced article 31(2a) of the Constitution, which provides that 'Marriage between persons of the same sex is prohibited'.
21 This issue was not among the issues formally raised for the Constitutional Review Commission to seek people's views on. See JD Mujuzi 'The absolute prohibition of same-sex marriages in Uganda' (2009) 23 *International Journal of Law, Policy and the Family* 278, 282-285.

Uganda does not recognise same-sex marriages contracted elsewhere.[22] Uganda also attempted to buttress the prohibition through a penal provision in the now nullified Anti-Homosexuality Act (AHA). As such, section 12 of the Act criminalised attempts to solemnise same-sex marriages, and punished it with seven years' imprisonment for individuals and the withdrawal of licences for offending institutions.[23] The Act was nullified only a few months later by the Constitutional Court in the case of *Prof. J Oloka-Onyango & 9 Others v Attorney General* (*Anti-Homosexuality Act* case).[24]

Although less specific than Uganda, the Constitution of the Republic of Kenya, 2010 (2010 Constitution) impliedly denied the right to marry to same-sex couples by limiting marriages to persons of opposite sexes.[25] This was a new development, as before there was actually no explicit right to marry in the Constitution of the Republic of Kenya 1963 (1963 Constitution). Marriage was provided for under different marriage laws, none of which specifically limited it to persons of opposite sexes, except for the marriage formula in Section 29(2) of the Marriage Act, which referred to 'man and wife,' and the Common Law understanding of marriage. Strictly speaking therefore, one would regard the Kenyan law before 2010 as allowing for different forms of marriage in accordance with the customs and rites of the different communities. As such, marriages between persons of the same sex could be recognised as valid if contracted in accordance with the rites and customs of the community in question. In *The Matter of the Estate of Cherotich Kimong'ony Kibserea* (Deceased),[26] the High Court recognised a woman to woman marriage in accordance with Nandi customs. However, with the coming into force of the 2010 Constitution, and of the Marriage Act 2014, the question as to whether woman-to-woman marriages would still be recognised is more open. Discussions have been held about same-sex marriages in Kenya, and some scholars opine that the 2010 Constitution allows same-sex marriages as it provides for the right to equality for everyone.[27] The Marriage Act, 2014[28] which repeals all the other marriage laws, including the Marriage Act, Cap 150, and consolidates them into one law, only provides for marriages between persons of opposite sexes.[29] Whereas the Act continues to recognise customary marriages contracted under the customs of the community in question, the overarching nature of the definition of a marriage in section 3 and article 45(2) of the Constitution now throws into question the legality

22 Above, 284.
23 The Anti-Homosexuality Act, 2014, sec 12.
24 Constitutional Petition No. 008 of 2014 (Constitutional Court of Uganda).
25 Article 45(2).
26 Succession Cause No. 212 of 2010 (High Court, Kenya, 2011.
27 See for example 'Why Kenya's new Constitution protects gays' *Daily Nation* 11 December, 2010.
28 No. 4 of 2014, Laws of Kenya, Revised Edition 2016.
29 Section 3(1) of the Marriage Act, 4 of 2014 defines marriage as 'the voluntary union of a man and a woman…'

of woman-to-woman marriages. However, despite the new constitutional framing, the courts still continue to recognise woman-to-woman marriages.[30] This may not be contradictory to the Constitution, as it should be understood that the traditional understanding of woman-to-woman marriages was not as sexualised as the current understanding of same-sex marriages, as they were largely intended to secure for an older barren woman a male heir to inherit her property, as the children that the wife would have would belong to the female husband.[31] Amadiume opines that the women would actually find the assertion that these were lesbian relations to be offensive, and decries some western academics' approach of viewing such relationships through westernised sexualised lenses.[32]

Botswana's marriage laws have remained largely the same since independence in 1966. The Constitution does not provide for the right to marry. The Marriage Act 1970,[33] which was repealed by the Marriage Act 2001, did not define marriage. The only change in the marriage laws so far came in the Marriage Act 2001, but the law does not define marriage, only making it clear through the marriage formula in section 10 that marriage is between persons of opposite sexes as it refers to 'bride' and 'bridegroom'. The Court of Appeal in the case of *Kanane v The State* (The *Kanane* case)[34] discussed same-sex relationships at length and concluded that they were not protected within the Constitution. The Court also concluded that 'gay men and women do not represent a group or class which at this stage has been shown to require protection under the Constitution.' The Court therefore left it open that perhaps in future, protection would extend to this group. Indeed, the Court of Appeal has extended protection to LGB groups, as far as the registration of organisations working on LGB issues is concerned.[35] No case has so far been brought to the courts on same-sex marriage, and neither had a law been put in place on same-sex marriages by the end of 2019.

Nigeria did not go the Ugandan and Kenyan ways as the right to marry is not framed as such in the bill of rights but is rather expressed as part of the National Objectives and Directive Principles of State Policy. Article 15.1(3)

30 See for example 'Wife wins 10-year battle to bury her female 'husband'' Standard Digital 4 August 2018 https://www.standardmedia.co.ke/article/2001290676/wife-wins-10-year-battle-to-bury-her-female-husband (accessed 26 August 2018).

31 S Oboler 'Is the female husband a man? Woman/woman marriage among the Nandi of Kenya' (1980) *Ethnology Journal* 69. Also see RJ Cadigan 'Woman-to-woman marriage: Practices and benefits in Sub-Saharan Africa' (1998) *Journal of Comparative Family Studies* 94.

32 For a more detailed discussion of this position see I Amadiume *Male daughters, female husbands: Gender and sex in an African society* 1987, 7.

33 The Marriage Act Cap 29:01

34 [2003] 2 BLR 67 (CA). EK Quansah 'Same-sex relationships in Botswana: Current perspectives and future prospects' (2004) 4 *African Human Rights Law Journal* 201-217.

35 *Attorney General v Thuto Rammoge & 19 Others* (2014) CACGB-128-14 (CA) (*LEGABIBO Registration* case).

(C) imposes a duty on the state to 'encourage inter-marriage among persons from different places of origin, or of different religious, ethnic or linguistic association or ties.' Same-sex marriages are expressly prohibited in the Same Sex Marriages (Prohibition) Act, 2013 (SSMPA). The Act's objective is to 'prohibit a marriage contract or civil union entered into between persons of same sex, solemnization of same [sex marriages]; and for related matters.' Section 1 prohibits the solemnisation of same sex marriages in Nigeria and their recognition, as well as recognition of those celebrated outside Nigeria. Entering into such a marriage attracts a punishment of 14 years imprisonment,[36] while solemnising, witnessing or aiding and abetting such a marriage attracts ten years imprisonment.[37]

The recognition of same sex marriages thus remains a dream for all Common Law African countries, which has only been almost realised in South Africa. Perhaps by decriminalising through the courts of law, Botswana may be the next country to have same sex marriages legalised by the courts. South Africa is however an example of successful LGB strategic litigation leading to immediate changes. The fact that activists in the other countries have not even tried to litigate for marriage equality is perhaps not because same-sex marriages are not desirable, but because the different countries are still struggling with basics such as decriminalization.

3.3.2 Criminalisation of consensual same-sex relations

The criminalisation of consensual same-sex relations, even when the laws are not implemented, is the ultimate signification that homosexuals are 'unapprehended felons'[38] and unwanted persons in society, who ought to be gotten rid of.[39]

Before 1997, all the selected African Common Law countries criminalised consensual same-sex relations. However, by end of 2019, Botswana had joined South Africa among countries that had decriminalised consensual same-sex relations through strategic litigation. Botswana emerged from the shadow of an unsuccessful case 10 years earlier to decriminalise consensual same-sex relations in June of 2019. Activists in Uganda successfully challenged the Anti-Homosexuality Act, but criminal provisions in the Penal Code remain. On the other hand, Kenya's promising success rate in the courts was cut short by a loss in the EG & 7 others v Attorney General; DKM & 9 others; Katiba Institute & another (Kenya Decriminalisation case).[40] Attempts by activists in Nigeria to challenge the expanded criminalisation have so far failed to yield

36 SSMPA, section 5(1).
37 Above, Section 5(3).
38 *See RD Mohr Gays/justice: A study of ethics, society, and law* (1988).
39 Ackermann J in *The National Coalition for Gay and Lesbian Equality v the Minister of Justice* 1999 1 SA 6 (CC), (The *Sodomy* case) para 28, and Sachs J in para 128. Also see DM Kahan 'The secret ambition of deterrence' 113 (1999) *Harvard Law Review* 413, 421.
40 Consolidated petitions 50 of 2013 and 234 of 2016.

results. Therefore, for Kenya, Nigeria and Uganda, same sex relations remain criminalised, despite active strategic litigation on LGB issues.

For South Africa, same-sex acts between men in public were criminalised with a punishment of up to 7 years in prison under section 20A of the Sexual Offences Act, 1957[41] as well as the common law offence of commission of an unnatural sexual act. It was also included in the schedule to the Criminal Procedure Act, 1977[42] and the Security Officers Act, 1987.[43] These provisions were enforced through the police raiding places where persons suspected of engaging in same-sex relations were present, mainly if they were white.[44] One outstanding example occurred in 1966 when the police raided a gay party in Forest Town and arrested the white persons in attendance.[45] This created a moral panic that led to the eventual passing of the Immorality Amendment Act, 1969[46] which introduced section 20A of the Sexual Offences Act 1957,[47] and also prohibited sex toys and changed the age of consent to same-sex acts from 14 to 19. This criminalisation led to LGB persons being regarded as less important than heterosexuals, and largely subjected them to humiliating treatment at the hands of law enforcement officials.[48] The change came in 1997, when the Constitutional Court declared unconstitutional all laws criminalising consensual same-sex relations in the *Sodomy* case. The legislature later adopted the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007,[49] which made rape gender neutral[50] and protected all children, male and female, from sexual exploitation by persons of any sex.[51]

In Botswana, section 164 of the Penal Code which criminalised 'carnal knowledge against the order of nature,' section 167 which criminalised 'committing indecent practices between males' and section 165 which

41 Act 23 of 1957. This provision was introduced through the Immorality Amendment Act, 1969 (Act No. 57 of 1969). It also prohibited sex toys and changed the age of consent to same-sex acts from 14 to 19.

42 Act 51 of 1977.

43 Act 92 of 1987. This implied that any person convicted of sodomy could not be registered as a security officer; could have his/her registration withdrawn; or be found guilty of improper conduct.

44 Homosexuality among black people, particularly those in the mines, had largely been accepted as being crucial to the proper running of the mines. See for example, TD Moodie *et al* 'Migrancy and male sexuality on the South African goldmines' (1988) *Journal of Southern African Studies*.

45 M Gevisser 'A different fight for freedom: a history of South African lesbian and gay organisation from the 1950s to the 1990s' in M Gevisser and E Cameron (eds), *Defiant desire: Gay and lesbian lives in South Africa* (1994) 30.

46 Act No. 57 of 1969.

47 Sexual Offences Act 23 of 1957.

48 For a detailed discussion of the effect of this, see E Cameron 'Unapprehended felons: Gays and lesbians and the law in South Africa' in Gevisser & Cameron (n 45 above) 89.

49 Act No. 32 of 2007.

50 Above, section 3 and 4.

51 Section 15 and 16.

criminalised attempts to commit unnatural offences were declared unconstitutional. This was in the case of *Letsweletse Moshidiemang v Attorney General*.[52] These provisions had existed way before 1997. However, even before decriminalisation, these provisions were rarely used to arrest LGB persons. The provisions on carnal knowledge against the order of nature were earlier challenged in the *Kanane* case and found to be constitutional. In 1998, the state carried out a law reform process, which was aimed at making the offences in the Penal Code gender neutral.[53] In this process, the laws criminalising consensual same-sex acts extended the criminalisation to same-sex acts among women.[54] The state supported the amendment, arguing that the provisions were originally discriminatory on the basis of gender.[55] However, even before, these provisions were rarely used to arrest LGB persons. Now all this has changed with the decriminalisation of same-sex relations.

Kenya continues to criminalise consensual same-sex relations just as was the case before 1997. Section 162(a) of the Penal Code Act, 1948[56] criminalises 'carnal knowledge against the order of nature', while section 162(c) criminalises someone permitting a male person to have carnal knowledge of him or her against the order of nature. Section 163 criminalises attempts to commit carnal knowledge against the order of nature, and section 165 criminalises indecent practices between males. The High Court recently decided the *Kenya Decriminalisation* case[57] which challenged section 162(a) and (c) as well as section 165 of the Penal Code, and upheld the provisions as constitutional. Kenya actually enforces these laws, with arrests happening. In January 2018, a Catholic priest was arrested for allegedly 'sodomising' an 18 year old man,[58]and several convictions have been recorded under this provision.[59] The arrests also occasion violations of, among others, the rights to privacy and dignity of persons, as they are usually arbitrary, and the police usually conduct anal examinations to find evidence of same-sex conduct, although such examinations have recently been ruled unconstitutional by the Court of Appeal.[60] Nevertheless, the police continue to arrest people and

52 MAHGB- 000591-61.

53 *Penal Code* (Amendment) *Act*, 5 of *1998* (*Botswana*).

54 For example section 164(c), originally only punishing permitting a male person to have carnal knowledge of one against the order of nature, now applied to 'any person'.

55 See A Jjuuko & M Tabengwa '*Expanded criminalisation of consensual same sex relations in Africa: Contextualizing the recent developments*' in N Nicol *et al* (eds) '*Envisioning global LGBT human rights: (Neo)colonialism, neoliberalism, resistance and hope*' 2018, 63.

56 No. 81 of 1948, Cap 63 Revised Edition 2014.

57 *Consolidated petitions 50 of 2013 and 234 of 2016.*

58 'Police: Kenyan Catholic priest arrested for sodomy' News24.com https://www.news24.com/Africa/News/police-kenyan-catholic-priest-arrested-for-sodomy-20180116 (accessed 25 March 2018).

59 For example in *Francis Odingi v Republic* (2006) 2011 eKLR (C.A. Nakuru), where conviction of a man and a sentence of six years imprisonment for having had carnal knowledge of another person against the order of nature were upheld.

60 *COL & GMN v Resident Magistrate Kwale Court, DCIO Msabweni Police Station, Coast*

charge them under different provisions of the law, and this criminalisation and the attendant stigma associated with same sex relationships subjects individuals to blackmail from both law enforcers and private citizens.[61] LGB persons are also subjected to discriminatory treatment, which is justified by the criminalisation.[62]

In Nigeria, the treatment of same-sex relations differs by region as well as state, although there has been expanded criminalisation in some parts. The Criminal Code Act,[63] which applies to all states subject to the Penal Code (Northern States) Federal Provisions Act, criminalises same-sex relations with a maximum penalty of 14 years' imprisonment.[64] Attempts to commit such an act are punishable with seven years' imprisonment,[65] while gross indecency is punishable with up to three years imprisonment.[66] The Penal Code (Northern States) Federal Provisions Act, in section 284 criminalises 'carnal intercourse against the order of nature' with imprisonment of up to 14 years. Section 405(2)(e) also regards as a vagabond 'any male person who dresses or is attired in the fashion of a woman in a public place or who practices sodomy as a means of livelihood or as a profession.' Upon conviction, such a person is liable to imprisonment for up to two years or a fine which may extend to four hundred and fifty Naira or both.[67] Twelve states in Northern Nigeria have incorporated Sharia law in their penal laws. The laws apply to all Muslims and those who voluntarily consent to the jurisdiction of the Shari'a courts. The laws in these states variously provide for death by stoning for married men found guilty of same-sex relations, and whipping and/or imprisonment for unmarried men or women.[68] Section 81 of the Armed Forces Act[69] criminalises carnal knowledge against the order of nature and gross indecency amongst persons in the armed forces. The punishment is the same across board, seven years' imprisonment. The Same Sex Marriages (Prohibition) Act, 2013 introduced yet another layer of criminalisation, as it criminalises the 'public show of same sex amorous relationship, directly or indirectly.'[70] The punishment for this offence is 10 years' imprisonment.[71] These laws are actually enforced, although no one

Provincial General Hospital, Director of Public Prosecutions, and Cabinet Secretary Ministry of Health Civil Appeal 56 of 2016.

61 UHAI-EASHRI *Lived realities, imagined futures: Baseline study on LGBTI organizing in Kenya* (2011) 25. www.uhai-eashri.org/ENG/resources?download=6:uhai-lived-realities-imagined-futures (accessed 15 April 2018)

62 Above at 4-6.

63 Chapter C38 of the Laws of the Federation of Nigeria, 2004.

64 Section 214.

65 Section 215.

66 Section 217.

67 Nigerian Penal Code Section 407.

68 See P Ostien *Shari'a implementation in Northern Nigeria 1999-2006* A Sourcebook Volume III (2007) 7.

69 Chapter A20 of the Laws of the Federation of Nigeria.

70 n 63 above, section 4(2)

71 Above, section 5(2).

has been convicted under them in the recent past.[72] They are used mainly for extortion and harassment.[73] Human Rights Watch found that although the laws were implemented before the SSMPA, there was a noticeable increase in arrests and violence after the SSMPA was passed.[74]

In Uganda, section 145(a) of the Penal Code Act[75] criminalises having carnal knowledge against the order of nature while section 145(c) criminalises 'permitting a male person to have carnal knowledge of someone.' These carry a punishment of life imprisonment. Section 146 criminalises attempts to commit carnal knowledge against the order of nature, while section 148 criminalises indecent practices among males, which are both punishable by seven years' imprisonment. The High Court observed in passing that section 145 only criminalised particular acts and not the whole status of being gay.[76] In a latter case, however, the High Court held that the Penal Code provision against having carnal knowledge against the order of nature did not only apply to those who commit the offence, but also to those who aid and abet the commission of the offence.[77] However, the real change that happened in Uganda in the past nine years was the expanded criminalisation of same-sex relations through the now nullified Anti-Homosexuality Act, 2014, which created the new offence of 'homosexuality,' which went beyond the sexual act to things like 'touching with the intent to commit homosexuality'.[78] It also created the offence of aggravated homosexuality.'[79] The Act also provided immunity to prosecution for crimes committed while involved in or defending oneself against homosexuality.[80] It criminalised 'aiding and abetting',[81] and the promotion of homosexuality.[82] The Act was in force between 10 March 2014 and 1 August 2014, when the Constitutional Court declared it unconstitutional, on the basis that it was passed without following the constitutionally mandated procedure.[83] The criminal provisions not only make all LGB persons in Uganda unapprehended felons, they are also actively enforced – perhaps more so than any other of the countries covered in this study. For example, in 2016, there were 31 documented arbitrary arrests of lesbian, gay, bisexual and transgender

72 Initiative for Equal Rights (TIERS) 'Compendium of Laws: Discrimination against persons based on sexual orientation and gender identity expression in Nigeria' 7-8.
73 Above.
74 Human Rights Watch '"Tell me where I can be safe" The impact of Nigeria's Same Sex Marriage (Prohibition) Act' 2016, 16.
75 Cap 120 (1950).
76 *Kasha Jacqueline Nabagesera, David Kato Kisuule & Pepe Julian Onziema v The Rolling Stone Newspaper* Miscellaneous Cause No. 163 of 2010 (*Rolling Stone* case).
77 *Kasha Jacqueline Nabagesera & 3 Others v The Attorney General and Hon. Rev. Fr. Simon Lokodo* High Court Miscellaneous Cause No. 33 of 2012 (*Lokodo* case).
78 Anti-Homosexuality Act 2014, section 2.
79 Above, section 3.
80 Section 5.
81 Section 7.
82 Section 13.
83 *AHA* case, n 24 above.

(LGBT) persons in Uganda.[84] The existence of the sodomy laws in Uganda has also been used as a justification for denial of all other rights, including as a justification for refusal to register organisations, as was seen with the refusal to register Sexual Minorities Uganda (SMUG), which was unsuccessfully challenged in the case of *Frank Mugisha, Dennis Wamala & Ssenfuka Warry Joanita v Uganda Registration Services Bureau (URSB)* (*SMUG Registration* case).[85] The laws have also been used to block LGB activities, and at least eight such events have been stopped in the last ten years.[86] As such, only South Africa and Botswana have had positive change brought about by strategic litigation in terms of decriminalising same-sex relations.

3.3.3 Ages of consent to same-sex relations

Where consensual same-sex relations are not criminalised, there is usually a difference in the ages of consent, with homosexual sex requiring a higher age of consent than heterosexual sex. Among the selected countries, before 1997, only South Africa did not criminalise same-sex relations in private and so provided a different age of consent for same-sex relations, which was 19, and yet that for heterosexual relations was 16. This discrimination was contained in sections 14(1)(b) and 14(3)(b) of the Sexual Offences Act, 1957.[87] The provisions were found to be unconstitutional in *Geldenhuys v National Director of Public Prosecutions & Others*.[88] However, by then provisions were already repealed by the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.[89] For Kenya, Nigeria and Uganda where consensual same-sex relations are criminalised, consent does not matter and therefore age of consent issues do not arise.

3.3.4 Recognition of gay persons as suitable to adopt children

LGB persons are often not allowed to adopt children as a couple. This is because their relationships are not recognised in law, and they are usually not seen as 'fit and proper' persons to bring up children. This is true even when one of them is the parent of the child. Before 1998, adoptions by LGB couples were largely unheard of in the selected Common Law African countries. Not much has changed from then, except for South Africa. The other countries' laws largely remain as they were 23 years ago. In South Africa, the law initially did not allow adoptions by gay persons or joint adoption for persons in same-sex

84 Human Rights Awareness and Promotion Forum & Consortium on Monitoring Violations Based on Sex Determination, Gender Identity and Sexual Orientation 'LGBT violations report 2016' (2017) 29.

85 Miscellaneous Cause No. 96 of 2016.

86 Interview with Patricia Kimera, Head, Access to justice Division, Human Rights Awareness and Promotion Forum (HRAPF), Kampala, 24 April 2018.

87 Sexual Offences Act 23 of 1957.

88 2009 5 BCLR 435 (CC).

89 Act 32 of 2007.

relationships. Sections 17(a), 17(c) and 20(1) of the Child Care Act, 1983[90] and section 1(2) of the Guardianship Act, 1993[91] only provided for the joint adoption and guardianship of children by married persons. This was declared unconstitutional in *Du Toit & Another v Minister of Welfare and Population Development & Others*,[92] and the Court read into the provisions words importing persons of the same-sex in a permanent relationship. The Child Care Act was later replaced by the Children's Act, 2005 which allows joint adoption by 'partners in a permanent domestic life-partnership'[93] as well as stepparent adoption by a 'permanent domestic life-partner' of the child's parent.[94] It also allows any person, including unmarried persons, to adopt a child, provided they are 'fit and proper' to be entrusted with parental responsibilities, they are willing to take on such responsibilities, are over 18 years and have been properly assessed by an adoption social worker.[95] Sexual orientation is therefore not an issue in adoption of children anymore in South Africa.

The other four countries studied do not provide for joint adoptions by same-sex couples, although the laws are vague about a single person who identifies as gay, lesbian or bisexual.

For Botswana, the law only provides for joint adoption by married couples of the opposite sex.[96] It also requires that the court must be satisfied that such persons, including single persons, are, among others, 'fit and proper' to be entrusted with the child.[97] According to Sigweni, the law does not specifically rule out individual LGB persons from adopting a child, although in practice such persons may not be found to be 'fit and proper.' [98] This may no longer be legally tenable after the decriminalisation of consensual same sex relations.

For Kenya, the law provides for both joint adoptions and individual adoptions. Adoptions are allowed where the applicants, or at least one of them in case of joint adoptions, is 25 years of age and above, and at least 21 years older than the child but not yet 65 years old; or is a relative or father or mother of the child.[99] The law, however, expressly prohibits adoptions where the applicant or one of the joint applicants is a 'homosexual,' and this is one of those instances where the law does not give the court any discretion.[100]

90 No. 74 of 1983.
91 No. 192 of 1993.
92 2002 ZACC 20.
93 Children's Act, 2005, section 231(1)(a)(ii).
94 Above, section 231(1)(c).
95 Section 231(2).
96 Section 3 of the Adoption Act [Cap 28:01] Law of Botswana.
97 Above, section 4(b).
98 See SF Sigweni 'Adoption laws and procedures of Botswana: Questioning their effectiveness and compliance with regional and international human rights standards' *Masters Dissertation, School for Advanced Legal Studies, University of Cape Town*, July 2014, 43.
99 Children Act, No, 1 of 2010, Section 158(1).
100 Above, section 158(3)(c).

In Uganda, the Children Act 1996,[101] allows both joint adoptions and individual adoptions, but joint adoptions are only available to 'spouses'. The applicant/s must be 25 years of age and above, and at least 21 years older than the child;[102] and if it is an adoption by one of the spouses, the other must have consented.[103] It does not allow an individual to adopt a child of the opposite sex.[104] The law is silent about an openly gay, lesbian or bisexual person adopting a child, but such persons may easily be found not to be 'proper and fit' on the basis of the criminalisation of same-sex relations. Indeed, the National Alternative Care Panel at the Ministry of Gender, Labour and Social Development established under the National Alternative Care Framework, 2012 and Action Plan, (2016/17–2020/21) found an out lesbian – international award winning LGB rights activist, Jacqueline Kasha Nabagesera, not to be a fit and proper person to adopt a child based on her sexual orientation.[105]

In Nigeria, the Child Rights Act, 2003 allows adoptions by single persons and by married persons.[106] The Act does not define who married persons are, but the general framework of the law in Nigeria indicates that it cannot be a person in a same-sex marriage, since such marriages are prohibited. For a single person, the person should be at least 35 years old, and the child to be adopted should be of the same sex as the applicant. The persons applying for adoption in all cases must be have been found 'suitable to adopt the child in question by the appropriate investigating officers.'[107] However, like elsewhere, the fit and proper requirement may exclude LGB persons.

Therefore, strategic litigation has only led to a change in adoption laws in South Africa, and nowhere else. But again, South Africa is the only country where such litigation has been brought. This may be attributed to the limited litigation so far and the fact that decriminalisation has not yet happened in any of the other countries.

3.3.5 Parentage in respect to same-sex couples

Only South Africa recognises both persons in same-sex unions as parents of the children of the relationship. This was confirmed in the case of *J & B v Director-General, Department of Home Affairs, Minister of Home Affairs, and President of the Republic of South Africa*, [108] where the Constitutional Court read down section 5 of the Children's Status Act of 1987, which only

101 The Children Act, Cap 59, Statute 6 of 1996.
102 Above, section 45(1)(i).
103 Above, section 45(1)(ii).
104 Above, section 45(1)(4).
105 See 'Ugandan activist's heartbreak as she's blocked from adopting because she's lesbian' 25 January 2015 http://www.mambaonline.com/2017/01/25/ugandan-lgbt-activists-heartbreak-shes-denied-adoption/ (accessed 11 April 2018).
106 Child Rights Act, Section 129(a), (b) and (c).
107 Section 129(d).
108 (2003) AHRLR 263 (SACC) 28 March 2003.

recognised the birth mother of a child born out of artificial insemination as a parent for being discriminatory on the basis of sexual orientation. The court read down the provision by deleting words that restricted recognition of parentage to only married couples. The Child Care Act was repealed by the Children's Act[109] and provisions on recognition of parents of a child born through artificial fertilisation are now in section 40, which although passed after the court's decision still uses the word 'spouse' which nevertheless has to be read down in light of the Constitutional Court judgment. It excludes recognition of gamete donors as parents.[110] Section 68(1)(l) of the National Health Act[111] requires the minister to pass regulations regulating artificial fertilisation. The Regulations Relating to Artificial Fertilisation of Persons[112] provide for the procedures to be conducted, and these have been criticised for seeking to involve a medical practitioner in all cases of artificial fertilisation, as this would violate the constitutional rights to privacy, and dignity.[113] The other countries do not have such laws.

3.3.6 LGB persons in employment

Employment is another area where LGB persons suffer discrimination. This discrimination has a direct impact on their livelihoods and the quality of lives they live. Before 1997, there was not much protection for LGB persons in employment. Twenty two years later, only Botswana and South Africa expressly protect against discrimination in employment on grounds of sexual orientation. For Kenya, Nigeria and Uganda, the situation is still the way it was before 1997.

In South Africa, before 1997, the law did not provide for equality and non-discrimination. However, the Employment Equity Act[114] under section 6(1) now protects against discrimination in employment on the ground of sexual orientation, as does section 187(1)(f) of the Labour Relations Act[115] on unfair dismissals. The rules made under the Judges' Remuneration and Conditions of Employment Act, 47 of 2001 now have the words 'or partner in a permanent same-sex life partnership' inserted after the word 'spouse' as directed by the Constitutional Court in *Satchwell v President of the Republic of South Africa and Another*, (the *Satchwell* case)[116] The Equality Court also extended protection to LGB persons in employment in the case of *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park*.[117] In *Langemaat v Minister of Safety*

109 Act 38 of 2005.
110 Above, section 26(2).
111 No. 61 of 2003.
112 GN R1165 GG 40312, 30 September 2016.
113 D W Jordaan 'A constitutional critique on the regulations relating to artificial fertilisation of persons' *South African Journal of Bioethics Law* 2017 10(1) 29.
114 Act No. 55 of 1998.
115 Act No. 66 of 1995
116 2004 1 BCLR 1 (CC) (17 March 2003).
117 ZAGPHC 269, ZAEQC 1; 30 ILJ 868.

& Security & *Others*,[118] the High Court had found refusal to pay benefits to a deceased employee's same-sex partner on the basis that the South African Police Services' Regulations and rules defined dependents as legal spouses and children untenable. The changes are largely attributed to the Final Constitution that protects persons against discrimination based on sexual orientation, but some are also attributed directly to strategic litigation as seen above.

For Botswana, section 23(d) of the Employment (Amendment) Act, 2010,[119] now prohibits dismissals based on, among other grounds, one's sexual orientation. This was done without any litigation on the matter and without constitutional recognition of sexual orientation as a protected ground. However, it came in the aftermath of discussions about equality in the *Kanane* case. Kenya and Uganda have no such specific protections. Both countries have a closed list of grounds upon which one cannot be discriminated against in employment, which include sex but not sexual orientation.[120] Nigeria provides for protection against discrimination in the Constitution, but does not address discrimination in employment specifically.[121]

The difference between South Africa and the other countries is the Constitutional protection, but also the protracted litigation which removed the last vestiges of discrimination in employment. Therefore, overall, there has been limited change in legal protections against discrimination for LGB persons in employment in the selected Common Law African countries, except for South Africa, and Botswana. Even there, strategic litigation has played a very limited and indirect part in changes in the protection of LGB persons in employment, as the changes have mainly come through statute.

3.3.7 Protections against discrimination in LGB civil society activities

Another area where LGB persons are usually excluded by law from participation is in the area of civil society activities. Before 1997, all the countries had more restrictive civil society laws. These laws have changed over time.

In South Africa, before 1997, the Fundraising Act, 1978[122] restricted organisations involved in political activism, including legal reform, from accessing government funding.[123] Organisations generally faced hostility, including those agitating for LGB rights.[124] The Final Constitution, 1996, however, includes the right to freedom of association, and this is a right that

118 (1998) 19 ILJ 240 (T).
119 Employment (Amendment) Act, 2010, No. 10 of 2010.
120 For Kenya this is in the Employment Act, 2007, while for Uganda, it is Employment Act, section 6(3).
121 Section 15(2) of the Federal Republic of Nigeria Constitution 1999.
122 Act No. 107 of 1978.
123 Above, Chapter I and III.
124 E Emdon, W Mgoqi & R Rosenthal 'Report on the establishment, registration and administration of NGOs – The independent study into an enabling environment for NGOs' The Development Resources Centre (1995) 2.

accrues to 'everyone,'[125] and protects organisations from undue state control, except perhaps for criminal associations and associations that directly threaten the constitutional order.[126] It is indeed these very same exceptions that were widely exaggerated during apartheid to curtail the work of organisations working on issues like LGB rights.[127] The Non-profit Organisations Act, 1998[128] gave effect to the constitutional protections. The approach was to consider organisations as partners in development. The Act allows organisations to operate even without registration.[129] The Registrar may also refuse to register an organisation but only if not satisfied that the application meets the requirements of registration, which do not include desirability of name or objectives.[130] This makes it possible for any organisation, including those working on LGB rights, to register and operate, or choose not to register and still operate. The Act also repeals provisions of the Fundraising Act, 1978 that unduly limited the operational space for non-profit organisations.[131]

Organisations in all the other countries still face a number of challenges, as their constitutions do not expressly protect against discrimination based on sexual orientation. However, in Botswana and Kenya, progress has been made through judicial declarations of equality, while Uganda and Nigeria have instead entrenched discrimination through court decisions.

In Botswana, the Constitution protects freedom of assembly and association.[132] Provision is made for limitations in the interests of 'defence, public safety, public order, public morality or public health;' or protection of the rights of others, provided these laws or actions done under them are reasonably justifiable in a democratic society.[133] The main law governing civic organisations is the Societies Act, 1972,[134] which is a pre-1997 law, and which has not been amended post 1997. It requires every local organisation to apply for registration within 28 days of its formation.[135] The Registrar is given powers to refuse to register an organisation if, in his/her opinion, its objects are 'likely to be used for any unlawful purpose…',[136] or its constitution or rules 'are in any

125 Constitution of the Republic of South Africa, 1996, section 18.
126 I Currie & J De Waal *The Bill of Rights handbook* (2005) 425.
127 Above, 420.
128 Act No. 71 of 1998
129 Above, section 12(1). Also see Inyathelo – The South African Institute for Advancement 'A concise guide to The Nonprofit Organisations Act 71 of 1998' (2009) 4 http://www.Inyathelo.Org.Za/Images/Publications/Non-Profit_Organisations_Act_71.Pdf (accessed 11 April 2018).
130 Section 13(3).
131 Section 33.
132 Botswana Constitution, section 13(1).
133 Above, section 13(2).
134 18:01 (Botswana).
135 Above, section 6(1).
136 Above, section 7(2)(a).

respect repugnant to or inconsistent with any written law,'[137] or the name is in his/her opinion 'repugnant to or inconsistent with any written law or otherwise undesirable'.[138] Section 7(2)(a) has in the post 1997 period been used by the Registrar to deny registration to the main LGB organisation in Botswana, Lesbians, Gays and Bisexuals of Botswana (LEGABIBO). This was the subject of the *Attorney General v Thuto Ramogge & 19 Others* (*LEGABIBO Registration* case),[139] where the Court of Appeal found no justifiable reasons to restrict the right to freedom of association of LGB persons.

In Kenya, the 1963 Constitution provided for the right to freedom of association under article 70(b).[140] The claw-back clause however made it easy for a repressive state to grossly limit these rights, which is what happened.[141] The 2010 Constitution introduced a more elaborate and less restricted right to freedom of association in Article 33. It accords the right to every person and specifies that the right includes the 'right to form, join or participate in the activities of an association of any kind.'[142] It also requires that legislation requiring registration of organisations should not provide for unlawful denial of registration and should provide for the right to a fair hearing before registration is cancelled.[143] At the statute level, however, the Non-Governmental Organizations Coordination Act,[144] was the first law to broadly govern civil society in Kenya.[145] The Act provides for mandatory registration of organisations.[146] It also gives the Director of the NGO Coordination Board powers to reject a proposed organisation's name on the grounds that the name is, in their opinion, 'repugnant to or inconsistent with any law or is otherwise undesirable'.[147] The Director used these powers to refuse to register the National Gay and Lesbian Human Rights Commission (NGLHRC), which led to the decision of the Court of Appeal in the *NGLHRC Registration* case,[148] which emphasises freedom of association for all including LGBT persons. The NGO Board may also refuse to register an organisation if it is satisfied that its proposed activities or procedures are 'not in the national interest'.[149]

137 Above, section 7(2)(e).
138 Above, section 7(2)(h)(iii).
139 (2014) CACGB-128-14 (Court of Appeal of Botswana)
140 Constitution of the Republic of Kenya, 1963, article 80.
141 For a discussion on the relationship between the civil society organisations and the state in East Africa generally but Kenya in particular see, CP Maina 'Conclusion: Coming of age: NGOs and state accountability in East Africa' in M Mutua (ed) *Human rights NGOs in East Africa: Political and normative tensions* (2009) 305, 208.
142 Constitution, article 33(1).
143 Constitution, article 33(3).
144 Cap 134
145 RA Jillo, F Kisinga 'NGO law in Kenya' (2009) 11 *International Journal for Not-for-Profit Law* 39, 42.
146 Section 10(1).
147 Section 8(3)(b)(ii).
148 Civil Appeal No. 145 of 2015.
149 n 144 above, section 14(a).

This language is vague and can be used against organisations working on LGB rights.[150] Indeed, the NGO Board has withdrawn the licences of organisations working on human rights issues, including LGB issues.[151] The Public Benefit Organisations (PBO) Act, 2013 is more in line with the Constitution, as it specifies more transparent and less onerous requirements for registration,[152] establishes an independent regulator, the Public Benefit Organizations Regulatory Authority,[153] and gives organisations an opportunity to self-regulate.[154] It only came into force after protracted negotiations and after a court decision.[155]

For the case of Nigeria, the Constitution guarantees freedom of association in section 40, but this is subject to the interests of defence, public safety, public order, public morality or public health, or to protection of the rights or freedoms of others.[156] However, the Same Sex Marriages Prohibition Act, 2013 criminalises the 'registration of gay clubs, societies and organisations, their sustenance, processions and meetings'.[157] This is the only provision of its kind in the selected Common Law African countries. Indeed the SSMPA provisions were used by the court to justify upholding of the refusal to register the Lesbian Equality and Empowerment Initiatives in the *Pamela Adie v Corporate Affairs Commission* case.[158] Human Rights Watch reports that the SSMPA has been used to raid organisations including mainstream ones that express opposition to the law.[159] This law is in addition to the laws regulating civil society in general. Organisations that wish to register can do so under the Companies and Allied Matters Act (CAMA),[160] by the Corporate Affairs Commission. Civil society organisations face challenges arising out of anti-terrorism laws, which are sometimes used to curtail civil society freedoms. There is a proposed Bill to Regulate the Acceptance and Utilization of Financial/Material Contributions of Donor Agencies to Voluntary Organizations. The Bill would greatly curtail

150 Also see Jillo & Kisinga (n 145 above) 48.

151 One of these is the Kenya Human Rights Commission, which is one of the organisations that supports LGB rights in Kenya. See for example 'NGOs: We were shut over plan to contest poll result in court' https://www.nation.co.ke/news/NGOs--We-were-shut-over-plan-to-contest-poll-result-in-court-/1056-4059114-jc5pvc/index.html (accessed 11 April 2018). However, courts have found some of these revocations unlawful, and they have been halted. See for example that of KHRC, in *Kenya Human Rights Commission & Another v Non-Governmental Organisations Co-ordination Board & Another* [2018] eKLR.

152 Public Benefits Organisations Act, section 6-19.

153 Above, sections 34-49.

154 Above, sections 20-33.

155 *Trusted Society of Human Rights Alliance v Cabinet Secretary for Devolution and Planning & 3 Others* [2017] eKLR.

156 Constitution, section 45.

157 SSMPA, section 4(1)

158 Suit no: FHC/ABJ/CS/827/2018.

159 Human Rights Watch, "Tell me where I can be safe": The impact of Nigeria's Same Sex Marriage (Prohibition) Act, 59-64, https://www.hrw.org/sites/default/files/report_pdf/nigeria1016_web.pdf (accessed 7 September 2019 at 5.27pm).

160 Cap C20, Laws of the Federation of Nigeria 2004.

civil society operations as it would require prior registration of the organisation and prior approval to receive foreign funding, among other equally restrictive provisions.[161] Therefore, for the case of Nigeria, the situation has worsened from 1997 to date, with some negative changes occurring during the time that LGB strategic litigation has been going on.

In Uganda, the 1995 Constitution of Uganda protects the right to freedom of association in article 29(1)(e), which includes the freedom to form and join organisations. The right is subject to the general limitation of rights in article 43 of the Constitution.[162] The first law to deal with NGO operations was the Non-Governmental Organisations (Registration) Act, Cap 113, which commenced in 1989. It required mandatory registration of organisations[163] and gave powers to the then NGO Board to revoke the registration of an organisation in the public interest, among other reasons.[164] This Act was amended in 2006, giving powers to the NGO Board to incorporate organisations and issue permits to regulate them.[165] It also introduced a provision barring registration of organisations whose objectives contravene the law.[166] The Constitutional Court found these provisions to be constitutional as it emphasised the importance of regulation of civil society.[167] The new NGO Act, 2016 largely built upon the 2006 amendment, and made many provisions of the 2006 regulations, including the special obligations imposed on NGOs, a part of the law.[168] This has made the operating environment for LGB organisations more complicated.[169] Under section 30, an organisation shall not be registered 'where the objectives of the organisation as specified in its constitution are in contravention of the laws of Uganda', among other reasons. Since the laws of Uganda criminalise same-sex relations, it may easily be interpreted as allowing the refusal to register organisations working on LGB issues.[170] The provision on special obligations specifically threatens LGB organisations, as the obligations are wide and vague.[171] All NGOs now have to first be incorporated before applying for a

161 For a detailed discussion of this bill and other proposed laws, see International Centre for Not for Profit law (ICNL) 'Civic Freedom Monitor: Nigeria' http://www.icnl.org/research/monitor/nigeria.html (Accessed 29 August 2019).

162 It subjects the enjoyment of rights to the rights of others and public interest (article 43(1). The Public interest is further restricted not to allow political persecution; detention without trial, and limitations beyond what is acceptable and demonstrably justifiable in a free and democratic society (article 43(2)).

163 Section 2 of the repealed Non-Governmental Organisations Registration Act, Cap 113.

164 Above, section 10(c).

165 Non-Governmental Organisations Registration (Amendment) Act 2006.

166 Above, section 4(d).

167 *HURINET and Others v Attorney General* Constitutional Petition No. 5 of 2009.

168 This is now section 44 of the NGO Act, 2016.

169 See Human Rights Awareness and Promotion Forum 'Position paper on the Non-governmental Organisations Act, 2016' (2016) 3-4 https://hrapf.org/?mdocs-file=1669&mdocs-url=false (accessed 20 April 2018).

170 As above.

171 As above.

permit to operate.[172] The incorporation is usually done under the Companies Act, 2012. However, section 32 gives the Registrar powers to refuse to reserve the name of a company if the name is seen as 'undesirable'. The Registrar's use of these powers to deny SMUG registration has been challenged before the High Court of Uganda, but unfortunately the Court upheld the registrar's action on the basis that same-sex relations were criminalised under section 145 of the Penal Code Act.[173]

The above analysis shows that LGB strategic litigation seems to contribute to positive developments to civil society law in South Africa, Botswana and Kenya, and at the same time, it seems to contribute to negative developments in Uganda. For Nigeria, curtailment on CSOs begun before strategic litigation started, and so it does not seem to be a reaction to it, as the situation in Uganda would suggest.

3.3.8 Status of LGB persons serving in the army

Service in the army is another area where LGB persons are usually excluded. This exclusion is based largely on patriarchal beliefs which consider LGB persons to be unfit for military service.[174] The situation has changed from 1997 to date in only South Africa among the selected countries. South Africa expressly provides protection for LGB persons in the army, upon entry and during service. Furing the apartheid period, there was a dual-policy on how to deal with LGB persons in the army. Persons who were gay could be conscripted into the army but not allowed to join the permanent force.[175] Those who committed homosexual acts would be punished up to court martial level, and those who admitted to homosexuality but who had not committed any acts would be sent for rehabilitation.[176] This policy tolerated LGB persons among those conscripted to join the army, but strictly prohibited homosexuality among members of the permanent force. Now, there is protection of LGB persons within the army starting in 1998 when, following the express protections against discrimination based on sexual orientation in the South African Constitution, the South African National Defence Force (SANDF) adopted the Policy on Equal Opportunity and Affirmative Action.[177] The Policy among others formally banned discrimination on the basis of sexual orientation within the

172 Section 29 of the Non-governmental Organizations Act, 2016.

173 *SMUG Registration* case, n 85 above.

174 This was the case for example in South Africa, see DJ Conway 'In the name of humanity, can you as a woman, as a mother, tolerate this? Gender and the militarisation of South Africa' (2000) Unpublished master's thesis, University of Bristol, Bristol.

175 A Belkin & M Canaday 'Assessing the integration of gays and lesbians into the South African National Defence Force' (2010) 38 *Scientia Militaria: South African Journal of Military Studies* 1.

176 L Heinecken 'Social equality versus combat effectiveness: An institutional challenge for the military' (1998) 7:6 *African Security Review* 3–16.

177 South African Department of Defence 'Department of Defence policy on equal opportunity and affirmative action' (2002).

army. The Policy was reviewed and readopted in 2002. Therefore, officially, LGB persons can join the armed forces and can serve just like everyone else, a complete departure from the pre-1998 position.

The other countries have no express regulations stopping service in the army by LGB persons, but at the same time have no protections for them, and the environment promotes hiding one's sexual orientation if it is homosexual or bisexual. In Nigeria, section 81 of the Armed Forces Act[178] criminalises carnal knowledge against the order of nature and gross indecency.[179] In Botswana, section 66 of the Botswana Defence Force Act[180] recognises civil offences for members of the military, but now that same-sex relations are no longer criminalised, the Penal Code provisions criminalising same-sex relations do not apply, which implies that LGB persons can serve in the armed forces for Botswana. For Kenya, the Armed Forces Act also incorporates civil offences and applies them to the military, and these include the criminalisation of consensual same-sex relations.[181] In Uganda, section 145 of the Uganda Peoples Defence Force Act criminalises 'scandalous' conduct' – conduct against 'expectations and morality' with the penalty being dismissal from the army. Similarly, the Code of Conduct of the Uganda Peoples' Defence Forces prohibits developing 'any illegitimate or irresponsible relationship that is contrary to public morality with any other persons'.[182] The reference to relationships 'contrary to public morality' shows that it may be used to target homosexual relationships.

As such in this area, the changes in South Africa are largely attributable to the constitutional protection of sexual orientation rather than strategic litigation. Strategic litigation is also yet to lead to any significant contributions in relation to the protection of LGB persons in the armed forces in other countries, with the exception of Botswana, where the decriminalisation of consensual same-sex relations is likely to result in better protection for LGB persons in the armed forces at the formal level.

3.3.9 LGB persons donating blood

Since the discovery of HIV, the donation of blood by LGB persons, particularly men who have sex with men, has been restricted in various countries. This has usually been justified on the grounds that usually, the HIV prevalence rate is higher for men who have sex with men than men who have sex with women, and therefore their blood is much more likely to be infected with HIV than other groups of persons.[183] Internationally, the World Health Organisation issued

178 Chapter A20 of the Laws of the Federation of Nigeria.
179 See discussion in 3.3.2 above.
180 Chapter 21:05
181 For Kenya section 69(1) of the Armed Forces Act, Chapter 199, and for Uganda
182 Uganda Peoples' Defence Forces Act, Act 7 of 2005, Seventh Schedule, Regulation 2(e).
183 See FA Hochberg 'HIV/AIDS and blood donation policies: a comparative study of public health policies and individual rights norms' (2002) 12 *Duke Journal of Comparative &*

guidelines on assessing donor suitability for blood donation in 2002, which classified men who have sex with men and gays as a high-risk group.[184] The Guidelines recommended deferring a person whose former sexual behaviours put them at risk for at least 12 months after the last sexual contact, and to permanently defer 'individuals whose sexual behaviours put them at high risk of transfusion-transmissible infections.'[185] Instead of classifying persons by their sexual orientation, the Guidelines do so by their behaviour.

In the selected countries, there has been limited change in this aspect from 1997 to date. The practices differ from country to country, and this is so because each country has its own unique experiences with HIV, but also because the HIV scourge in these countries is largely due to heterosexual sexual behaviour rather than homosexual activity.[186] South Africa is the only country to have no restriction on gays donating blood. The South African National Blood Service (SANBS) initially only allowed donation of blood by gay men if they had had no sex for six months or longer. This however ended in 2014,[187] and now anyone who has had a new partner within the last six months is not allowed to donate blood.[188] This can be attributed to the constitutional protection against discrimination.

In Botswana, the National Policy on Blood Transfusion is silent on homosexuality,[189] and even the pre-donation form does not collect information on sexual behaviour.[190] Indeed, non-discrimination is one of the principles to be followed.[191] The Ministry of Health has previously asserted that they do not discriminate against gays in blood transfusion, but the Director of the National Blood Transfusion Service clarified that they actually do not take blood from gay donors based on the WHO guidelines.[192] The 2001 Policy Guidelines on Blood Transfusion in Kenya protects against the discrimination of blood donors on any grounds.[193] However, it requires donors to fill a form disclosing their present and past health status, and any person with 'an identified risk factor will be temporarily or permanently excluded from blood donation'.[194] This implies that MSM could be excluded on the basis of being high risk for

International Law 231-280, 233-241.

184 World Health Organisation 'Guidelines on assessing donor suitability for blood donation' (2002) 220-224.

185 As above.

186 C Gerard *et al* (eds) *Safe blood in developing countries* (1995) 17, 48.

187 SA finally ends gay blood donation ban' *Mamba Online* 20 May 2014 http://www.mambaonline.com/2014/05/20/sas-gay-blood-donation-ban-finally-ends / (accessed 5 March 2018).

188 Above.

189 Ministry of Health 'National policy on blood transfusion' 2000.

190 Above, Appendix 2.

191 Above, Appendix 3.

192 'Botswana gay blood donation ban challenged' *Mamba Online* 5 June 2014 http://www.mambaonline.com/2014/06/05/botswana-gay-blood-donation-ban-challenged/ (accessed 5 March 2018).

193 Ministry of Health 'Policy Guidelines on blood transfusion in Kenya' (2001) 5.

194 Above, 13.

HIV. In Nigeria, there is no specific ban. The National Blood Policy, revised in 2015, does not provide for a basis of exclusion for blood transfusion, but also emphasises safety.[195] In Uganda, the health check questionnaire includes a question as to whether one has had 'sex with a male or female prostitute or more than one partner?' and this is applicable to both men and women. When one answers 'Yes' to this question, they are supposed to contact a pre-donation counsellor.[196] Demographic information is collected before donation, and questions are asked about one's lifestyle and 'disease risk factors',[197] and thus MSM may be left out based on the information corrected.

Strategic litigation has not done much to change the limitations on gay men donating blood, except that this does not actually appear to be a big exclusionary criteria in Africa, perhaps due to the secrecy surrounding sexuality. It has also not been a matter of litigation, not even in South Africa, thus attributing the progress in that country more to the constitutional protection against discrimination based on sexual orientation.

3.3.10 Non-discrimination in access to health services

Another area where there is usually discrimination is in access to goods, information and services within the health sector generally. Most goods and services are tailored towards the majority heterosexual communities.[198] As such, states must go out of their way to provide tailored goods and services for LGB persons, including lubricants, condoms, and tailored health services that address the issues of LGB persons. In the selected countries, almost all of them have made progress at the legal and policy level to provide non-discriminatory services, even though gaps still remain. There were no specific protections for LGB persons in access to health services before 1997.

South Africa leads with the Constitution guaranteeing the right to non-discrimination on the basis of sexual orientation,[199] and also the right to health care, which belongs to 'everyone'.[200] At the policy level, the National Strategic Plan (NSP) 2017 – 2022 identifies LGBTI persons as one of the most-at-risk-populations. Goal 3 aims at reaching 'all key and vulnerable populations with customised and targeted interventions.'[201] It grounds the HIV response in a

195 National Blood Transfusion Service. Federal Ministry of Health, Nigeria. Nigeria National Blood Policy Revised. Abuja: National Blood Transfusion Science, Federal Ministry of Health; 2006.

196 Uganda Blood transfusion services 'Who can give blood?' http://www.ubts.go.ug/giving-blood.html (accessed 5 March 2018).

197 Uganda Blood Transfusions Services 'Blood donation process' http://www.ubts.go.ug/donation%20process.html/ (accessed 5 March 2018).

198 KH Mayer et 'Sexual and gender minority health: what we know and what needs to be done' (2008) 98 *American Journal on Public Health* 989–995.

199 Section 9 of the South African Constitution.

200 Section 27(a) of the Constitution.

201 South Africa National AIDS Council 'The national strategic plan (NSP) 2017 – 2022' Goal 3 http://sanac.org.za/about-sanac/the-national-strategic-plan-nsp-2012-2016-in-a-

human rights framework and expressly maps out measures to address barriers that affect, among others, LGB access to services.[202] The South African National LGBTI Framework, 2017-2022 recognises the challenges that LGB populations face in accessing health goods and services and provides for tailored goods and services.[203]

Botswana's Constitution does not expressly protect the right to health. The Public Health Act[204] does not prohibit discrimination in access to health care either, except for discrimination against health workers by their employers on the basis of their health status.[205] At the policy level, however, the 2011 National Health Policy's vision is to create an environment where all people can achieve the highest standard of health and wellbeing.[206] This can be interpreted as accommodating all persons. Its implementation is guided by, among other principles, respect for dignity, and ensuring access to resources for the 'vulnerable, marginalised and underserved…'[207] The 2012 Botswana HIV Policy protects 'every person' in Botswana against discrimination access to health services.'[208] It however does not specifically include LGB persons. The National Strategic Plan for HIV[209] has among its guiding principles non-discrimination, including on the basis of sexual orientation.[210] However, it does not make particular mention of key populations or LGB persons.[211] The 2012 Botswana National HIV and AIDS Treatment Guidelines also do not specifically address LGB persons, except for recognising that safe implementation of post exposure prophylaxis interventions for men who have sex with men remains to be established.[212] The Integrated HIV Clinical Care Guidelines 2016 include engaging high-risk groups like men who have sex with men on the use of pre-exposure prophylaxis, [213] and actually prioritising them for PrEP.[214] Therefore, Botswana has also made progress towards including LGB persons in access to health, particularly within the HIV response.

nutshell/ (accessed 5 March 2018).

202 Above, Goal 5.

203 South Africa National AIDS Council 'South African national LGBTI HIV framework, 2017-2022' 2017 http://sanac.org.za/2017/06/26/sa-national-lgbti-hiv-plan/ (accessed 5 March 2018).

204 Public Health Act, 11 of 2013.

205 Above, section 148(1).

206 Republic of Botswana 'National health policy: Towards a healthier Botswana' (2011).

207 Above, para 31.

208 Republic of Botswana 'Botswana national policy on HIV and AIDS' revised edition (2012) paras 2.1.3 and 7.1.5.

209 Republic of Botswana 'The second Botswana national strategic framework for HIV and AIDS 2010-2016' (2009).

210 Above, para 2.3.

211 Above, para 1.2.4.

212 Government of Botswana, Ministry of Health '2012 Botswana national HIV & AIDS treatment guidelines' (2012) para 1.2.3

213 Republic of Botswana, Ministry of Health 'Handbook of the Botswana 2016 integrated HIV clinical care guidelines' (2016) 5.

214 Above, 7.

Kenya's 2010 Constitution guarantees the right to health and to healthcare, including reproductive health for 'every person'.[215] This was a big departure from the 1963 Independence Constitution, which did not provide for the right to health. Article 27 provides that 'every person is equal before the law…' and this includes enjoyment of all rights.[216] The state is enjoined not to discriminate on 'any ground,' but the Constitution does not specifically mention sexual orientation, although it mentions sex.[217] The High Court has, in respect of LGB persons, held that the word 'every person' in article 27 means exactly that, and as such LGB persons are also among those protected.[218] Although the Health Act 2017 does not specifically address LGB persons, it confirms that the right to the highest attainable standard of health is for 'every person'.[219] It also provides that everyone has the right to privacy, and to be treated with dignity and respect.[220] It however requires the state to, among other things, put in place a comprehensive programme to implement 'means to reduce unsafe sexual practices'[221] which may imply trying to 'cure' homosexuality rather than creating an environment that promotes safe sex. The Kenya AIDS Strategic Framework recognises men who have sex with men among key populations.[222] It also adopts a human rights approach to HIV. The 2015-2019 National AIDS Council's Strategic Plan also includes interventions geared towards Key Populations, among whom men who have sex with men are included. Functional Area 3 seeks a human rights approach to facilitate access by key populations, among others.[223]

Nigeria has no specific protections for LGB persons as regards health. For HIV, the HIV/AIDS (Anti-Discrimination) Act, 2014 was passed soon after the SSMPA. It outlaws discrimination based on HIV status and calls for protections.[224] The National HIV and AIDS Strategic Plan 2017-2021 includes targets for MSM.[225] However, the criminalisation of same-sex relations tends to undermine all these positive provisions. Human Rights Watch found that service provision and advocacy on HIV for LGB persons are stopped by the state's interference in NGO work.[226]

Uganda's Constitution does not provide for the right to health, but includes access to medical care and health care among the National Objectives and

215 Article 43(1)(9a) of the Constitution of the Republic of Kenya 2010.
216 Constitution, article 27 (1) and (2).
217 Constitution, article 27(4).
218 *NGLHRC Registration case* (n 148 above).
219 The Health Act, No. 21 of 2017, section 5(1).
220 Above, section 5(2).
221 Above, section 68(1)(e)(ii).FX
222 Ministry of Health 'Kenya AIDS strategic framework 2014-2015-2018-2019'
223 The National AIDS Control Council 'Strategic Plan 2015-2019,' July 2015.
224 Section 4(1)
225 Federal Republic of Nigeria 'National HIV and AIDS strategic plan 2017-2021' 38.
226 Human Rights Watch, (n 159 above) 67, 106.

Directive Principles of State Policy (NODPSP).[227] This would imply that the right is not justiciable, but in light of a recent amendment to the Constitution to recognise the NODPSP,[228] it is now arguable that the rights included therein are justiciable.[229] The Public Health Act has been in place since 1935, and it predictably does not address discrimination on the grounds of sexual orientation.[230] Uganda has adopted the trend of attempting to address the general HIV/AIDS epidemic while at the same time criminalising same-sex practices and harassing LGB persons. In 1990, the Penal Code was amended to increase the punishment for carnal knowledge against the order of nature from 14 years to life imprisonment, ostensibly as a way of curbing HIV/AIDS.[231] The HIV/AIDS Prevention and Control Act, 2014 prohibits discrimination on the basis of HIV status in access to health services.[232] The state has obligations to among others ensure the right of access to equitable distribution of resources in a non-discriminatory manner, and give priority to most at risk groups.[233] The definition of most at risk populations however leaves out gay men, men who have sex with men, lesbians, and women who have sex with women.[234] The HIV/AIDS Strategic Plan III recognises that there is a higher HIV prevalence among men who have sex with men.[235] It aims at reducing discrimination by 90%, and specifically considers `ensuring access to health services to MSM and other groups'.[236] However, it provides that the state will not specify sexual orientation in data collected,[237] which is instead a problem, as the information concerning these groups may not be known. Uganda also has a ministerial directive on non-discrimination in health service provision that specifically covers services for LGB persons.[238] Uganda has therefore made some progress in the health sector, marking a big departure from what the position was prior to 1997.

Generally, changes in access to HIV services policies and laws have happened as the epidemic was understood more, and there have been adjustments in

227 Principle XIV(b) and XX.

228 Article 8A of the Constitution of Uganda (introduced by the Constitutional Amendment Act 2005).

229 C Mbazira 'Public interest litigation and judicial activism in Uganda: Improving the enforcement of economic, social and cultural rights' (2009) Human Rights and Peace Centre Working Paper No. 24. See also the Supreme Court decision in *CEHURD v. Attorney General*, Constitutional Appeal No.1 of 2016.

230 The Public Health Act Cap, 281.

231 Penal Code Amendment Act 1990.

232 HIV/AIDS Prevention and Control Act, 2014, sections 37 and 39.

233 Above, Section 24.

234 Above, Section 24(2)

235 Ministry of Health 'National HIV and AIDS Strategic Plan 2015/2016 - 2019/2020' 5.

236 Above, 8.

237 Above, 15.

238 Republic of Uganda, Ministry of Health 'Ministerial directive on access to health services without discrimination' (2014) https://www.scribd.com/document/233209149/MoH-Ministerial-Directive-on-Access-to-Health-Services-Without-Discrimination-19-June-14 (accessed 8 September 2017).

all countries, including access to services for MSM. Strategic litigation has not been the main factor in this change but rather the realisation that if the epidemic is to be managed, MSM too have to have access to services. Criminal laws where they exist are however a big challenge, and this is the main concern in the selected Common Law African countries.

3.3.11 Non-discrimination in access to justice

Although the justice system is usually available for all, there are accessibility concerns for different groups of people depending on where they are. Prior to 1997, there were no formal laws limiting access to justice by particular groups, although this did not mean equal access for everyone. This was simply formal equality, and so many were left behind. LGB persons are among those left behind when access to justice mechanisms do not specifically reach out to them, as they are already excluded through stigma and discrimination.[239] This implies that in order for change to happen, specific laws or policies encouraging access by LGB persons have to be devised.[240]

Only South Africa has specifically mentioned LGB persons in the context of access to justice, and this is under the equality clause of the Constitution. That provision expressly protects against discrimination on the basis of sexual orientation. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, which was intended to give effect to section 9 of the Constitution, also clearly shows that sexual orientation is one of the grounds against which discrimination is prohibited.[241] The Act establishes equality courts, which are all at the level of the High Court,[242] and gazetted magistrate's courts.[243] These courts are meant to bring justice closer to the people. It imposes a duty on the state, state contractors and other actors including non-governmental organisations, to promote equality through drawing plans, codes and regulatory mechanisms, enforcing and monitoring them, and reporting non-compliance.[244] The Act also establishes the Equality Review Committee, which advises the minister on the steps taken towards ensuring substantive equality.[245] The Constitution also entrenches the mandate of the South African Human Rights Commission.[246] The South African Human Rights Commission Act gives the Commission powers to, among others, promote respect and observance of human rights, and monitoring and assessing the human rights

239 See Southern African Litigation Centre 'Access to justice for healthcare violations: Background document' (2017) 24.
240 Above, 27-33.
241 The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, section 1(1).
242 Above, section 16(1)(a)
243 Above, section 16(1)(c).
244 Section 26.
245 Section 32.
246 Section I81(1)(b) and 184 read together with item 20 of schedule 6 of the Constitution.

situation in the country.[247] It can advise and make recommendations on any human rights matters in line with the Constitution.[248] This clearly includes discrimination based on sexual orientation among matters it can investigate.

No such revolutionary change has been witnessed in the case of Botswana, which has had the same Constitution in force since 1966. Section 3 provides for rights for 'every person' without any discrimination, although it does not include sexual orientation among the prohibited grounds of discrimination. Section 15 prohibits the making of discriminatory laws,[249] as well as discriminatory treatment.[250] It also establishes courts and ensures independence of the courts through the provisions on how the judges are appointed, security of tenure and disciplinary action.[251] Section 10(9) guarantees independence of the courts. The Court of Appeal has in fact extended protection to LGB persons by acknowledging that they are persons who are entitled to the same rights as any other persons under section 3.[252] Botswana, however does not have a national human rights institution, although efforts are underway to establish one, which presently makes it difficult for people to challenge and report human rights violations.[253]

Before 2010 in Kenya, there was no guarantee for full equality in access to a fair trial. The 2010 Constitution however guarantees the independence of the judiciary and subjects them only to the Constitution and the law.[254] The Constitution requires the courts to do justice to all regardless of status.[255] It also guarantees the right to a fair hearing, which is a right guaranteed to 'every person'.[256] 'Every person', as already discussed, has been interpreted by the courts to include LGB persons.[257] It also provides for the corollary right to a fair trial for anyone accused of committing an offence.[258] It also establishes the Kenya National Human Rights and Equality Commission,[259] which is given the mandate to, among others, 'monitor, investigate and report on the observance of human rights in all spheres of life in the Republic, including observance by the national security organs'.[260] Under article 59(3) 'every person' has a right

247 Section 2, South African Human Rights Commission Act, Act 40 of 2013.
248 Section 13(1)(a).
249 Constitution of Botswana, section 15(1).
250 Above, section 15(2).
251 Constitution of Botswana, sections 95-104.
252 *LEGABIBO Registration* case (n 47 above).
253 The Republic of Botswana 'Office of the President: Human rights commission' http://www.gov.bw/en/Ministries--Authorities/Ministries/State-President/Office-of-the-President/Divisions/Human-Rights-Commissions1/ (accessed 8 March 2018).
254 Constitution of Kenya, article 160(1).
255 Constitution of Kenya, article 159(2)(a).
256 Above, article 50(1).
257 *NGLHRC Registration case* (n 148 above).
258 Above, article 50(2).
259 Above, article 59(1).
260 Above, article 59(2)(d).

to complain to the Commission about human rights violations. It therefore allows all persons, including LGB persons, to report cases of human rights violations. The Kenya National Human Rights and Equality Commission Act also provides that the Commission shall be open to all persons.

For Nigeria, the 1999 Constitution provides for the right to a fair hearing in section 39(1). The National Human Rights Commission Act 1995 established the National Human Rights Commission. The 2010 amendment to the Act gave it powers to handle complaints and investigate human rights abuses.[261] The Violence against Persons (Prohibition) Act, 2015 was passed to protect against violence, and it provides effective remedies for victims and punishes offenders. It even includes protection from anal rape, and thus technically includes LGB persons who may be violated thus, in accessing justice in case of violence.[262] The courts do in fact provide remedies when such cases are taken before them as it was in *Ifeanyi Orazulike v Inspector General of Police & Abuja Environmental Protection Board*,[263] where the court awarded damages for arbitrary arrests and detention.

For Uganda, the 1995 Constitution established courts that are independent and not subject to the control of any person or authority.[264] Article 28(1) entitles every person to the right to a 'fair, speedy and public hearing before an independent and impartial court or tribunal established by law'. This right is non-derogable under article 44(c). The Constitution also establishes the Uganda Human Rights Commission, which investigates abuses of human rights, and the Equal Opportunities Commission, which is responsible for redressing abuses arising out of discrimination and marginalisation. Originally, section 15(6)(d) of the Equal Opportunities Commission Act, 2007 had stopped the Commission from investigating matters regarded as immoral or socially unacceptable by the majority. The provision was inserted specifically to prevent 'homosexuals and the like' from claiming protection under the Act,[265] but was eventually declared unconstitutional by the Constitutional Court in *Adrian Jjuuko v Attorney General* (*Equal Opportunities Commission* case).[266]

Formal access to justice for LGB persons is thus not a major issue in the selected African Common Law Countries. It is also not a matter that has been litigated upon except for Uganda, and in this case, positive progress has been made.

261 National Human Rights Commission (Amendment) Act, 2010.
262 Section 1.
263 Suit No. FHC/ABJ/CS/799/2014.
264 Constitution of Uganda, article 128.
265 276 See discussion in Chapter 2.3 above.
266 Constitutional Petition No.1 of 2009. (Constitutional Court of Uganda).

3.3.12 Support for a surviving same-sex partner

Again South Africa stands out as the only country among those in Common Law Africa with protections for surviving partners in same-sex relationships upon the death of one. In *Gory v Kolver NO & Others* (the *Gory* case)[267] which was decided before the recognition of same-sex marriages, the Constitutional Court held that section 1(1) of the Intestate Succession Act[268] that did not recognise partners in permanent same-sex relations to inherit automatically, as a spouse would when their partner died without will beneficiaries, was discriminatory on the grounds of sexual orientation. Earlier, in In *Du Plessis v Road Accident Fund*,[269] the Supreme Court of Appeal (SCA)[270] decided that even though same sex marriages were not recognised, the Common Law was moving towards recognizing obligations arising out of same-sex relationships, which were not marriages, and therefore held the legal duty of maintenance owed by the deceased to the plaintiff deserved to be protected.[271] However, the fact that same-sex persons who have not entered a civil union have more rights than cohabiting heterosexual couples implies that persons in same-sex relations have more rights than those in heterosexual relationships.[272] Indeed in the case of *Volks v Robinson*,[273] the constitutional Court refused to recognise the right of survivorship under the Maintenance of Surviving Spouses Act[274] for a woman who had been cohabiting with a man as she had not exercised the option to get married. The Court indeed recognised this dilemma in the Gory case but left it to parliament, which has still not resolved it.[275]

3.3.13 Changes in treatment of LGB immigrants

Recognition and acceptance of LGB immigrants has lately become an important issue. There are two categories of immigrants and different rules apply to each. Short-term immigrants come into the country for brief visits, while the second category is those seeking asylum or permanent residence. For the first category, no country among those selected expressly excludes short-term immigrants on the basis of sexual orientation. South Africa however, formerly recognised only spouses of married persons to be entitled to an easier immigration process under section 25(5) of the Aliens Control Act, and left out partners of persons in permanent same-sex relations. This provision of the Act was declared unconstitutional in the *National Coalition*

267 2007 3 BCLR 249 (CC).
268 81 of 1987.
269 2004 1 SA 359 (SCA).
270 The Supreme Court of Appeal is created under section 168 of the South African Constitution. It only hears appeals and can thus invalidate statutes on appeal.
271 Above, para 33.
272 See P de Vos and J Barnard (n 7 above) 823.
273 2005 (5) BCLR 446 (CC).
274 Act No. 27 of 1990.
275 E Bonthuys 'A duty of support for all South African unmarried intimate partners Part I: The limits of the cohabitation and marriage based models' *PER / PELJ* 2018(21).

for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others (2 December 1999) – (*Immigration* case) and the court read in the words 'or partner, in a permanent same-sex life partnership' after the word 'spouse' in order to remedy the discrimination.[276] In 2002, the Immigration Act, 2002 replaced the Aliens Control Act, 1991.[277] It defines 'spouse' to include a partner in a permanent homosexual relationship.[278]

For the second category, the 1951 Refugee Convention regards as refugees all persons who are unable or unwilling to return to their home countries due to a well-founded fear of persecution for reasons, among others, of 'membership of a particular social group.'[279] The Convention imposes obligations upon states not to discriminate against refugees,[280] expel refugees[281] or forcefully return them to their countries of origin.[282] South Africa's Refugees Act, 1998 largely adopts the definition of a refugee in the 1951 Convention,[283] and also defines 'social group' to include persons belonging to a particular sexual orientation.[284] This makes LGB persons entitled to protection when fleeing persecution due to their sexual orientation. In Botswana, Kenya, Nigeria and Uganda, the refugee laws also adopt the 1951 Refugee Convention definition and specifically protect persons persecuted on the basis of 'sex' and 'membership of a social group' but do not specifically provide protection on grounds of sexual orientation.[285] Therefore, strategic litigation has been able to extend immigration rights to LGB persons in South Africa, while there has been no litigation at all on the issue in the other countries.

3.4 The extent of legal change on LGB rights in Common Law Africa

Overall, although there has been much positive change in the laws in the selected Common Law countries in Africa since 1997, there have been pockets of negative change. The changes can be summarised as below:

276 *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*, 2000 1 BCLR 39 (2 December 1999).
277 Act 96 of 1991.
278 The Immigration Act, 2002, section 1.
279 Article 1 of the Refugee Convention, 1951.
280 Above, Article 3.
281 Article 32.
282 Article 33.
283 Section 3 of the Refugees Act, 1998.
284 Above, section 1.
285 In Botswana, this is in the schedule to the Refugees (Recognition and Control) Act, 1968; section 3 of Kenya's KRefugees Act, No. 13 of 2006; section 20(1)(a) of Nigeria's National Commission for Refugees Act, 1989; and section 4(1) of Uganda's Refugee Act, 2006.

Table 3: Extent of positive legal change among the selected African Common Law countries

Country	Level of positive legal change	Code
South Africa	Very High – Stagnating	4.5
Botswana	Medium – Progressing	3.5
Kenya	Low – Progressing	2.5
Uganda	Low – worsening	2.0
Nigeria	Very low – worsening	1.5

'1' denotes limited legal change, '3' denotes moderate change and '5' denotes significant change.

Overall, South Africa has made a lot of positive progress within a short period of 23 years. It has achieved almost all there is to achieve in terms of legal change, except for the issues of full marriage equality. It is thus accorded 4.5 in Table 3 above.[286]

Botswana is also making steady progress with major legal changes, particularly with decriminalisation of same-sex relationships, and the express inclusion of sexual orientation as a protected ground against discrimination in the employment law, and the enforcement of the decision in the *LEGABIBO Registration* case. Botswana is thus scored with '3.5' ranking on the table above.

Kenya follows as the country is making considerably fast progress towards achieving equality with a more inclusive constitution, and progressive court decisions. However, the recent refusal to decriminalise same-sex relations by the High Court seems to suggest active backlash, and thus brings down its ranking. On Kretz's spectrum, Kenya would also be ranked at stage 2 'criminalization of status and behaviour', because it is yet to decriminalise. Kretz's scale however fails to capture situations where, although there is criminalisation, progress is being made. The real positioning of Kenya would therefore lie between stages 2 and 3 – criminalisation and establishment of positive rights. For this reason, Kenya is ranked '2.5' in Table 3 above in recognition of the positive decisions and general progress.

Uganda has had the highest number of cases, and in the process scored some important court victories. It also has positive achievements in health laws and policies and was able to have the Anti-Homosexuality Act nullified. On Kretz's spectrum, Uganda would be at the second stage of 'criminalization of status

286 This is the level of social change that affects the whole nation, and which Rosenberg refers to as 'significant social reform'. GN Rosenberg *Hollow hope: Can courts bring about social change?* (2008) 4. Giddens on the other hand regarded significant social change to be in terms of 'modification of basic institutions during a specific period.' see A Giddens 'A reply to my critics,' in D Held & JB Thompson *Social theory of modern societies: Anthony Giddens and his critics* (1989) 45.

and behaviour', just like Kenya. As in the case of Kenya, there has been some improvement in the recognition and establishment of positive rights for LGB persons, despite the continuing criminalisation of same sex relations, and as such, Uganda lies between stages 2 and 3 – criminalisation and establishment of positive rights. Nevertheless, because of the worsening situation as seen from the most recent losses in the strategic litigation cases seeking to affirm LGB rights in Uganda, it scores 2 on Table 3 above.

Finally, Nigeria brings up the rear in the rankings in terms of positive legal change. Most of the changes have been for the worse, except perhaps in the HIV sector. The Same Sex Marriages (Prohibition) Act's prohibition of LGB organising criminalises the status of being LGB rather than conduct. This makes it the only country among those selected with expanded criminalisation. This study ranks Nigeria with 1.5 in terms of legal change as shown Table 3 above.

3.5 Conclusion

The discussion above shows that a lot of positive legal change has happened in the selected Common Law African countries in the past 23 years. Before 1997, homosexuality was a no go topic within the laws, except for the criminal law, and same-sex marriages were a far dream even in South Africa. Currently, same sex marriages are possible in South Africa, same-sex relations have been decriminalised in South Africa and Botswana, and there is protection for LGBT persons in all aspects in South Africa, and in employment in Botswana, registration of organisations in South Africa, Botswana and to a lesser extent Kenya, and recognition in HIV policies for all countries. At the same time, the SSMPA in Nigeria is an example of a retrogressive law- a law that makes the situation worse than before. This expanded criminalisation is however the exception rather than the norm in the selected countries. Generally, there is much progress being made. What cannot also be denied is that the past 23 years are also the years when LGB strategic litigation has been undertaken with a lot of gusto in the selected countries As such, strategic litigation has been a contributing factor to both the progress and the retrogression, and this contribution will be discussed in more details in the coming chapters. Whether this legal change has led to the expected equivalent social change is a question for the next chapter to explore.

Four

The Contribution of Strategic Litigation to Social Change on LGB Rights in Common Law Africa 1997-2019

4.1 Introduction

There has been considerable positive progress in terms of legal change for LGB persons in the selected Common Law African countries in the past twenty-three years. The question therefore remains whether this positive legal change is also reflected in the lived realities of people. Whereas legal change is no doubt very important in contributing to social change, nevertheless, for the average LGB person, there can be no overstating the importance of how society treats them. As such, social change is not just measured basing on the extent of legal change, but also the extent to which political, social and economic conditions change in favour of LGB persons. This chapter highlights key and visible changes that have happened in the selected countries that have been undertaking strategic litigation in the past 23 years. It examines the changes in the political climate, including political positions taken by leaders and the recognition or respect for the rights of LGB persons. It also considers the changes in social status and treatment of LGB persons – in public spaces: on the streets, at school, by businesses and depiction in popular culture. Finally, it looks at changes in the economic conditions of LGB persons, including their general standards of living and access to employment opportunities. The chapter considers these changes in light of the passage of time. As such, it considers the period before 1997 and the period from 1997 up to the end of 2019. The chapter draws a rough picture of the direction and magnitude of that change and analyses the impact of LGB strategic litigation in creating that social change. Rather than being a deep analysis of the causal relations, this study simply utilises the findings of opinion polls, existing studies and other publicly available information to draw and make rough conclusions on the incidence and direction of social change. Conclusions are eventually made on the extent to which the selected countries have achieved social change, and to do this, the extent of legal change in Chapter 3 is juxtaposed with that of change in the political, social and economic factors in this chapter.

4.2 Measuring social change

Measuring social change involves not only measuring the extent of the change but also showing to what extent that change can be attributed to the factor being studied. Therefore, to study social change, one must look at different aspects, key among which are: the occurrence of change, followed by the direction of change, and finally the magnitude of change. In this chapter, all these aspects are considered as regards the legal, political, social and economic conditions of LGB persons in an approach that differs only slightly from Goodwin's definition of social change.[1] On Kretz's seven stages,[2] focus is on the extent to which the selected countries have moved from the first stage 'total marginalization' to the seventh stage- 'cultural integration'- which is the one that is about changing societal perceptions and attitudes.

4.3 Changes in political positions on homosexuality

This section explores the changes in the political environment that have occurred in the selected countries, where LGB strategic litigation has been taking place in the last 23 years. It proceeds from the standpoint made in Chapter 2 above, that strategic court cases on LGB rights influence social change through influencing decisions made by political leaders on LGB rights. The changes are examined basing on the following themes: political commitments to the protection of LGB rights, political speeches, pronouncements and policy positions about LGB issues, and the issue of appointments of LGB individuals to positions of political authority.

South Africa has seen the most change on the political front. For a greater part of its history, the now ruling African National Congress (ANC) had been largely hostile to LGB rights. Key leaders were quoted during the period of the struggle against apartheid as stating that LGB persons were not normal.[3] Matters came to a head during key ANC stalwart Winnie Mandela's trial for kidnap of four young boys from a church. Disparaging language was used against homosexuals by ANC officials as her defence was that she rescued the youths from sexual abuse by the male priest in charge of the church.[4] The ANC's stance only changed towards the end of apartheid with key leaders such as Thabo Mbeki, the ANC Director of Information, and key activist Albie Sachs speaking out in favour of LGBT protection.[5] Later, the ANC included

1 Goodwin focuses on the political, economic and social changes. (R Goodwin *Changing relations: Achieving intimacy in a time of social transition* (2009) 2.) This study however, being concerned with the law, also includes changes in the law as a separate category.

2 A Kretz 'From 'kill the gays' to 'kill the gay rights movement': The future of homosexuality legislation in Africa' (2013) 11 *Northwestern Journal of International Human Rights* 207, 211-216.

3 See P Tatchell, 'The moment the ANC embraced gay rights' in N Hoad *et al* (eds.) *Sex and politics in South Africa* (2005) 140, 142.

4 R Holmes 'De-segregating sexualities: Sex, race and the politics of the 1991 Winnie Mandela Trial' (1993) 5 *Program of African Studies Northwestern University* 12.

5 See Tatchell (n 3 above) 145.

sexual orientation among the protected grounds against discrimination in its Constitutional Principles for a New South Africa.[6] This made its way into the Interim Constitution of South Africa.[7] The ANC which was by then the ruling party supported the inclusion of protection on the grounds of sexual orientation within the Final Constitution in 1997,[8] and thus section 9(3) of the same.[9] Surprisingly to the LGB movement, the ANC government opposed every case in which the constitutional validity of laws that were discriminatory against LGB persons were challenged in court.[10] Political statements and actions after the Constitution came into force were largely unfriendly to LGB persons. For example, when he was Deputy President, Jacob Zuma in 2006 publicly referred to same-sex marriages as a disgrace.[11] At the international level, South Africa's commitment to the protection of LGB persons has at best been unpredictable. In 2011, South Africa led the process that culminated in the passing of the first ever resolution on sexual orientation at the UN Human Rights Council.[12] This resolution in fact came out of lobbying efforts of activists as South Africa had initially tabled a resolution that was questioning the position of protection on the grounds of sexual orientation in international human rights laws.[13] Since that time, South Africa has continued to be unpredictable in its support of LGB rights at the UN level, sometimes voting in favour of protections based on sexual orientation and sometimes backtracking, showing that political commitment is lacking at this level.[14] Most controversially, South Africa abstained during the recent voting to appoint an independent expert on sexual orientation and gender identity (SOGI) issues.[15]

6 The African National Congress 'Constitutional principles for a democratic South Africa' April 1991 http://www.anc.org.za/content/constitutional-principles-democratic-south-africa (accessed 24 March 2018).

7 Constitution of the Republic of South Africa, Act 200 of 1993, section 8(2).

8 African National Congress 'ANC policy proposals for the final constitution' http://www.anc.org.za/content/anc-policy-proposals-final-constitution (accessed 24 March 2018).

9 Constitution of the Republic of South Africa, 1996.

10 Interview with Crystal Cambanis, Johannesburg, 8 February 2018.

11 'Candidate of the left or the conservatives?' *Mail and Guardian* 29 September–5 October, 2006.

12 UN Human Rights Council, Resolution A/HRC/RES/17/19 'Human rights, sexual orientation, and gender identity' June 17, 2011.

13 This was UN Human Rights Council 'The imperative need to respect the established procedures and practices of the General Assembly in the elaboration of new norms and standards and their subsequent integration into existing international human rights law' A/HRC/16/L.27 http://ap.ohchr.org/documents/dpage_e.aspx?si=A%2FHRC%2F16%2FL.27 (accessed 21 Mar. 2011).

14 For a detailed discussion on South Africa's changing positions at the UN, see E Jordaan 'Foreign policy without the policy? South Africa and activism on sexual orientation at the United Nations' (2017) 24:1 *South African Journal of International Affairs* 79-97.

15 'SA abstains on key UN vote to end discrimination against gays' News 24 5 July 2016 https://www.news24.com/SouthAfrica/News/sa-abstains-on-key-un-vote-to-end-discrimination-against-gays-20160705 (accessed 24 March 2018).

Botswana follows next, as LGB rights were largely not discussed by politicians before 1998.[16] However, starting in 1998, discussions on LGB rights started as the reform of the Penal Code was underway. Then secretary of the ruling party stated that LGB rights were not to be discussed, as they would 'shock' the people.[17] The then vice president (and later President) Seretse Ian Khama, emphasised that human rights does not justify 'unnatural acts',[18] and Kgosi Linchwe III, traditional leader of the Bakgala, stated that homosexuals were worse than animals,[19] while Kgosi Seepapitso IV of the Bangwaketse emphasised that gays deserved to be beaten and jailed.[20] The state strongly opposed the decriminalisation of homosexuality during the case of *Kanane v The State* (*Kanane* case).[21] In 2015, then Vice President (and current President) Mokgweetsi Masisi expressed sentiments that legalising same-sex relations could cost the ruling party the elections.[22] The government is also said to have snubbed US envoy on LGB rights, Randy Berry, when he visited Botswana in 2016.[23] In contrast, as President Mokgweetsi Masisi has spoken out in favour of protecting LGB persons.[24] Former President Festus Mogae has been supportive of LGB rights, calling for the decriminalisation of consensual same-sex relations.[25] Nevertheless, there has so far been no firm political commitment to protect persons against discrimination on the grounds of sexual orientation, except for the City Council of Gaborone's motion calling for an end to the criminalisation of same-sex relations.[26] Furthermore, the

16 See M Tabengwa & N Nicol 'The development of sexual rights and the LGBT movement in Botswana' in C Lennox & M Waites (eds.) *Human rights, sexual orientation and gender identity in the commonwealth: Struggles for decriminalisation and change* (2013) 339, 340.

17 As above at 341.

18 'Vice President Khama harshly denounced homosexuality' *Midweek Sun,* 1998 quoted in Human Rights Watch (n 63 above) 48.

19 'Whip them or jail them: Kgosi Seepapitso's view on homosexuals' *Midweek Sun,* 17 June 1998.

20 Human Rights Watch 'UN: landmark resolution on anti-gay bias' 26 September 2014 https://www.hrw.org/news/2014/09/26/un-landmark-resolution-anti-gay-bias (accessed 24 March 2018).

21 [2003] 2 BLR 67 (CA).

22 'Human rights lawyer condemns VP comments on gays and lesbians' *Sunday Standard*, 21 October 2015, http://www.sundaystandard.info/human-rights-lawyer-condemns-vp-comments-gays-and-lesbians (accessed 21 October 2019).

23 See 'Plot thickens in Botswana-America diplomatic relations over gay rights' *The Sunday Standard* 24 January 2016 http://www.sundaystandard.info/plot-thickens-botswana-america-diplomatic-relations-over-gay-rights (24 March 2018).

24 See 'Botswana: New president acknowledges LGBTI people's rights'https://www.mambaonline.com/2018/12/10/botswanas-new-president-acknowledges-lgbti-peoples-rights/ (accessed 21 October 2019).

25 See for example 'Botswana should decriminalise homosexuality, says former president' *The Telegraph* 20 October 2011, https://www.telegraph.co.uk/news/worldnews/africaandindianocean/botswana/8839131/Botswana-should-decriminalise-homosexuality-says-former-president.html (accessed 24 March 2018).

26 See 'City of Gaborone calls for an end to gay ban in Botswana' *Mamba Online* 1 April 2016 http://www.mambaonline.com/2016/04/01/city-gaborone-calls-end-gay-ban-botswana/ (accessed 26 February 2018).

government deported an anti-gay American pastor for hate speech during a radio debate after he called a gay activist a liar and a paedophile.[27] At the international level, Botswana has maintained consistent opposition to sexual orientation protections at the UN, the latest being its leading the resistance to the appointment of an Independent Expert on 'protection against violence and discrimination based on sexual orientation and gender identity'.[28] It also voted against the 2014 resolution to combat violence and discrimination based on sexual orientation and gender identity.[29]At best, Botswana has abstained on votes concerning sexual orientation.[30]

In Kenya, before 1997, there was little or no political discussion on LGB rights. However, after that political leaders started making negative statements. Then President Daniel Arap Moi expressed his opposition to same-sex relations in 1999.[31] In 2015, President Uhuru Kenyatta stated that homosexuality was a 'non-issue' for Kenya[32] while in 2010, then Prime Minister Raila Odinga stated that gays were unnatural and deserved to be arrested.[33] In 2015, Vice President William Ruto stated that there was no room for gays in Kenya.[34] A few positive voices have spoken out in favour of LGB rights. One was the-then Minister of Special Programmes Esther Murugi who, in October 2010, advocated for the rights of men who have sex with men (MSM) to access health services.[35] Despite calls for her resignation, the Minister of Justice, Hon. Mutula Kilonzo, supported her, stating that discrimination against LGB persons was against the law.[36] Former Chief Justice Willy Mutunga also spoke

27 'American anti-gay pastor deported from Botswana for hate speech' Africannews.com 20 September 2016 http://www.africanews.com/2016/09/20/american-anti-gay-pastor-deported-from-botswana-for-hate-speech/ (accessed 31 March 2018).

28 See 'Botswana bid to derail gender body fails' *Sunday Standard* 29 November 2016 http://www.sundaystandard.info/botswana%E2%80%99s-bid-derail-gender-body-fails (accessed 24 March 2018).

29 Human Rights Watch 'UN: Landmark resolution on anti-gay bias' 26 September 2014 https://www.hrw.org/news/2014/09/26/un-landmark-resolution-anti-gay-bias (accessed 24 March 2018).

30 For example, it abstained during the vote on the independent expert on SOGI issues. See The Conversation 'LGBTI vote at the UN shows battle for human rights is far from won' https://theconversation.com/lgbti-vote-at-the-un-shows-battle-for-human-rights-is-far-from-won-62307 (accessed 23 March 2018).

31 'Moi condemns gays' *BBC News, World: Africa,* 30 September 1999. http://news.bbc.co.uk/2/hi/africa/461626.stm (accessed 15 April 2018).

32 'Uhuru Kenyatta dismisses gays rights as a non-issue in Kenya' *Daily Nation* 25 July 2015.

33 'Kenya: PM orders arrest of gay couples' *Daily Nation* 28 November 2010.

34 'No room' for gays in Kenya, says deputy president' *Reuters* 4 May 2015. https://uk.reuters.com/article/uk-kenya-gay/no-room-for-gays-in-kenya-says-deputy-president-idUKKBN0NP10620150504 (accessed 24 March 2018).

35 'Religious outrage over minister's support of gay rights' *IRIN* 6 October 2010 http://www.irinnews.org/report/90685/kenya-religious-outrage-over-ministers-support-gay-rights (accessed 5 May 2018).

36 See UHAI-EASHRI *Lived realities, imagined futures: Baseline study on LGBTI organizing in Kenya* (2011) 21.

out, stating that gay rights are human rights.[37] President Kenyatta also stated that he would not tolerate violence against gays.[38] Following the passing of Uganda's Anti-Homosexuality Act in 2014, a minor party in Kenya sought to table a similar law against homosexuality, something that did not succeed.[39] At the international level, Kenya has consistently voted against protection of LGB persons at the UN Human Rights Council.[40]

In Uganda, there was largely not much political discussion before 1997 on LGB rights. Discussions on prohibiting same-sex marriages made it to the Constituent Assembly in 1994, but many delegates saw same-sex marriages as unthinkable.[41] After 1997, a clearly anti-gay stance started emerging among politicians. President Museveni has sent out mixed signals on the matter. He started with calls to arrest gays,[42] and then, during discussions on the Anti-Homosexuality Bill, he warned ruling party MPs to 'go slow' on the issue,[43] and wrote expressing concerns about the bill when it was passed.[44] He however signed the bill into law.[45] Some cabinet ministers, particularly the current and former ministers of Ethics and Integrity, have been at the helm of the fight against homosexuality. Current minister Rev. Fr. Simon Lokodo issued a statement confirming that the government would not tolerate the promotion of homosexuality after the stopping of the 2016 Pride celebrations.[46] He has gone ahead to live up to this by stopping LGB events he regards as promoting homosexuality.[47] His predecessor, Nsaba Buturo, promised a tough law on gays,

37 'Kenya: Gay rights are human rights, says Chief Justice Mutunga' *The Star* 9 September 2011.

38 'I will not allow violence on gays, Uhuru says, cites protection for all under law' *The Star* 19 October 2015.

39 'Kenyan Adventist politician proposes extreme anti-gay bill' The Spectrum Magazine, 14 August 2014, https://spectrummagazine.org/article/alita-byrd/2014/08/14/kenyan-adventist-politician-proposes-extreme-anti-gay-bill (Accessed 24 March 2018).

40 Kenya voted no to the appointment of at the UN independent expert on sexual orientation. See LGBT Europe 'UN Human Rights Council votes for independent expert on LGBT discrimination' 4 July 2016 http://www.lgbt-ep.eu/press-releases/un-body-votes-for-independent-expert-on-lgbt-discrimination/ (accessed 24 March 2018). Kenya also voted no during the 2014 resolution on LGB rights. See MK Lavers 'UN Human Rights Council adopts LGBT resolution' 26 September 2014. http://www.washingtonblade.com/2014/09/26/breaking-u-n-human-rights-council-adopts-lgbt-resolution/ (accessed 24 March 2018).

41 See JD Mujuzi 'The absolute prohibition of same-sex marriages in Uganda' (2009) 23 *International Journal of Law, Policy and the Family* 278, 282-283.

42 'Arrest homos, says Museveni' *The New Vision* 28 September 1999.

43 'Gay Bill: Museveni warns MPs' *New Vision* 12 August 2014. Also see 'Museveni warns NRM on Homosexuality Bill' *New Vision*, 12 January 2010.

44 'Museveni blocks Anti-Homosexuality Bill' *Monitor* 17 January 2014

45 'Joy, anger as Museveni signs law against gays' *Daily Monitor*, 24 February 2014.

46 'Government position on the activities of lesbians, gay, bi-sexuals & transgender in Uganda' 8 August 2016 https://ugandamediacentreblog.wordpress.com/2016/08/08/government-position-on-the-activies-of-lesibians-gay-bi-sexuals-transgender-lgbt-in-uganda/ (accessed 14 April 2018).

47 He stopped the 2016 and 2017 Pride events; the 2017 Queer Kampala International Film Festival; the FARUG skills training workshop in 2014 and the East and Horn of Africa

a promise that was fulfilled in the form of the Anti-Homosexuality Bill.[48] Then ruling party MP, David Bahati, tabled the Anti-Homosexuality Bill in 2010, and, instead of being castigated, was elected vice chairperson of the ruling party caucus and later State Minister for Finance in charge of Planning.[49] However, there have been pro-LGB moves within various government ministries and institutions. The Uganda Police Force has officially been training police officers on LGB rights in collaboration with Human Rights Awareness and Promotion Forum, an LGB-friendly NGO, and the Uganda Human Rights Commission.[50] The Minister of Health also issued a directive on non-discrimination in health services, including on the basis of sexual orientation.[51] At the international level, Uganda has been unwavering in their opposition to protection on the basis of sexual orientation, voting 'No' during the first ever resolution on LGBT rights at the UN Human Rights Council,[52] and again during the 2016 resolution on the mandate of the UN Independent expert on SOGI issues.[53]

In Nigeria, there was also not much political discussions on homosexuality before 1997. Political discussions mainly arose when the Same Gender Marriage (Prohibition) Bill, 2006 was tabled in January 2007 by then Justice Minister Bayo Ojo. The Bill was eventually approved by the Senate as the Same-Sex Marriages (Prohibition) Act in 2011, and by the House of Representatives in 2013. It was signed into law by President Goodluck Jonathan in 2014. Politicians spoke out for the bill basing on sovereignty, the need to resist western influences as well as preservation of culture and morals.[54] Former President Olusegun Obasanjo supported the law and as early as 2004 referred to homosexuality as 'unbiblical, unnatural and definitely unAfrican.'[55] Nevertheless, some politicians have not been expressly negative,

Human Rights Defenders Project workshop in 2014.

48 'Tough anti-gay law due' *Sunday Vision* 26 August 2007. Also see 'Anti-gay Bill to be tabled soon' *New Vision* 1 July 2009

49 See 'Uganda appoints anti-gay politician to government' *eNCA*, 2 March 2015 http://www.enca.com/africa/uganda-appoints-anti-gay-politician (accessed 14 April 2018).

50 'Police organise workshop on how to protect gays' *Daily Monitor* 15 November 2017.

51 Republic of Uganda, Ministry of Health 'Ministerial directive on access to health services without discrimination' (2014) https://www.scribd.com/document/233209149/MoH-Ministerial-Directive-on-Access-to-Health-Services-Without-Discrimination-19-June-14 (accessed 8 September 2017).

52 Uganda opposed the UN Human Rights Council SOGI resolution in 2011 (See International Service for Human Rights 'Historic decision: Council passes first-ever resolution on sexual orientation & gender identity' 17 June 2011 http://www.ishr.ch/news/historic-decision-council-passes-first-ever-resolution-sexual-orientation-gender-identity (accessed 24 March 2018).

53 Above.

54 For a discussion of some of this rhetoric, see generally T McKay & N Angotti 'Ready rhetorics: Political homophobia and activist discourses in Malawi, Nigeria, and Uganda' *Qualitative Sociology* 39, 397-420.

55 'Obasanjo chides same sex marriage, homosexuality' *Sudan Tribune*, Thursday 28 October 2004 http://www.sudantribune.com/Obasanjo-chides-same-sex-marriage,6193

with then President Goodluck Jonathan expressing no opinions even when signing the Act into law, and in fact later on suggested that it may be time for its reconsideration.[56] In 2016, Femi Adesina, the then Special Adviser on Media and Publicity to Nigeria's President Muhammadu Buhari, declared that sodomy was against the laws and culture.[57] At the international level, Nigeria has been a leading crusader against recognition of LGB rights, opposing all votes on the matter whenever the country was part of the UN Human Rights Council.[58]

Political commitments protecting LGB persons have been made only in South Africa, but even there the actions of politicians usually differ from written commitments. For Botswana, Kenya, Nigeria and Uganda, there are very few political commitments made to protect LGB rights. Whereas in Botswana and Kenya the state is largely ambivalent, in Nigeria and Uganda the state actively persecutes LGB persons.

LGB rights have therefore received a significant amount of attention in political discussions within the different countries in the past 23 years, and in all of them, apart from South Africa to some extent, the political rhetoric has been hostile. This increase in negative rhetoric certainly has a connection to the continuing strategic litigation, and in many ways is part of backlash against such LGB organising. In all the countries under consideration, however, it is important to note that the political statements on protection of the rights of LGB persons depends largely on the individuals in authority, some of whom have spoken positively in the wake of courtroom victories on LGB rights, although similar victories in other countries (such as Uganda) have conversely led to more negative rhetoric in this regard.

4.4 Changes in the social environment

Over the past 23 years, there has been some visible change in how LGB persons are regarded by the general population in the selected countries. It is the premise of this study that strategic litigation has an important role to play in shaping the public discourse surrounding LGB rights, and that changes can be attributed to the institution of cases as well the pronouncements of courts, both for and against LGB rights. Changes in the social environment will be considered by analysing opinion polls and other studies that have considered changes in: social attitudes; social status; religious stance and attitudes; media coverage; and depiction in popular culture, putting into consideration

(accessed 30 August 2019).

56 Former President of Nigeria Goodluck Jonathan reassess anti-gay law' *Gay Times* https://www.gaytimes.co.uk/community/38752/former-president-nigeria-goodluck-jonathan-re-examines-anti-gay-law/ (accessed 30 August 2019).

57 'There is no room for gay rights in Nigeria, says Buhari' *Guardian Nigeria* https://guardian.ng/news/there-is-no-room-for-gay-rights-in-nigeria-says-buhari/ (accessed 30 August 2019)

58 This was in 2016 and 2019.

the potential bias and the inherent limitations of such surveys and studies, including not asking the same questions and failure to repeat the same surveys over a long period of time.[59]

4.4.1 Societal attitudes towards LGB persons

In the past 23 years, there has been more change in public attitudes seen in South Africa than elsewhere among the selected Common Law African countries. Public opinion in South Africa has shifted quite radically from the time before inclusion of sexual orientation protections in the country's Final Constitution. Du Pisani argues that there were hardly any positive discussions about homosexuality prior to the 1960s.[60] In 1994, public opinion was still very hostile to LGB rights, and in a survey done by the NCGLE, it was found that 48% of the responses were clearly anti-gay.[61] The Pew Research Centre found that in 2002, 63% of the population did not accept homosexuality.[62] By 2006, the percentage had risen to 70%.[63] Seven years later, in 2013, they found a 9% drop to 61%.[64] In 2007, 64% were of the opinion that homosexuality should be rejected.[65] An AfroBarometer survey published in March 2016 found that 67% of South Africans would like or would not mind having homosexual neighbours.[66] The Other Sheep Foundation found in 2017 that 70% of South Africans believed that homosexual sex was 'wrong and disgusting', while at the same time 49% believed that gay people should not have the same rights as others.[67] The Williams Institute of the University of California, Berkeley show consistently rising acceptance levels, with the peak happening around the year 2008.[68] These surveys all indicate an increase in the acceptance of homosexuality in South Africa, although this change is not as much as would be expected, considering the expansive constitutional and legal protections.

59 AR Flores & A Park 'Polarized progress: Social acceptance of LGBT people in 141 countries, 1981 to 2014' March 2018, 6-7

60 Above.

61 N Hoad *et al* (eds.) *Sex and politics in South Africa* (2005) 194.

62 See Pew Research Centre (2013) 'The global divide on homosexuality: Greater acceptance in more secular and affluent countries' Washington, 23, http://www.pewglobal.org/files/2013/06/Pew-Global-Attitudes-Homosexuality-Report-FINAL-JUNE-4-2013.pdf (accessed 28 March 2018).

63 Pew Research Centre 'Attitudes toward homosexuality in African countries' 13 November 2006, http://www.pewresearch.org/fact-tank/2006/11/13/attitudes-toward-homosexuality-in-african-countries/ (accessed 28 March 2018).

64 See Pew Research Centre (2013) (n 62 above) 23.

65 The Pew Global Attitudes Project World publics welcome global trade – but not immigration: 47-Nation Pew Global Attitudes Survey' 2007, 35.

66 See AfroBarometer 'Good neighbours? Africans express high levels of tolerance for many, but not for all' Afrobarometer Dispatch No. 74 (2016) 12.

67 See generally, The Other Foundation 'Progressive prudes: A survey of attitudes towards homosexuality and gender non-conformity in South Africa' (2016).

68 See Flores & Park, n 59 above, 6-7.

In Botswana, no opinion poll was conducted about the public's perceptions on LGB rights before 1997. According to Quansah, same-sex conduct was not largely discussed in public before the *Kanane* case, which started in March 1995.[69] By 1998, public discussions about the need for law reform had started, and the human rights organisation DITSHWANELO organised a conference at which human rights lawyer Duma Boko, spoke out against the laws criminalising consensual same-sex conduct as vague, stressing that they ought to be declared null and void.[70] 1998 is the year that LGB persons in Botswana formed LEGABIBO, the first LGB organisation in the country. Nevertheless, discrimination against LGB persons remains, although this is expected to change with the recent decriminalisation of same-sex relations.[71] However, some positive changes have been observed with regard to how the public in Botswana perceives LGB rights, with public discussions on homosexuality taking place and many voices coming out in support of decriminalisation. The March 2016 AfroBarometer survey found that 43% of the people in Botswana would like or would not mind having homosexual neighbours.[72] This is twice the African average of 21%,[73] making Botswana one of the more tolerant countries for homosexuals in Africa. The Other Sheep Foundation interviewed parents of LGB persons who were supportive of their children, even when they still found it hard to believe that they were 'born that way'.[74] The study by the Williams Institute found that over 33 years (1981-2014), there had been a consistent positive change in societal attitudes towards LGB persons in Botswana, albeit without any major changes.[75]

Kenyans' attitudes towards homosexuality before 1997 were also generally not measured, and homosexuality was largely not discussed at the time. However, discussions preceding the 2010 Constitution in Kenya ignited the debate on same-sex relations, with many voices for and against prohibition in the Constitution coming up. In 2002, the Pew Research Centre found that 99% of Kenyans believed that homosexuality should not be accepted. This number was at 96% in 2007;[76] remained at 96% in 2011; and was at 90% in 2013.[77] This shows a considerable positive change in a period of less than ten years, although the rates of homophobia remain very high. The percentage of Kenyans who express tolerance has continued to increase, with 14% of

69 EK Quansah 'Same-sex relationships in Botswana: Current perspectives and future prospects' (2004) 4 *African Human Rights Law Journal* 201, 202, 217.
70 Tabengwa & Nicol (n 16 above) 340.
71 M Selemogwe & D White 'An overview of gay, lesbian and bisexual issues in Botswana' (2013) 17:4 *Journal of Gay & Lesbian Mental Health* 406–414.
72 See AfroBarometer (n 66 above) 12.
73 Above.
74 The Other Sheep Foundation 'Canaries in the coal mines: An analysis of spaces for LGBTI activism in Botswana' (2017) 15.
75 Flores & Park, n 59 above, 31.
76 The Pew Global Attitudes Project (n 65 above) 35.
77 See Pew Research Centre (2013) (n 62 above) 23.

Kenyans indicating that they would tolerate or not mind having homosexual neighbours in 2016. [78] The International LGBTI Association conducted the 2016 Global Attitudes Survey on LGBTI people and noted that 53% of people in Kenya did not agree that being LGB should be a crime, and that 46% of the people had no concerns about their neighbour being gay or lesbian.[79] UHAI-EASHRI observed in 2011 that 'viral homophobia and transphobia is still the order of the day for the majority of LGBTI Kenyan citizens.'[80] Generally, a greater number of Kenyans do not accept homosexuality or homosexuals, but this number has been steadily reducing since 2002. This is more or less in line with the Williams Institute's finding that over the past 33 years, attitudes have become more positive, although the period between 2010 and 2012 saw a sudden decline in the levels of acceptance, which then rose again, and have been rising since.[81]

In Nigeria, there was also no opinion poll on public attitudes towards homosexuality before 1997. But since then there have been some estimates. In 2006, the Pew Research Centre found that 98% of Nigerians surveyed stated that homosexuality was never justified.[82] In 2007, the number that rejected homosexuality was 97%.[83] In 2013, the Pew Research Centre found no change, with 98% of the respondents still not accepting homosexuality- the highest rate in the world.[84] In March 2016, the Afrobarometer survey on the acceptance of homosexuality in Africa found that 84% of persons in Nigeria would not tolerate having homosexual neighbours.[85] However, a recent survey by Nigerian organisation The Initiative for Equal Rights (TIERS) shows a decrease in homophobia. The organisation established that the number of those who would not accept a homosexual family member were 60%, down from 83% in 2017 and 87% in 2015.[86] This shows a situation where attitudes are changing, although it has to be noted that the question asked by TIERS was more personal than those asked by AfroBarometer.

In Uganda, before 1997, homosexuality was not much of a public topic. Occasionally, a few religious leaders and journalists would bring up the matter in public.[87] Although no public opinion polls were published on the matter

78 See AfroBarometer (n 66 above) 12.
79 The ILGA-RIWI 2016 *Global attitudes survey on LGBTI people* http://ilga.org/downloads/07_THE_ILGA_RIWI_2016_GLOBAL_ATTITUDES_SURVEY_ON_LGBTI_PEOPLE.pdf (accessed 31 March 2018)
80 UHAI-EASHRI, n 36 above, 20.
81 Flores & Park, n 59 above, 355.
82 The Pew Forum on Religion & Public Life 'Spirit and power – A 10-country survey of Pentecostals' Pew Research Centre, 5 October 2006, 8.
83 The Pew Global Attitudes Project (n 65 above) 35.
84 See Pew Research Centre (2013), n 62 above, 3.
85 See AfroBarometer, n 66 above, 12.
86 The Initiative for Equal Rights (TIERS) and Vivid Rain 'Social perception survey on Lesbian, gay, bi-sexual and transgender persons Rights in Nigeria, June 2019 13.
87 For a selection of such articles in the press for the period 1998-2007, see S Tamale (ed)

at the time, public sentiments about the issue were exposed when Makerere University law lecturer, Prof. Sylvia Tamale, started speaking out in favour of the protection of LGB persons. She was voted worst woman of the year in 2003 because of this.[88] At around the same time, the Pew Research Centre found that 95% of Ugandans did not accept homosexuality. This increased to 96% in 2007[89] and continued to hover around the same margin in 2013.[90] The AfroBarometer study in 2016 found that 95% of Ugandans would not tolerate having a homosexual neighbour.[91] This shows almost no change in the levels of homophobia between the years 2002 and 2017. A 2008 study involving 164 participants at Makerere University found that 69.5% of the respondents objected to homosexuality on moral grounds.[92] However, of all the respondents, only 43% understood homosexuality to be about sexual orientation rather than sexual conduct, and 50% thought that homosexuality was all about anal sex.[93] Uganda is generally a tolerant society,[94] and the fact that levels of homophobia seem to be very high is not commensurate with this view, as the relatively low levels of violence against LGB persons show. The results of the opinion polls may therefore be a result of a highly politically charged atmosphere rather than a reflection of the real views of the masses.[95] The Williams Institute study shows a steep decline in the levels of society acceptance from 2005 to 2006, and then again from 2008 to 2014. Acceptance has been increasing back to pre-2005 levels since then.[96]

Taken together, the levels of acceptance of homosexuality are still low in all the different sample countries, but progressing. Nevertheless, it can be concluded that South Africans are more accepting of homosexuals than any of the other countries, indicating that decriminalisation and positive legal protection does a lot to change people's attitudes. Botswana also shows a marked positive

'Homosexuality: Perspectives from Uganda' Sexual Minorities Uganda (2007).

88 See 'End of year list of cheers, jeers' *New Vision* 31 December 2003. Tamale describes the state of public opinion at the time as 'a shock'. See S Tamale 'Out of the closet: Unveiling sexuality discourses in Uganda' (2003) 2 *Feminist Africa* 42. https://www.akinamamawaafrika.org/index.php/publications/oral-herstory/48-tamale-out-of-the-closet-femafrica/file (accessed 5 May 2018).

89 The Pew Global Attitudes Project (n 65 above) 35.

90 Pew Research Centre (2013) (n 62 above) 23.

91 Afrobarometer, n 66 above, 12.

92 A Jjuuko 'Aren't these emperors naked?' Revealing the nexus between culture and human rights over the issue of homosexuality in Uganda (2008) LLB Dissertation, Makerere University, 92.

93 Above, 88-89.

94 K Ward 'Religious institutions and actors and religious attitudes to homosexual rights: South Africa and Uganda' in in Lennox & Waites (eds) *Human Rights, Sexual Orientation and Gender Identity in The Commonwealth: Struggles for Decriminalisation and Change* (2013) 409, 410. Also see AfroBarometer, n 66 above.

95 See T Shah, 'The Uganda conspiracy theory' (2011) 15 *Christianity Today* www.christianitytoday.com/ct/2011/marchweb-only/ugandaconspiracytheory.html (accessed 31 March 2018).

96 Flores & Park, n 59 above, 355.

change, demonstrating that perhaps the recent positive court decisions have made an impact in changing people's attitudes. Kenya also shows gradual positive change over the years, although the levels of homophobia remain high, and this also collates with the recent positive legal judgments. Nigeria and Uganda are still showing less change. This therefore indicates that there is a positive relationship between legal change and change in public perceptions on homosexuality. However, the nuanced nature of public opinion must be taken into consideration, and factors such as the need to fit in with prevailing trends, misconceptions and myths, the prevailing political and legal positions as well as local perceptions concerning an issue all need to be considered when measuring public opinion. Finally, there is a need to further interrogate what respondents actually mean when they provide answers to the surveys so as to fully appreciate the responses within the relevant contexts and nuances.

4.4.2 Violence against LGB persons

LGB persons face violence in all communities, as they are usually regarded as second-class citizens, who thus deserve or bring upon themselves the violence.[97] In all five countries, LGB persons face violence, albeit at different levels. Violence manifests in the form of murders, physical attacks, insults and various other abuses. In all the Common Law African countries considered in this study, there are reports of violence against LGB persons.

In the case of Botswana, reports of violence against LGB persons are rare but they exist, more especially against young LGB persons who are sometimes bullied or beaten, and so people still have to be careful.[98] LEGABIBO is now a fully registered organisation that rents an office in a well to do suburb of Gaborone. It has never been attacked, despite the community knowing the work done by the organisation.[99] Even well-known LGB activists live relatively violence-free lives, as intimated by Caine Youngman, who has been at the frontline for LGB equality in Botswana.[100] Youngman attests that he can walk around freely even when people do identify him as an LGB activist.[101] The low levels of violence are attributable to the peaceful nature of the Batswana, who are more or less a peaceful society that resolve their issues amicably rather than through violence. Many respondents in Botswana belive that Batswana

97 Human Rights Council, United Nations General Assembly, Report of the Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity, 2017, A/HRC/35/36, Geneva, CH: Office of the High Commissioner for Human Rights, Para 17 https://daccess-ods.un.org/TMP/4976555.7050705.html (accessed 15 May 2018).

98 Interview with Caine Youngman, Lesbians, Gays and Bisexuals of Botswana (LEGABIBO), Gaborone, 12 October 2017.

99 Interview with Bradley Fortuin and Botho Maruatone, of Lesbians, Gays and Bisexuals of Botswana (LEGABIBO), Gaborone, 10 October 2017.

100 Interview with Caine Youngman, n 98 above.

101 Above.

are 'hospitable, and less confrontational.'[102] Therefore, there has not been much change as regards the incidence of violence towards LGB persons from the period before 1998, as there have always been low levels of violence.

For Kenya, there was less violence in the period before 1997, with violence against LGB persons being a more recent development. Of late however, as LGB court-based victories increase, violence against LGB persons has also risen.[103] In 2008, the Kenya Chapter of the International Centre for Reproductive Health (ICRH-Kenya) had its health unit in Kilifi forcefully shut down by religious groups who threatened to burn it down for providing health services to LGB persons.[104] In February 2010, a mob emerged from Friday prayers and dragged several men out of a government research facility, and doused them with petrol. They were only saved from being set alight by the police.[105] This followed calls by a US-based right wing religious entity, Project See, to have LGB persons attacked.[106] In February 2010 in Mombasa, two men were beaten by a mob referring to themselves as 'Operation Gays Out,' for allegedly preparing to have a gay wedding. It is only the police that saved them from death.[107] Human Rights Watch reported at least three murders in the three years preceding 2015.[108] Despite this violence, LGB activists in Kenya believe that the Kenyan community poses less of a threat to them.[109] On a more positive note, the police has been protective of LGB persons who are attacked, although it takes no action against the perpetrators, and they also sometimes engage in violence against LGB persons themselves.[110] One outstanding example of police protection from violence is when they monitored the Project See website to keep track of and investigate cases of hate speech directed against LGB persons.[111]

In Nigeria, violence was seen to increase after the passing of the SSMPA, mainly mob violence and sexual violence.[112] This is mainly from members of the public, but also from state actors during arrests, and extortion of suspected

102 Interview with Advocate Tshiamo Rantao. Rantao Kewagamang Attorneys, Gaborone, 12 October 2017. Interview with Botho Maruatone (n 99 above) and Caine Youngman (n 98 above).

103 For a discussion of violence against LGB persons, see generally, Human Rights Watch 'The issue is violence: Attacks on LGBTI people on Kenya's coast' (2015).

104 Above, 29-30.

105 UHAI-EASHRI (n 36 above) 21.

106 Above.

107 'Mob attacks gay 'wedding' party' *Daily Nation* 12 February 2010.

108 Human Rights Watch (n 103 above) 30.

109 Joint interview with Lorna Dias, Jackson Otieno, Kelvin N. Washiko, Yvonne Oduor, and Brian Macharia, all of Gay and Lesbian Coalition of Kenya (GALCK staff), Nairobi, 26 July 2017.

110 Human Rights Watch (n 103 above) 30-38.

111 UHAI-EASHRI (n 36 above) 31.

112 Human Rights Watch *'Tell me where I can be safe' The impact of Nigeria's Same Sex Marriage (Prohibition) Act' 2016,* 16.

LGB persons by both the law enforcers and members of the general public.[113] The *Orazulike* case illustrates such violations. The applicant was arrested from his office during his birthday party and taken into detention. The High Court found this to be a violation of his right to liberty, and awarded damages.[114]

In Uganda, there are few reported cases of violence before 1998, and again few cases from then up to 2009.[115] According to HRAPF and the Consortium on Documentation of Violations based on Sexual Orientation and Gender Identity, only one case of violence was documented for each of the years 1995, 1999, and 2001.[116] However, with the President speaking out strongly against homosexuality in the early 2000s, and the amendment of the constitution to prohibit same-sex marriages in 2005, the levels of violence started increasing. The Consortium recorded 10 cases of violations, many of which involved violence, in 2010; 9 in 2011; 21 in 2012; and 30 in 2013.[117] Violence continued to increase, with 89 cases of violations recorded by the Consortium in 2014,[118] and 91 in 2015,[119] and then there was a drop to 57 cases in 2016.[120] Sexual Minorities Uganda reported 162 violations against LGB and transgender persons for the period 20 December 2013 to 1 May 2014, following the passing of the Anti-Homosexuality Bill.[121] 30% of these cases involved a component of violence, and 30% a component of intimidation.[122] Another outstanding example of violence in recent times is the 2016 stopping of the Pride celebrations by the Uganda Police.[123] Sixteen activists were arrested, bundled onto police trucks, dumped in dirty Police cells, and subjected to beatings and mockery by inmates.[124] The more than 200 persons at the venue

113 Above, 34-39.

114 *Ifeanyi Orazulike v Inspector General of Police & Abuja Environmental Protection Board* Suit No. FHC/ABJ/CS/799/2014.

115 HRAPF and The Consortium on documenting Violations Based on Sex determination, Sexual Orientation and Gender Identity 'Uganda report of violations based on sex determination, gender identity, and sexual orientation 2014' (2015) 13.

116 Interview with Ms Patricia Kimera, Head, Access to Justice Division, HRAPF, Kampala, 24 April 2018.

117 HRAPF and The Consortium on documenting Violations Based on Sex determination, Sexual Orientation and Gender Identity (n 115 above) 13.

118 HRAPF and The Consortium on Monitoring Violations Based on Sex Determination, Gender Identity and Sexual Orientation 'The Uganda report of violations based on gender identity and sexual orientation' (2015) 21.

119 HRAPF and The Consortium on Monitoring Violations Based on Sex Determination, Gender Identity and Sexual Orientation 'The Uganda report of violations based on gender identity and sexual orientation' (2016) 25.

120 HRAPF and The Consortium on Monitoring Violations Based on Sex Determination, Gender Identity and Sexual Orientation 'The Uganda Report of Violations based on Gender Identity and Sexual Orientation'(2017) 26.

121 Sexual Minorities Uganda 'From torment to tyranny: Enhanced persecution in Uganda following the passage of the Anti-Homosexuality Act 2014 20 December 2013 – 1 May 2014' (2014) 2.

122 Above, 3-7.

123 HRAPF 2016 (n 119 above) 22.

124 Above.

were kept in the room for over an hour, and some were groped and had wigs and hair extensions forcefully and painfully yanked off their heads.[125] However, Uganda has few recorded murders based on sexual orientation,[126] despite the high profile murder of prominent LGB activist David Kato in 2010, who was hit on the head with a hammer by a person he had harboured at his home.[127] More murders were recorded in 2019 than any of the other years with 4 murders reported by the end of October 2019.[128] Uganda has thus witnessed increasing violence against LGB persons over the past ten years, with a reduction in the year 2016 when the police, who usually perpetuate the violence, agreed to be trained on LGB rights. However, with the stopping of the police trainings in 2019, violence peaked to all time highs in that year.[129]

South Africa, which has perhaps the most progressive laws on LGB rights the world over, unfortunately also continues to suffer from high levels of violence against LGB persons. There is rampant hate crime including murders, and 'corrective' rape against LGB persons.[130] According to a study by Out LGBT Well-being, 4 out of 10 South Africans know of someone who has been murdered because of their sexual orientation.[131] Black South Africans in rural areas are at higher risk of violence.[132] Lesbians who have a low income and are not able to access secure housing and private transport are also particularly vulnerable to corrective rape and other forms of violence.[133] A recent survey shows that 14% of the population in the Gauteng province of South Africa approved of violence against LGB persons.[134] There is a noted disconnect

125 Details of the violence and violations are documented in the LGBTI Violations Report 2017 (n 120 above) 22-25.

126 A number of allegations of murders of LGB persons have been made but HRAPF has not been able to verify most of them despite conducting verification on the ground. Interview with Patricia Kimera, n 116 above. For one allegation that stood out, see JL Feder 'American organizations sought thousands off unsubstantiated story of stoning of LGBT Ugandans' Sexuality Policy Watch, 22 Aug 2014 http://sxpolitics.org/around-the-web-136/9655 (accessed 31 August 2018).

127 'Gay activist murderer sentenced to 30 years' *Daily Monitor* 10 November 2011.

128 Sexual Minorities Uganda 'Uganda must not condone violence towards the LGBTI community' https://sexualminoritiesuganda.com/uganda-must-not-condone-violence-towards-the-lgbti-community/ (accessed 19 October 2019).

129 On 21 October 2019, 16 gay men were arrested after being rescued from a mob that wanted to lynch them. They were charged with carnal knowledge against the order of nature and subjected to anal examinations. On 11 November 2019, 125 persons were arrested from a gay bar in Kampala and charged with being a common nuisance.

130 K Thomas 'Homophobia, injustice and "corrective rape" in post-Apartheid South Africa' *Violence and Transition Project, Centre for the Study of Violence and Reconciliation* (2013) 4.

131 Above, 12.

132 Out LGBT Well-being, Access Chapter 2 *et al* 'Hate crimes against Lesbian, Gay, Bisexual and Transgender (LGBT) People in South Africa' (2016) 12.

133 Human Rights Watch '"We'll show you you're a woman" Violence and discrimination against black lesbians and transgender men in South Africa' (2011) 2.

134 R Ballard & C Hamann 'Quality of life survey IV 2015/2016: Social cohesion' GCRO Data Brief No. 8, 2018, 26.

between the rights and protections on paper and those in reality.[135] A further issue is the failure or refusal of the police to protect LGB persons from violence; a refusal to take seriously the cases of hate crimes reported to them and, even worse, the complicity of law enforcers with the perpetrators of violence based on sexual orientation.[136] Additionally, the National Task Team on LGBTI and Gender-based Violence (NTT), which was established in 2011 to coordinate redress for attacks against LGB and transgender and intersex persons, although hailed as an example of important mechanisms put in place by the state to address violence against LGB persons,[137] remains largely ineffective as its mechanisms are not easily accessible by LGB persons.[138]

Overall, violence against LGB persons in the selected countries was rather uncommon before 1997. This may have been due to the fact that very few persons had come out as LGB at the time, and this made homosexuality less of a threat to the established heterosexual ways of life. It may also have been due to no reporting due to absence of proper documentation of the violence. The levels of reported violence increased with the increased visibility of the LGB movement, particularly after the turn of the century, which is also the same time there were increased court victories in favour of LGB persons. Therefore, violence seems to be a reaction by the majority to a minority seen as threatening the established heterosexual and patriarchal ways of life. The absence of effective mechanisms to offer redress to victims, and a lack of awareness of these mechanisms where they exist and/ or lack of access to them, exacerbate the effects of violence. Persons who mainly face violence are those living in slum or low-income areas, who therefore lack access to security services, and stand out in their own communities due to their sexual orientation. Generally as regards violence, the change in the selected countries has been negative, as there is more violence against LGB persons.

Therefore, violence still remains a main concern in Common Law African countries, and even successful litigation does not seem to cure it. It appears apparent that violence against LGB persons is more of a result of backlash against progress made by LGB groups. Botswana seems to be the one country that is largely sheltered against violence, and this may be attributed to its unique political and social history.

135 Lawyers for Human Rights, *et al* 'A Submission to the UN Human Rights Committee in response to the Initial Report by South Africa under the International Covenant on Civil and Political Rights at the 116th session of the Human Rights Committee' Geneva, March 2016, 5.

136 Out LGBT Well-being *et al*, n 132 above, 46-49.

137 United Nations 'Living free and equal: What states are doing to tackle violence and discrimination against lesbian, gay, bisexual, transgender and intersex people' 2016, 36-37.

138 Lawyers for Human Rights *et al* (n 135 above) 14.

4.4.3 Societal attitudes towards LGB persons in public settings

How other persons in the public treat LGB persons is an important indicator of acceptance in a particular country. The particular public settings that are going to be examined here are: the streets (which includes being allowed to hold meetings, and other public activities like pride parades and workshops), schools, and hospitals. The attitudes differ from one country to the next but in all the study countries, out LGB persons are treated with some degree of resentment.

In South Africa, where same-sex marriages have been legal since the recognition of sexual orientation as a protected ground against discrimination in the Constitution in 1994, there have been notable changes in the treatment of LGB persons in the public setting. Where LGB organisations were largely operating more or less clandestinely,[139] they are now freely allowed to register and to operate. Gay pride parades have been held in South Africa since 1990.[140] The pride parades and activities have suffered more from internal conflicts and controversies than from external attacks, as they have become more commercialised and racialised than before.[141] As regards business, service is usually available to all now without discrimination. However, there have been numerous cases where businesses have refused to provide venues or other services to same-sex couples.[142] One of these, a refusal by a wedding venue to host a same-sex wedding, resulted into an investigation by the South African Human Rights Commission, although the complaint was later withdrawn.[143]As regards schools, formally, all students of all sexual orientations are admitted to schools, and are supposed to be protected from discrimination. However, in the Out LGBT Wellbeing study, 55% of all LGB persons below 24 years indicated that they have faced discrimination while in school.[144] Indeed, there are reports of LGB students being kicked out of school for their sexual orientation.[145] Concerning hospitals, cases of LGB persons being abused have also surfaced.[146] What is strange about South Africa is that,

139 For a history of gay organising see M Gevisser 'A history of South African Lesbian and Gay Organisation: The 1950s to the 1990s,' in M Gevisser & E Cameron (eds) *Defiant desire: Gay and lesbian lives in South Africa* 1994, 14.

140 For a detailed discussion of the Pride Parade, see generally A Manion & S de Waal *Pride: Protest and celebration* (2006).

141 See for example S Moore 'Asserting difference, asserting sameness: Heteronormativity, homonormativity, and subversion in South African pride events' https://www.ru.ac.za/media/rhodesuniversity/content/criticalstudiesinsexualitiesandreproduction/documents/CSSR%20Blog%20Post%20-%20S.%20Moore_March17.pdf (accessed 2 April 2018).

142 See for example 'Made to feel inhuman: Gay couple dumped by Springs wedding venue' http://www.mambaonline.com/2018/01/16/feel-inhuman-springs-wedding-venue-dumps-sex-couple/ (accessed 02 April 2018).

143 *L Brown-Waterson v Kilcairn, Riebeek Valley* (SAHCR) 2014.

144 Out LGBT Well-being (n 132 above) 6.

145 See for example 'Gay student kicked out of Durban college' *GroundUp*, 8 February 2017 https://www.groundup.org.za/article/gay-student-kicked-out-durban-college/ (accessed 28 March 2018).

146 See for example A Muller 'Scrambling for access: Availability, accessibility, acceptability

despite the presence of equality courts and other enforcement mechanisms, LGB persons rarely use them when they are being discriminated against in public, pointing to the assertion that the mechanisms need to be taken down to the people and made more relevant to them.[147] Thus, whereas a lot has changed from 20 years ago as regards the public visibility of LGB persons, a lot still has to be done. Indeed more than half of LGB persons in South Africa prefer not to come out, and live in fear of discrimination.[148]

For Botswana, there has been a slow positive change in the way LGB persons are treated in public spaces since 1997. LGB organisations can now register after the *LEGABIBO Registration* case, and many organisations have come up.[149] However, there is still need to be cautious, and many organisations, including LEGABIBO, do not label their offices.[150] On the streets, LGB organisations are able to demonstrate and make demands, as well as get involved in political processes. Although gay pride parades have not been held, LEGABIBO holds a party to coincide with the Johannesburg Pride (Jo'burg Mardi Gras) in South Africa, and usually supports individuals to attend pride parades in South Africa.[151] It has also been holding public demonstrations to demand for LGB rights, particularly on the International Day Against Homophobia and Transphobia (IDAHOT).[152] Furthermore, an annual LGB film festival has been held since 2013 and is supported by other organisations.[153] In 2013, LEGABIBO also held a meeting with chiefs (dikgosi) from across Botswana on LGB rights.[154] As regards businesses, no business specifically caters for LGB persons, and no cases have been reported of businesses refusing to serve LGB persons. Cases of the eviction of LGB persons from rented premises have however been recorded.[155] In schools, there have been reported cases of discrimination and bullying against LGB students.[156] Discrimination and stigma in public health continues to be high, despite MSM being recognised in government policies.[157]

and quality of healthcare for lesbian, gay, bisexual and transgender people in South Africa' (2017) 17 *BMC International Health Human Rights* 16.

147 S Bornman *et al Protecting survivors of sexual offences – The legal obligations of the state with regard to sexual offences in South Africa* (2013).

148 Out LGBT Well-being (n 132 above) 5.

149 Interview with Bradley Fortuin and Botho Maruatone (n 99 above).

150 As above.

151 Lesbians, Gays and Bisexuals of Botswana 'Events' https://legabibo.wordpress.com/events/ (accessed 15 May 2018).

152 Above.

153 The Other Sheep Foundation (n 74 above) 15-16.

154 See generally, J McAllister, J 'LGBT activism and 'Traditional values': promoting dialogue through indigenous cultural values in Botswana' Hivos 2014 https://hivos.org/sites/default/files/7._lgbt_activism_and_traditional_values_by_john_mcallister.pdf (accessed 26 June 2018)..

155 Interview with Bradley Fortuin and Botho Maruatone (n 99 above).

156 Above.

157 The Other Sheep Foundation, n 74 above, 18.

In Kenya, LGB organisations have increased from the time when they were six and came together to form GALCK in 2006 to over 18 in 2011, working on different issues and ranging in size.[158] The oldest organisation, ISHTAR MSM, was established in 1998 and registered in 2002.[159] There are a number of mainstream organisations and even state entities working with LGB groups, and with which GALCK and other organisations have established strategic partnerships, including the Kenya National Human Rights Commission (the KNHRC), the Kenya Human Rights Commission (KHRC) and the International Commission of Jurists (ICJ-Kenya).[160] GALCK and other organisations have been involved in campaigns for LGB equality.[161] These include World AIDS Day celebrations since 2006 and IDAHOT celebrations since 2007.[162] Kenyan organisations have however not yet held pride celebrations. In schools, LGB students still face discrimination, and are usually dismissed when their sexual orientation is discovered, and their parents usually stop paying school fees for them.[163] Access to health services for openly LGB persons is also still a major challenge, despite the progressive policy regime.[164] In terms of businesses openly providing services to LGB persons, this is not very common. Indeed one of the challenges LGB Kenyans still face is being evicted from their rented premises when their sexual orientation is discovered.[165] Therefore, the increased visibility of LGB organising in Kenya has come with the downside of LGB persons being largely excluded, although the levels of acceptance seem to be increasing generally.

In Nigeria, before the SSMPA, LGB persons were not entirely accepted in public spaces, but the SSMPA made them easier targets for abuse, extortion and mob violence.[166] Organisations could also operate prior to the SSMPA but, with the SSMPA, organisations activities became illegal, and organisations promoting LGB rights could not be registered. There are no gay pride parades in Nigeria.[167] However, many LGB activists continue to be active and to engage the public, even through social media.[168] Organisations also continue to operate despite the SSMPA, and TIERS is one of these, and it is duly registered, operational and visible.[169] Therefore, despite the law being restrictive, not all is doom and gloom in Nigeria at the moment.

158 UHAI-EASHRI (n 36 above) 9-10.
159 Above.
160 Above, 13-16.
161 Joint interview with Lorna Dias and GALCK staff (n 109 above).
162 UHAI-EASHRI (n 36 above) 16-17.
163 Above, 28.
164 Above, 32.
165 Above, 27-28.
166 Human Rights Watch, n 112 above, 25-30.
167 See for example 'No pride in anti-gay Nigeria' *Mail & Guardian* 20 July 2018
168 For a discussion on this see 'How the internet is helping queer Nigerian youth push for Pride' *Dazed* 28 June 2019 https://www.dazeddigital.com/life-culture/article/45073/1/nigeria-lgbtq-queer-youth-pride-2019 (accessed 30 August 2019)
169 The Initiative for Equal Rights 'Who are we' https://theinitiativeforequalrights.org/about-us/ (accessed 30 August 2019).

In Uganda, the change has largely been negative. By 1997, there was no visible LGB organisation or LGB organising in public spaces. The tabling of the Anti-Homosexuality Bill in 2009, with its restrictive provisions, made LGB issues emerge to the fore in Uganda, which simultaneously increased LGB organising and galvanised opposition to LGB issues.[170] There has been a big rise in the number of LGB organisations, and this has increased visibility for LGB groups.[171] This visibility has led to resistance, with organisations being unable to register with their names or objectives undisguised,[172] with the Registrar's powers to reject such organisations bolstered by a decision of the High Court.[173] LGB activists have held pride celebrations for the past five years, albeit in private confined spaces, but the police, on the orders of Minister Lokodo, have disrupted the last two.[174] The police also continue to raid and stop LGB public events as already discussed.[175] This is an addition to targeting allies of the LGB community, for example the suspension of Refugee Law Project, which used to host the Civil Society Coalition on Human Rights and Constitutional Law (CSCHRCL) in 2014,[176] and the raid on the Makerere University Walter Reed Project, which used to conduct HIV research including LGB persons.[177] Human Rights Awareness and Promotion Forum (HRAPF), an organisation that provides legal aid services to LGB persons had its offices broken in May 2016, and February 2018, with a murder in the first incident and grievous bodily harm in the second one.[178] A positive change has been however noted in the health sector as there are specialised clinics serving LGB persons in a form of collaboration between the Ministry of Health and the Most at Risk Populations Initiative (MARPI).[179] The Uganda Human Rights Commission (UHRC) has been conducting workshops on LGB rights, which have involved the training of magistrates, prosecutors, and members

170 For a detailed discussion of the Bill and the various efforts to fight it, see A Jjuuko & F Mutesi 'The multifaceted struggle against the Anti-Homosexuality Act in Uganda, in N Nicol *et al Envisioning global LGBT human rights: (Neo) colonialism, neoliberalism, resistance and hope* (2018) 342.

171 There are over 50 LGBTI organisations in Uganda. Interview with Ms. Patricia Kimera, n 116 above.

172 Above.

173 *Frank Mugisha, Dennis Wamala & Ssenfuka Warry Joanita v Uganda Registration Services Bureau (URSB)* Miscellaneous Cause No. 96 of 2016.

174 See n 46 and n 47 above.

175 See n 64 above.

176 'Ugandan government launches investigation of leading NGO for "promoting homosexuality' *BuzzFeed News* 5 June 2014 http://www.buzzfeed.com/lesterfeder/ugandan-government-launches-investigation-of-leading-ngo-for#.fjLpvP3Dd (accessed 14 April 2018).

177 'Makerere project recruited gays – police' *Daily Monitor* 9 April 2014.

178 See for example Civicus 'Authorities fail to investigate break-ins targeting human rights organisations' 3 August 2018 https://monitor.civicus.org/newsfeed/2018/03/08/authorities-fail-investigate-break-ins-targeting-human-rights-organisations/ (accessed 31 August 2018).

179 See Most at Risk Populations Initiative 'Who we are' http://www.marpi.org/marpisite/aboutus (accessed 14 April 2018).

of civil society.[180] The Uganda Police Force has allowed its police officers to be trained on LGB rights.[181] No cases of businesses refusing to serve LGB persons have been reported, although a number of bars and other services exist that are known as 'gay bars' as they cater to LGB clients.[182] Eviction of LGB persons from housing on the basis of their sexual orientation is one of the most common violations registered.[183] In terms of schools, students discovered to be engaged in same-sex relations are routinely dismissed, and in some cases beaten up by their fellow students.[184] Continuing Sexuality Education has now been banned in schools for fear of promoting homosexuality.[185]

In conclusion, while there is visible positive change in the treatment of LGB persons in the public sphere in South Africa, there are still challenges that have to be overcome in order to achieve real acceptance. For Botswana and Kenya, the space is increasingly opening up, while for Nigeria and Uganda, the change is much slower, and in many cases it is negative rather than positive, as the more visible LGB persons become, the greater the crackdown on LGB organising by the state.

Visibility in public should be understood differently in Common Law Africa than in many of the countries outside Common Law Africa. In Africa, sexuality is generally not a matter for public discussions and debate, and so many people may not even comfortably discuss heterosexual sex, and all public displays of affection (including holding hands and kissing openly on the streets) may still be frowned upon, even when they are done by heterosexual couples. Pride parades are also not exactly the way many Africans would celebrate their sexuality. The general restraint expected and generally practised in matters of sexuality may in part account for the increase in violence in some of the Common Law African Countries, as such violence may be triggered by what would be considered exhibitionism. Therefore, the fact that pride parades are not common for most of the countries may be less about oppression and more about how people choose or are conditioned to express themselves.

180 The author has been one of the facilitators at some of these workshops.

181 n 50 above.

182 Interview with Frank Mugisha, Kampala, Executive Director, Sexual Minorities Uganda, Kampala, 20 July 2017.

183 In 2014, there were 20 such cases (Consortium on documenting violations due to sexual orientation and gender identity HRAPF n 115 above) 32-34, 1 in 2015, (HRAPF and Consortium on documenting violations due to sexual orientation and gender identity, n 119 above, 47), and 3 In 2016 (HRAPF and the Consortium on documenting violations due to sexual orientation and gender identity, n 120 above, 43).

184 See for example 'Ntare closed as students accuse school of 'homosexuality cover-up' *The Observer*, http://observer.ug/news-headlines/39116-ntare-closed-students-accuse-school-of-homosexuality-cover-up (accessed 14 April 2018).

185 See, L Beljaars 'Moral panic in Uganda: How American influence led to the ban on all forms of sexual education in the East African nation' (2017). https://www.researchgate.net/publication/319324931_Moral_panic_in_Uganda_How_American_influence_led_to_the_ban_on_all_forms_of_sexual_education_in_the_East_African_nation (accessed 22 April 2018).

4.4.4 Changes in religious attitudes

There have been changes over the years in how LGB persons are treated by the church and other religions in the selected countries.

In South Africa, before 1997, the Dutch Reformed Church was the major opponent against homosexuality among Afrikaners,[186] but other churches were equally opposing among the communities where they operated.[187] Following the end of apartheid and the new constitution, many churches/leaders in the churches have emerged to stand up for equality, even when this is not the position of the majority of the church members. Archbishop Desmond Tutu of the Anglican Church particularly started out early and identified homosexuality as the new frontier for the struggle for equality.[188] The Dutch Reformed Church itself has apologised for its role in perpetuating apartheid and made amends towards ensuring equality, even for LGB persons, and as a result of this, divisions of opinion have appeared in the church. The South African Council of Churches in 2006 sent an open letter to the chairpersons of the Parliamentary Portfolio Committees on Home Affairs and Justice & Constitutional Development, urging them to abide by the Constitutional Court decision in the *Fourie* case[189] and to pass a law on marriage equality.[190] Among Muslims, an openly gay Imam, Muhsin Hendricks, has been ministering for over 20 years at what has been referred to as Africa's first gay mosque, the People's Mosque in Cape Town.[191] There has been a notable emergence of conservative Pentecostal churches in opposition to mainstream churches' shifting stance of supporting equality, but despite this, there is more support for equality in all sectors, even if this means also having gay equality.[192] On the whole, there is more positive change as regards church views on homosexuality in South Africa.

In Botswana, there have been both negative and positive changes since 1997. With the growing LGB movements, there has been a change in how the churches approach LGB issues. The debate started as early as 1997 when

186 See generally K du Pisani 'Puritanism transformed: Afrikaner masculinities in apartheid and post-apartheid period' in R Morrell (ed.) *Changing Men in Southern* Africa (2001) 157.

187 K Ward (n 94 above) 409, 414.

188 See for example D Tutu 'Foreword' in P Germond & S de Gruchy *Aliens in the household of God: Homosexuality and christian faith in South Africa* (1998).

189 *Minister of Home Affairs and Another v Fourie and Another; and Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* 2005 ZACC 19 paras 552G-553C. (*Fourie* case).

190 Global Ministries 'Same sex marriages position of South African Council of Churches' 1 November 2006 https://www.globalministries.org/same_sex_marriages_position_of_s_10_10_2014_1111 (accessed 14 April 2018).

191 A Bruce-Lockhart 'Meet the imam of Africa's first gay-friendly mosque' World Economic Forum 4 May 2017, https://www.weforum.org/agenda/2017/05/gay-lgbt-mosque-imam-muhsin-hendricks/ (accessed 14 April 2018).

192 K Ward (n 94 above) 415.

the Penal Code reform process was underway. The Evangelical Fellowship of Botswana, the coalition that brings together evangelical churches, began crusades against homosexuality.[193] These have been sustained as they opposed LEGABIBO's registration and also usually carry out public campaigns against individual LGB persons.[194] However, the other churches, including the Roman Catholic Church and the Anglican Church, have largely remained silent on the matter, and have been taking in openly LGB persons.[195] Indeed the Botswana Council of Churches, has openly supported LGB rights, with its Reverend Thabo Otukile Mampane stating that if the churches do not stand with LGB persons, then they would be '[judging] them against the wishes of God too.'[196]

In Kenya, the change has been largely negative, with more pronounced religious opposition to LGB rights. The opposition is led by Pentecostal churches and this means a lot in a country where there are more evangelicals than any other Christian group.[197] Kaoma identified Kenya as one of the countries where the US religious right is using its influence to oppose LGB rights and is largely succeeding.[198] The East African Center for Law and Justice (EACLJ), a Christian NGO, has led the fight against LGB rights.[199] They supported prohibition of same-sex marriages within the 2010 Constitution.[200] The Kenya Christian Professionals Forum (KCPF) was an interested party in the case of *NGO Board v EG & 5 others*,[201] and actively opposed the decriminalisation case before the High Court. [202] The National Council of Churches also actively opposes LGB rights.[203] Some groups of Muslims such as the Registered Trustees of Jamia Masjid Ahle Sunneit Wal Jamaat, the Umma Foundation,[204] and the Kenya Muslim National Advisory Council (KEMNAC) also join the Christian

193 See Tabengwa & Nicol (n 16 above) 341.

194 The Other Sheep Foundation (n 74 above) 16.

195 'Botswana accepts gays but rejects their marriages' *Cajnews Africa* 22 April 2016 http://allafrica.com/stories/201604220322.html (accessed 5 May 2018).

196 Above, 17.

197 The Pew Forum on Religion & Public Life found that 56% of all Christians in Kenya were either Pentecostal or charismatics. The Pew Forum on Religion & Public Life 'Spirit and power – A 10-country survey of Pentecostals' Pew Research Centre, 5 October 2006, 4.

198 See generally, K Kaoma 'Globalising the culture wars: US conservatives, African churches and homophobia' (2009).

199 See for example N Baptiste 'It's not just Uganda: Behind the Christian right's onslaught in Africa' *Foreign Policy in Focus* 2 April 2014, http://fpif.org/just-uganda-behind-christian-rights-onslaught-africa/ (accessed 14 April 2018).

200 Above.

201 Civil Appeal No. 145 of 2015.

202 See 'Christians, Muslims oppose petition seeking gay rights' *Standard Digital*, 2 March 2018 https://www.standardmedia.co.ke/article/2001271697/christians-muslims-oppose-petition-seeking-gay-rights (accessed 14 April 2018).

203 See for example National Council of Churches of Kenya 'Embrace value-based leadership – Central Region' April 30 2015, http://www.ncck.org/newsite2/index.php/information/news/391-embrace-value-based-leadership-central-region (accessed 14 April 2018).

204 These have appeared in court to formally oppose the decriminalisation of same-sex relationships and appeared in court in the on-going decriminalisation case.

groups.[205] On a more positive note, there are a handful of active LGB supportive churches, for example, the Riruta Hope Community Church in Nairobi led by Pastor John Makhoka,[206] The Other Sheep Kenya as well as St. Sebastian, which is hosted at Kisumu Initiative for Positive Empowerment (KIPE).[207]

For Nigeria, religion plays a key role in people's lives as the country is largely divided between the Christian South and the Muslim North. Religious leaders have thus been key players in the anti-gay movements. Opposition continues to grow rather than reduce. Kaoma highlights Nigeria as one of the countries where US evangelicals have much influence.[208] The Christian Association of Nigeria was a key supporter of the SSMPA,[209] and some US evangelicals supported the law and even travelled to Nigeria to drum up support for it.[210] The Catholic Church also supported the law, albeit less publicly.[211] Religious groups also purport to cure homosexuality by casting out demons,[212] and many people believe this is something that can be cured through prayers.[213]

Uganda is one of the countries where the religious right from the US has exercised much influence over the approach of religious bodies to the issue of LGB rights.[214] Here, the Pentecostal churches take the lead, with the Family Life Network, affiliated to the Watoto Ministries, being one of the foremost organised entities.[215] It was the Network that pushed for the Anti-Homosexuality Act, 2014, invited US Preacher Scott Lively to Uganda, and organised the Anti-LGBTI conference of 2009. Pastor Martin Sempa of the Makerere Community Church was for a long time on the frontline against LGB rights, as was Pastor Solomon Male of Arising For Christ Ministries, who spearheaded the establishment of the National Coalition Against Homosexuality and Sexual Abuses in Uganda (NCAHSAU), which he chairs.

205 This in 2011 asked leaders to apologise for pro-gay sentiments. See 'Muslims want CJ's apology on gays talk' *The Star* 12 September 2011.

206 For more information about this church, see 'Pastor John Makokha welcomes persecuted LGBT community to his church in Kenya' *Huffington Post* 30 April 2014 https://www.huffingtonpost.com/2014/04/30/john-makokha-lgbt-church-kenya_n_5241105.html (accessed 14 April 2018).

207 See UHAI-EASHRI (n 36 above) 21.

208 See generally, Kaoma, n 198 above.

209 See TIERS compendium 3.

210 See N Baptiste n 199 above.

211 See generally, Asue, D.U. (2018) 'A Catholic inclusive approach to homosexuality in Nigeria', *Theology Today*, 74(4), 396-408

212 See for example 'SCOAN founder gives his opinion on approved gay marriage in America (VIDEO)' Pulse.ng https://www.pulse.ng/communities/religion/prophet-tb-joshua-scoan-founder-gives-his-opinion-on-approved-gay-marriage-in-america/nq96hrj (accessed 30 August 2019).

213 See for example 'He's no Pope Francis – T.B. Joshua turns gay man straight' *Premium Times* 10 August 2019 https://www.premiumtimesng.com/letter-to-the-editor/154038-hes-pope-francis-t-b-joshua-turns-gay-man-straight.html (Accessed 30 August 2019).

214 Kaoma, n 198 above.

215 The Watoto Ministries are led by Pastor Gary Skinner, and it is one of the biggest elite Pentecostal churches in the country.

Male and Sempa have in the past gone to the extent of libelling other pastors as being homosexuals.[216] US evangelicals, including The Family, a powerful conservative group, support them.[217] Some of the pastors travel from the US to Uganda and preach against homosexuality.[218] The Inter Religious Council of Uganda (IRCU), which brings together different religions and faiths, also actively opposes LGB rights and even applied to join the Anti-Homosexuality Act case in support of its constitutionality. [219] Indeed, the pastors have proactively lobbied the state to further criminalise same-sex activity in the same way they actively planned the Anti-Homosexuality Bill,[220] and also organised a fete to thank President Museveni for signing the Bill into law.[221] The Anglican Church has also been very vocal, starting in 1998 when, with the support of the Episcopal Church of the USA, they organised conferences to prepare bishops who were to attend the decennial Lambeth conference in 1998 to resist attempts to recognise gay priests.[222] Archbishop Henry Luke Orombi took the campaign further, as he led a boycott of the 2008 decennial Lambeth conference over the consecration of openly gay Bishop Gene Robinson in the USA.[223] The Catholic Church has also largely maintained a position hostile to homosexuality. However, after initially supporting the Anti-Homosexuality Bill, the church eventually stated that criminalisation was not the way to go but rather the approach should be to bring LGB persons closer so that they could reform.[224] Muslims in Uganda have also largely been opposed to LGB rights,

216 Pastors Male and Sempa were both convicted of defaming fellow pastor, Robert Kayanja after they accused him of engaging in homosexual acts. *Uganda v Pr Moses Solomon Male, Pr Dr Martin Sempa, Pr Michael David Kyazze, Pr Robert Kaira, Deborah Kyomuhendo and David Mukalazi,* Buganda Road Magistrates Court criminal case 1063 of 2010, which conviction was upheld on appeal by the High Court.

217 See for example 'Museveni, Bahati named in US 'cult' *The Observer* 25 November 2009.

218 Apart from Scott Lively, Lou Engle is another big name pastor from the US who publicly preached against homosexuality in Uganda. See 'In Uganda, push to curb gays draws US guest' *The New York Times*, 2 May 2010 https://www.nytimes.com/2010/05/03/world/africa/03uganda.html (accessed 14 April 2018).

219 It did this together with The Family Life Network, and the Uganda Centre for Law and Transformation. They applied to join the *Anti-Homosexuality Act* case, as respondents, but the application was never heard as the case was decided before the application could be heard (*Inter Religious Council of Uganda (IRCU), the Family Life Network and the Uganda Centre for law and Transformation v The Attorney General of Uganda & 10 Others*, Miscellaneous Constitutional Application No. 23 of 2014).

220 They admitted to this in their application to oppose the *Prof J Oloka Onyango & 9 others v Attorney General*, Constitutional Petition No 8 of 2018 (The *Anti-Homosexuality Act* case).

221 'Uganda: Hundreds attend rally to celebrate anti-gay law' *Daily Xtra* 31 March 2014. https://www.dailyxtra.com/uganda-hundreds-attend-rally-to-celebrate-anti-gay-law-59430 (accessed 14 April 2018). For a detailed discussion of this event and what it implies, see B Bompani 'For God and For My Country: Pentecostal-charismatic Churches and the Framing of a New Political Discourse in Uganda' in E Chitando & A van Klinken (eds) *Public religion and the politics of homosexuality in Africa* (2016) 1.

222 Ward, n 94 above, 136.

223 'Orombi skips talks over gays' *The New Vision* 31 May 2007.

224 'Exclusive Video: Uganda's Catholic Archbishop opposes Anti-Homosexuality Bill' *Box Turtle Bulletin* 24 December 2009 http://www.boxturtlebulletin.com/2009/12/24/18804

with the Supreme Mufti of Uganda calling upon gays to be marooned on an island as early as 1998.[225] This position has not changed, as the Supreme Mufti supported the AHB and commended parliament for passing the Bill into law.[226] However, there are also religious groups supportive of LGB rights, although they are in a clear minority. These include Bishop Christopher Ssenyonjo, who was defrocked for this reason, and who has nevertheless continued to speak out.[227] The churches that are supportive are generally small and standalone or part of a global network. These include the Unitarian Universalist Church of Kampala. LGB people also meet and pray in small isolated communities since they are generally not accepted in the larger communities.[228]

Generally, the position of most churches in the selected countries has in the past 23 years galvanised against LGB rights. Only South Africa saw a change from official opposition among mainstream churches to a commitment to equality. For the other countries, the situation is largely one that continues to get hostile against LGB persons. Generally, religion has become more hostile to LGB equality in Common Law Africa, and Conservative Christian beliefs are the main drivers of this.

4.4.5 Changes in media coverage of LGB persons- representation in the media

Media plays an important role in shaping public opinion, and it can therefore play an important role in turning public opinion for the better in respect of LGB persons.[229] LGB rights received limited coverage as the majority of the public are largely homophobic in the selected countries. However, the media has the potential, through good and fair reporting, to change public opinion in favour of LGB persons. Despite this, it has been observed over the years that, for all the countries surveyed, media content on LGB issues is restricted, and the presentation of issues is not very friendly to LGB persons. Different countries are however at different levels with regards to progress in media narratives on LGB rights.

(accessed 14 April 2018).

225 'Mufti wants gays abandoned on islands' *Daily Monitor* 15 October 2007

226 Uganda Muslim Supreme Council 'The Mufti of Uganda speaks out against homosexuality' 22 March 2013, http://umsccommunications.blogspot.ug/2013/03/normal-0-false-false-false-en-us-x-none_22.html (accessed 14 April 2018). Also see 'Mufti commends Parliament for passing the Anti-Homosexuality Bill' Uganda Muslim Supreme Council News, 13 January 2014 (accessed 14 April 2018).

227 See K Ward 2013 (n 94 above) 136.

228 See for example 'Inside the tiny church where members of Uganda's beleaguered gay community have found sanctuary' *The Guardian* 9 February 2014. https://www.theguardian.com/world/2014/feb/09/uganda-gays-church-sanctuary-kampala (accessed 14 April 2018)

229 Gay and Lesbian Archives (GALA) of South Africa 'Out in the media? Knowledge, attitudes and practices of the media towards lesbian, gay, bisexual, transgender and intersex issues and stories' Community Media for Development/ CMFD Productions, November 2006, 5.

For South Africa, before 1994, gay issues were largely matters not to be discussed in mainstream media. Only LGB-specific media used to report on LGB issues, one of the better known of which was the magazine 'Exit'.[230] After 1997, LGB issues started gaining prominence and could be covered by the different media houses in more or less positive terms, reflecting the on-going debate in the country.[231] However, despite this, many still feel that LGB issues are sidelined in the media. A 2006 study found that over 55% of respondents thought that LGB issues are not given adequate coverage by the media.[232] More so, the coverage is usually overwhelmingly on negative stories, [233] and where stories are positive, they largely cover the white gay population and not the blacks.[234]

For Botswana, most of the stories (81%) published in the media about LGB persons are what was described as 'incomplete,' meaning that they do not give full facts or give LGB persons an opportunity to present their side of the story. [235] However, despite the negative coverage, many of the activists believed that the media sometimes gives them positive coverage and time, with more balanced views.[236] Social media is also alive, and activists use it to share positive stories.[237] There is therefore a more positive change in media coverage on LGB issues.

For Kenya, in 2011 UHAI-EASHRI found a change in the print media's coverage of LGB issues over a period of 10 years, from 2001-2011, pointing out that there were more positive stories coming through as well as more balanced reporting.[238] However, they also noted that there were few stories coming from LGB persons themselves being covered. LGB persons also appear on TV and speak about their lives, although no TV shows by openly LGB persons have aired on TV. In the 1990s, the 'Ellen Show' was dropped from the national broadcaster when Ellen DeGeneres came out as lesbian.[239] There is also a change in FM radio stations as at least they can now report the stories.[240] An analysis of the reporting on LGB issues in the media between 2005 and 2009 found that coverage largely focused on sensational stories.[241]

230 Above, 13.
231 Above.
232 Above, 8.
233 Above, 10.
234 Above, 13.
235 The Other Sheep Foundation (n 74 above) quoting a Genderlinks study on LGB media coverage in Botswana, 16.
236 Above, 16.
237 Above. Also interview with Caine Youngman (n 98 above).
238 UHAI-EASHRI (n 36 above) 20.
239 Above.
240 Above.
241 NS Mbugua 'Mass media framing of homosexuality: A content analysis of the national daily newspapers in Kenya' Master of Laws Dissertation submitted to the University of Nairobi, 2010, 45

The study found that the majority of newspaper articles had only 5% positive content on homosexuality.[242] Prominent Kenyans have been able to speak out in favour of LGB rights, and the media usually publishes their articles, such as Prof Makau Mutua, a professor of law at the State University of New York in the USA.[243] Social media is also alive with positive stories.[244]

In Nigeria, LGB issues did not feature much in the media before 1997. Debate heightened around the time of the Lambeth Conference in 1998,[245] and the ordination of the first openly gay bishop in the USA in 2003.[246] The SSMPA was the next discussion point, from the point it was introduced in 2006 until it was passed in 2014. Most of the coverage was negative. As a way of countering the negative narrative, LGB groups and individuals use social media extensively to relay their own stories.[247]

In Uganda, LGB issues were largely not presented in the media before 1997. The first time that LGB issues became household matters in the media was in 1998 when the Church of Uganda begun speaking out against the ordination of gay bishops in the Anglican Church.[248] Between 1998 and 2008, there were both positive and negative stories, although the latter were in the majority.[249] Reporting peaked at the height of the tabling of the AHB, and both positive and negative articles appeared.[250] The largest media house in Uganda, the Vision Group introduced an editorial policy that prohibits publication of content on homosexuality unless it is from the state.[251] The only newspaper that publishes positive content is the Observer.[252] The tabloid Red Pepper usually produces sensational articles on gays, referring to them as 'bum shafters.' In 2010, a newspaper run by students published the names and residences of LGB persons and called upon the public to hang them, something that the High Court held to be a violation of the rights to privacy and dignity.[253]

242 Above, 47.

243 See for example 'It is nonsense to assert that being gay is un-African' *Daily Nation* 31 October 2009. Also see 'Makau Mutua: Gay marriage will be legal in 10 years' *Nairobi Wire* 18 July 2013.

244 Joint interview with GALCK staff, n 109 above.

245 MacKay & Angotti (n 54 above). Also see N Hoad *African intimacies: Race, homosexuality, and globalization* (2007) 52-59.

246 'Nigerian Anglican leaders condemn consecration of gay bishop in US.' *The Vanguard, Nigeria.* 3 November 2003.

247 Skype Interview with Ayo Sogunro, 8 September 2019.

248 Ward (n 94) above, 128.

249 See generally, S Tamale, n 88 above.

250 See Civil Society Coalition on Human Rights and Constitutional Law (CSCHRCL) 'Uganda's Anti-Homosexuality Bill: The great divide' 2009

251 Vision Group (2014) 'Editorial Policy' https://issuu.com/newvisionpolicy/docs/243661083-editorial-policy-complete (accessed 24 July 2017).

252 For example, the Observer has published opinion pieces questioning the sensibility of an anti-homosexuality bill: 'What will an anti-gay bill achieve?' *The Observer* 23 January 2014 http://www.observer.ug/component/content/article?id=29787:what-will-anti-gay-bill-achieve (accessed 5 May 2018).

253 *Kasha Jacqueline Nabagesera, David Kato Kisuule & Pepe Julian Onziema v The Rolling*

Most TV stations do not cover LGB issues or host LGB activists, but when they do it is usually about embarrassing them.[254] FM radio stations are also largely sensationalist, but nevertheless they do present the issues more than the print media and TV stations,[255] despite punitive action against them by the Broadcasting Council for airing LGB-friendly content.[256] Nevertheless, progressive articles also make it to the media, such as those by Professor Sylvia Tamale and journalist Patience Akumu. Uganda also has vibrant social media activists who openly discuss LGB issues.[257]

Generally, the media representation of LGB issues in the selected countries is still limited, and more sensational than progressive. Media coverage of LGB issues has increased in the past twenty-three years in the selected Common Law African countries. The coverage is however based on key developments, particularly within the religious sector, and also around court cases.

4.4.6 Representation in popular culture

Popular culture usually denotes what cultural products the majority of the people consume or identify with.[258] It includes music, art, literature, fashion, dance, film, cyber culture, television and radio.[259] It is one of the determinants of who the public look up to as role models. From 1997, openly LGB persons are more often depicted in novels and popular TV shows in South Africa, but less so in other countrie s. Some of the more famous LGB names in South Africa are: Justices Edwin Cameron of the Constitutional Court of South Africa and Anna-Marié de Vos, formerly of the High Court; politicians Lynne Brown, former minister of Public Enterprises and former Prime Minister of the Western Cape, and Simon Nkoli, the deceased ANC activist who was one of the Delmas trialists;[260] writers Mark Gevisser who authored Thabo Mbeki's biography, Marlene van Niekerk, mostly known for her novel 'Triomf'; and Tatamkhulu Africa (Ismail Joubert), who is best known for his novel 'Broken Earth'; sportsperson Karen Hultzer, an Olympic archer; activists Zackie Achmat of the Treatment Action Campaign and Cecil Williams, deceased anti-apartheid activist; lawyer and scholar, Pierre de Vos; and photographer

Stone Newspaper Miscellaneous Cause No. 163 of 2010 (High Court of Uganda) 30 December 2010.

254 See for example 'Morning Breeze homosexuality debate 18th Dec NBS TV' *NBS TV* https://www.youtube.com/watch?v=LKP-PUAI96U (accessed 15 April 2018).

255 Interview with Patricia Kimera, n 116 above.

256 See generally The Electronic Media Act, Cap 104, schedule 1, a(i); 'Simba Radio fined for homos' *The New Vision* 2 October 2004; and 'Gaetano suspended over homo talk show' *The New Vision* 17 August 17 2007.

257 Interview with Patricia Kimera, n 116 above.

258 For the difficulties and different ways of defining popular culture, see J Storey *Cultural theory and popular culture* (2001).

259 A Crossman 'Sociological definition of popular culture' *Thoughtco* https://www.thoughtco.com/popular-culture-definition-3026453 (accessed 31 March 2018).

260 Gay and Lesbian Memory in Action (GALA) *'Till the time of trial: The prison letters of Simon Nkoli'* (2007)4.

Zanele Muholi.[261] They are largely accepted, respected, sand usually depicted in articles and TV shows.

For the other four countries, there are generally no openly LGB persons who have captured public imagination and are featured as role models in their own right. Perhaps only the late Kenyan writer Binyavanga Wainaina comes close to this, although he came out as gay after he had achieved celebrity status.[262] There are activists who are better known by persons working in civil society organisations and government and the international LGB activist community, but who are not necessarily revered within their countries. These include: Caine Youngman in Botswana;[263] David Nzioka[264] and David Kuria[265] in Kenya; David Kato,[266] Kasha Jacqueline Nabagesera,[267] Frank Mugisha[268] and Pepe Julian Onziema in Uganda,[269] and Bisi Alimi in Nigeria,[270] Among others. There are barely any outspoken openly gay politicians, lawyers, doctors or other leaders, and this continues to contribute to the stigma surrounding homosexuality in these countries. There are also no popular local TV shows or films featuring gay persons, except for the recent novel, *Kintu*, featuring a story about a general in 18th-century Buganda who had sex with both men and women.[271]

LGB persons scarcely feature in popular culture in the selected African countries. The exception is South Africa, where a number of notable LGB persons are well known and respected. As such, there has not been much change in any of the other four countries from how the situation was before 1997.

261 For these and other celebrity activists, see 'Top 10 local celebrity LGBT activists' Youth Village http://www.youthvillage.co.za/2014/08/top-10-local-celebrity-lgbt-activists/ (accessed 15 April 2018).

262 He is the winner of the Caine Prize for African Writing 2012, and he was named as one of the 100 most influential persons in the world by Time Magazine in 2014. He came out as gay in 2014. See 'Kenyan writer Binyavanga Wainaina declares: 'I am homosexual' *The Guardian* 21 January 2014 https://www.theguardian.com/world/2014/jan/21/kenyan-writer-binyavanga-wainaina-declares-homosexuality (accessed 15 April 2018).

263 He was one of the petitioners in the *LEGABIBO Registration* case. He features on TV in Botswana and was one of the debaters with US pastor Anderson who insulted him and was later deported.

264 He was the first openly gay person to appear on TV to speak about LGB rights.

265 He ran for Senator in Kenya but later withdrew from the race, citing the lack of funds and threats to his life.

266 He was a leading LGB activist in Uganda who was murdered in 2011, but was more celebrated by foreigners than local Ugandans.

267 Former Executive Director, of Freedom & Roam Uganda (FARUG), founder of Kuchu Times Media House and the recipient of the 2011 Martin Ennals Award for Human Rights Defenders.

268 Executive Director of Sexual Minorities Uganda (SMUG) and recipient of the 2011 Robert F Kennedy Human Rights Award and the 2011 Thorolf Rafto Prize.

269 Programs Director & Advocacy Officer of Sexual Minorities Uganda (SMUG) and recipient of the 2012 Clinton Global Citizen Award.

270 He was the first person to come out as gay and HIV positive on television in Nigeria in 2014. He is the founder of the Bisi Alimi Foundation.

271 JN Makumbi *Kintu* (2014).

Generally, there have been some big positive social changes in the selected Common Law African countries during the last twenty-three years of LGB strategic litigation in Common Law Africa. Opposition still remains, and no country has achieved full social acceptance for LGB persons, but given the notable progress so far, this is something that is certainly achievable, even in Common Law Africa.

4.5 Changes in the economic aspects

Many economic changes have taken place in the selected African countries since 1997, the period of LGB strategic litigation that is covered by this study. All the countries have continued to develop economically. This change has however not been reflected for all persons in all countries, as huge inequalities continue to exist. Among those who are still left behind are LGB persons, although the different countries are at different levels in terms of economic development generally and economic empowerment for LGB persons specifically. In 1997, few people could come out as openly gay in all the different countries, and opportunities were clearly blocked if one identified as such since there was no protection from discrimination on grounds of sexual orientation in all the countries. Only Botswana and South Africa were later able to obtain this protection, but Kenya and Uganda have not. Economic changes for LGB persons will be considered looking at the general economic conditions of LGB persons, and considering the trends of employment of LGB persons.

No data exists on the percentage of out LGB persons formally employed in the different countries, but it is quite clear that they are few. In South Africa, the rate of unemployment is one of the highest in the world,[272] and this becomes worse for LGB persons. The International Labour Organisation (ILO) found that, despite measures being taken to promote equality, in situations of a contracting economy with increased unemployment and high levels of inequality, there is the double challenge of being gay and being of a lower class, which makes it difficult to gain access to employment.[273] For those who are found to be gay, they are usually worked 'out of the job' due to harassment, stigma and discrimination.[274] Those already employed generally hesitate to come out as gay for fear of losing their jobs.[275] For Botswana, besides the change in law, there is nothing much that has been done to ensure substantive equality for LGB persons in employment, and so similar challenges to those in South Africa persist.

272 It stood at 26.7% in the first quarter of 2018, and has been averaging at 25.54% from 2000 until 2018. See Trading Economics 'South Africa unemployment rate 2000- 2018 'https://tradingeconomics.com/south-africa/unemployment-rate (accessed 25 May 2018).

273 International Labour Organisation 'Pride at work: A study on discrimination at work on the basis of sexual orientation and gender identity in South Africa' Working Paper No. 4 / 2016, 13.

274 Above, 17.

275 Above, 19-20.

For Kenya, Nigeria and Uganda, there is no protection for LGB persons as regards employment within the law. This creates a situation where people can be dismissed for being gay, and this has indeed been happening. In the case of Kenya, in 2015, the Equal Rights Trust's submission to the UPR indicated that LGB people had fewer opportunities in employment and faced discrimination.[276] Indeed, this is one the challenges that LGB persons in Kenya point out. [277] Dismissals on the basis of sexual orientation have been documented in Uganda. In 2015, four such cases were documented, [278] and it would be safe to assume that many more went undocumented, as the report itself highlights the lack of wider coverage as a challenge.[279]

4.6 Summary of the extent of social change in the selected Common Law African countries

Overall, although there has been much change in the laws and the manner in which LGB persons are perceived in the selected Common Law countries in Africa, complete social change, which denotes a change in attitudes, is yet to happen. Since LGB persons are regarded as second-class citizens, they also have limited access to opportunities, including education and employment, and are thus more likely to remain poor compared to the majority of the population. This is true even for South Africa. The progress can be summarised as in Table 4 below.

South Africa is rapidly progressing but its huge inequalities still stand in the way of achieving significant social change. It has achieved almost all there is to achieve in terms of legal change, but in terms of social acceptance, much more needs to be done, although progress is largely being seen. In this respect, South Africa is like two countries in one, with starkly different experiences marked by the racial and economic divide. Whereas some sections of the populace have certainly achieved social change, particularly the more affluent and usually white communities, the poor and usually black communities still face violence against LGB persons.

Although Kretz in 2011 regarded South Africa as being at Stage 5, 'Establishment of positive rights,' this study would instead put it at stage 6, 'Full legal equality', as indeed full legal equality has been achieved for LGB persons, with only the language of marriage missing for those who choose to enter into civil unions. It is for this reason that South Africa is denoted with '4.0' in Table 4 below.

276 Equal Rights Trust 'Submission to the United Nations Human Rights Council for a Universal Periodic Review' (21st session) of Kenya, 2015, http://www.refworld.org/country,,,,KEN,,54c0f1444,0.html (accessed, 31 March 2018).
277 See UHAI-EASHRI (n 36 above) 4-5, 25-26.
278 HRAPF and Consortium, n 119 above, 46.
279 Above, 15.

Table 4: Extent of social change among the selected African Common Law Countries

Country	Level of legal change	Code	Extent of social acceptance	Code	Extent of social change	Code
South Africa	High – Stagnating	4.5	Medium – Progressing	3.5	High – Progressing	4.0
Botswana	Medium – Progressing	3.5	Medium – Progressing	3.0	Medium – Progressing	3.25
Kenya	Low – Progressing	2.5	Low – Progressing	2.5	Low – Progressing	2.5
Uganda	Low – worsening	2.0	Low – Progressing	2.0	Low – Progressing	2.0
Nigeria	Very low – worsening	1.5	Low – Progressing	2.0	Low – Progressing	1.75

The level of social change is determined by combining the extent of legal change and the extent of societal acceptance. '1' denotes limited social change, '3' denotes moderate social change and '5' denotes significant social change.

Of the other countries, Botswana is making considerably fast headway with major legal changes, particularly decriminalisation, the express inclusion of sexual orientation as a protected ground against discrimination in the employment law, as well as the enforcement of the decision in the *LEGABIBO Registration* case. In terms of social acceptance, there is little violence and hate speech against LGB persons. On Kretz's spectrum, Botswana would be at Stage 3, because it has decriminalised same sex relations. However, the protection against discrimination in the Employment Act and the registration of LGB organisations would put it at Stage 4. This gives Botswana a '3.25' ranking in Table 4 above.

Kenya's is progressing towards social change. This is despite the recent refusal to decriminalise same sex relations. Political, social and economic changes show constant progress, although concentrated violence remains an issue. On Kretz's spectrum, Kenya would be ranked at stage 2 'criminalization of status and behaviour', because it is yet to decriminalise. Kretz's scale however does not take into account the progress being made in other spheres towards social acceptance, despite the continued criminalisation. The real positioning of Kenya would therefore be between stages 2 and 3 – criminalisation and establishment of positive rights. For this reason, Kenya is ranked '2.5' in Table 4 above to recognise the positive decisions and general progress.

Uganda faces a state-led hate campaign against LGB persons, which plays into the homophobia/ignorance of the majority. In Uganda, homophobia is the norm and the 'right thing to do'. This makes it difficult to achieve meaningful social change, despite major inroads being made with court victories affirming the rights of LGB persons. Social acceptance is still very low. On Kretz's spectrum, Uganda would be at the second stage of 'criminalization of status and behaviour', just like Kenya. However, the legal situation is worsening rather than progressing and this makes Uganda to lie between stages 2 and 3 –

criminalisation and establishment of positive rights. Because of the worsening legal situation and the not so progressing social change, Uganda scores 2.0 on Table 4 above.

Nigeria is the country with the least positive social change happening in the country. The legal situation is worsening, but there is some positive political, social and economic change that has occurred. On Kretz's spectrum, Nigeria would be at stage 2 –'criminalisation of status and behaviour' but this again does not recognise the different circumstances where LGB persons are recognised in HIV policies. This study would nevertheless also place Nigeria within that ranking. As such Nigeria scores 1.75 in Table 1 above in terms of social change.

It therefore still remains that for all the countries, the journey to social change in favour of LGB persons is still long, and much more needs to be done to achieve this. Each country lies at the stage where it ought to be in light of the circumstances pertaining in that country, and in light of the efforts by activists in the country towards ensuring that legal change happens.

4.7 The extent to which strategic litigation contributed to these changes

The above changes in the selected countries are attributable to a number of factors, among them strategic litigation. Determining the extent to which these changes can be attributed to strategic litigation however, requires a deeper examination of the changes, the time at which they occurred and whether they would not have happened even if the cases were not brought before the courts and decided the way they were. There are two aspects to consider when considering the impact of a case: enforcement and implementation of the decision, and the broader impact of the decision.[280] Enforcement is about whether the governments take deliberate measures to comply with the court's orders, while impact is about whether the rights that were intended to be realised through the decision are in fact realised. Whereas enforcement is critical to creating impact, sometimes impact can occur even without enforcement or compliance with the court decision. This is why it is advisable not only to consider the direct impact of a law but also the indirect changes that it creates.[281] Whereas enforcement is an active and deliberate process, impact is largely undirected. Impact can be direct or indirect. Direct impact is created when a court judgment is implemented as ordered by the court and what was intended by the judicial intervention is achieved.[282] Indirect impact

280 See C Rodriguez-Garavito 'Beyond enforcement: assessing and enhancing judicial impact' in M Langford, C Rodriguez-Garavito & J Rossi *Social rights judgments and the politics of compliance: making it stick* (2017) 75, 78-80.

281 See for example BE Harcourt 'After the "social meaning turn." Implications for research design and methods of proof in contemporary criminal law policy analysis' (2000) 34:1 *Law and Society Review* 179, 204-5.

282 Above, 85.

on the other hand arises from other aspects not ordered for by the court, but which nevertheless arise, leading to the realisation of the right.[283]

However, the desired change may also occur regardless of the judgment, and this is the organic change model, which relies on the fact that change is always happening and different components are interdependent in such a way that they influence each other differently.

Therefore, a particular change can be directly attributed to a judgment, or a judgment may only make a contribution to that change, or the change could happen anyway regardless of the judgment. Therefore, in Common Law Africa, among the above changes, only those that were ordered by the court can be directly attributed to the court cases. All the others, negative or positive, are indirect effects, or organic changes that could have happened regardless of the court cases.

There are two main types of judgments that have characterised the strategic litigation scene in the countries under examination, namely, those that apply to only the parties to the case, and those that apply beyond the parties to it. Cases that challenge violations against a particular individual and are brought in a strategic way as test cases fall in the first category, and these judgments affect only the parties. Consequently, the court's orders are exclusively directed to the parties. On the other hand, cases challenging laws or conduct that affects the public generally fall in the second category. In such cases, the court's decision will directly impact on all those affected by such a law. To measure impact of the judgments in the first category, one has to simply know whether the other party has done what it was ordered to do. For the second category, the decision binds all other persons beyond the parties and as such, they are expected to behave according to what was decided/ordered by the court. In this respect, measuring impact requires a consideration of how the judgment has changed the general situation for everyone similarly situated.

For LGB judgments in the selected Common Law countries, those that only affected the parties directly were *Victor Mukasa & Yvonne Oyoo v Attorney General (Victor Mukasa* case),[284] the *Rolling Stone* case[285] and the *Kasha Jacqueline Nabagesera & 3 Others v The Attorney General and Hon. Rev. Fr Simon Lokodo,* High Court Miscellaneous Cause No. 33 of 2012[286] in Uganda, where compensation was ordered for the violation of rights in the first two and the status quo maintained in the third case; the *NGLHRC Registration case*[287] in Kenya where the order to register NGLHRC was issued, and *COL & GMN*

283 Above, 86.
284 (2008) AHRLR 248 (High Court of Uganda) 22 November 2008.
285 n 253 above.
286 High Court Miscellaneous Cause No. 33 of 2012.
287 n 201 above.

v Resident Magistrate Kwale Court & 4 Others, (The *COL* case)[288] where anal examinations against the two accused persons were found unconstitutional; the *LEGABIBO Registration* case[289] in Botswana where LEGABIBO was ordered to be registered; the *De Lange* case in South Africa which was referred to mediation; *Ifeanyi Orazulike v Inspector General of Police & Abuja Environmental Protection Board* (Orazulike case),[290] in Nigeria where the court ordered damages for infringement of rights, and *Pamela Adie v The Corporate Affairs Commission*[291] where the court dismissed the application against the applicants. In all these cases, what was ordered by the courts directly affected the two parties. All of them were enforced except for the *Rolling Stone* case,[292] where the damages have never been recovered, and the *NGLHRC Registration case*, where an appeal was lodged and the NGO Board refused to register NGLHRC in the meantime.[293] Nevertheless, an indirect impact of these cases that can be traced is the fact that similar cases have not been brought to court yet, signifying either that the litigation put a stop to such cases, or that other actors behaved in accordance with such judgment. For example, in Uganda, the *Rolling Stone* case saw an end to reporting that called for the killing of LGB persons, something that went beyond what the court ordered.[294]

For those where laws were targeted, the change is measured by considering whether the laws changed, and whether people changed their conduct in accordance with the change in the laws. This is easier when the court itself changed the law through reading in, or through a declaration of nullity. An example is the case of Prof J Oloka Onyango & 9 others v Attorney General (*The Anti-Homosexuality Act* case), where the Constitutional Court declared the AHA unconstitutional;[295] the case of *Adrian Jjuuko v Attorney General* (*Equal Opportunities* case),[296] where the Court declared section 15(6)(d) of the Equal Opportunities Commission Act (EOC Act) unconstitutional; the South African Constitutional Court's declaration of the sodomy laws null and void in case of *National Coalition for Gay and Lesbian Equality v the Minister of Justice* 1999 (*Sodomy* case);[297] and the declaration of nullity of the impugned Regulations in the case of *Langemaat v Minister of Safety and Security* (*Langemaat* case).[298] Those where the courts read-in words to make

288 Petition No. 51 of 2015.
289 *Attorney General v Thuto Rammoge & 19 Others* (2014) CACGB-128-14 (CA) (*LEGABIBO Registration* case).
290 Suit No. FHC/ABJ/CS/799/2014
291 *Pamela Adie v Corporate Affairs Commission*, suit no: FHC/ABJ/CS/827/2018
292 n 201 above.
293 Interview with Eric Gitari, Nairobi, 20 July 2017.
294 Interview with Patricia Kimera, n 171 above.
295 Constitutional Petition No 8 of 2014.
296 Constitutional Petition No. 008 of 2014.
297 1 SA 6 (CC).
298 *Langemaat v Minister of Safety and Security* 1998 (3) SA 312 (T).

the challenged legislative provisions constitutional/ more inclusive were: *Gory v Kolver NO & Others;*[299] the *Satchwell* case;[300] the *Du Toit* case;[301] *J v Director-General, Department of Home Affairs, Minister of Home Affairs, and President of the Republic of South Africa*,[302] *Du Plessis v Road Accident Fund;*[303] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* (the *Immigration* case);[304] and *Geldenhuys v National Director of Public Prosecutions & Others.*[305] In all these cases, the impact was direct and immediate, and applied to all persons affected by the laws in question, and, due to the detailed nature of the judgments and the orders, there was no space left for persons to act otherwise than what the courts ordered.

For those where the courts required the state to take action, they only had direct impact when the action was taken. These include the *Fourie* case in South Africa,[306] in which the Court gave time to Parliament to enact an appropriate law, and the *Attorney General v Thuto Ramogge & 19 Others* (*LEGABIBO Registration*) case,[307] which required the state to register LEGABIBO.

All the unsuccessful cases did not require any action to be taken, and none of them made any legal changes, so there was no direct impact arising out of their implementation. However, they had the indirect effect of influencing how people perceived LGB rights, as well as sending a message to the executive and the legislature that law reform was not necessary. In a more positive way, in what is regarded as winning by losing, the cases further galvanised the LGB movements in their respective countries, and also sent a message that achieving LGB rights was a necessary struggle.

There is also the concept of backlash, or losing by winning. This is where, due to the court victory, the community or the legislature and/or the executive take it upon themselves to pass laws or take other actions that effectively nullify what the courts would have ordered. An example is the victory in the *Victor Mukasa* case[308] in Uganda, which is believed by Advocate Ladislaus Rwakafuzi to have contributed to the tabling of the AHB, as the then Minister of Ethics and Integrity promised a tougher law soon after the victory.[309] Makerere University professor Christopher Mbazira shares this view, and argues that

299 2007 3 BCLR 249 (CC).
300 2004 1 BCLR 1 (CC) (17 March 2003).
301 *Du Toit and Another v Minister of Welfare and Population Development and Others* 2001 (12) BCLR 1225 (T).
302 (2003) AHRLR 263 (SACC) 28 March 2003.
303 2004 1 SA 359 (SCA)
304 2000 1 BCLR 39.
305 2009 5 BCLR 435 (CC).
306 n 189 above.
307 n 289 above, which was an appeal against the High Court's decision to register LEGABIBO.
308 n 284 above.
309 Interview with Advocate Ladislaus Rwakafuzi, Kampala, 20 July 2017. See also 'Tough anti-gay law due' *Sunday Vision* 26 August 2007.

the agitation around the initial LGB strategic litigation cases was one of the reasons why the authorities decided to take a strong stance against LGB rights and to introduce the brutal AHB.[310]

From the above analysis, some of the changes can be directly attributed to strategic litigation. For others, the cases simply contributed to the positive outcome, and in the others, change was set to happen even if the cases had never been brought.

There are also other factors that clearly contributed to the legal, political, social and economic changes that took place in Common Law Africa besides litigation. These include: the struggle against apartheid in South Africa, which morphed into a fight against all forms of discrimination; the growth of the LGB movement outside of Common Law Africa which lent support to LGB groups in the different countries and helped to lobby governments to make changes; and the struggle against HIV/AIDS, which showed that leaving LGB persons behind would be detrimental to the struggle against HIV/AIDS. Also, due to the ongoing developments in countries like South Africa, it was simply inevitable that change would occur as equality was the overriding principle.

It is theorised that some changes would still have come even if the cases had not been brought. In Botswana, Kenya, Nigeria, and Uganda, the developments concerning HIV/AIDS inevitably had to address LGB rights. This explains why the health sector in all countries seems to recognise the need to protect LGB persons in order to stop the spread of HIV. Another factor that would have inevitably led to change is the growth of both the LGB and the anti-gay movements. Hence, whereas strategic litigation was an important factor, even without it, the social change seen in all the different countries would still have taken place, albeit at different rates.

Despite the contribution of other factors, strategic litigation is the main deliberate step that LGB groups took to create change. Even in South Africa where the struggle against apartheid had led to an agreement that all discrimination was to be condemned, all the legal changes had to come through hard-won litigation. Indeed, although De Vos does not regard the achievement of same-sex marriage in South Africa as a complete revolution, he acknowledges the role of the court in taking lead on the process, as there was no way the legislature was going to act without such a judgment.[311] In Uganda, only strategic litigation could have stopped the AHA, as the measures it encompassed were very popular. Similarly, in Botswana, only litigation could have led to the registration of LEGABIBO as the state had refused to register them and even had to first lose an appeal before agreeing to do so. In Kenya,

310 Interview with Prof Christopher Mbazira, Principal, School of Law, Makerere University, Kampala, 26 March 2018.

311 See generally, P de Vos 'A judicial revolution? The court-led achievement of same-sex marriage in South Africa' (2008) 4:2 *Utrecht Law Review* 162.

even after successful litigation, NGHLRC has not been registered, but nevertheless the message was clear that what was done was unconstitutional. In Nigeria, only dragging the state to court would have obtained justice for Orazulike. In all five countries, the state is largely opposed to LGB equality, albeit in different degrees, and this implies that the LGB groups themselves have to take action if at all change is to be achieved. Since the state is largely opposed, lobbying or dialogue does little to make change, and it is only strategic litigation that is coercive enough to ensure that the changes do happen. Therefore, to a large extent, the legal changes as well as the changes in the political, social and economic status of LGB persons in all the countries are as a result, both direct and indirect, of LGB strategic litigation.

4.8 Conclusion

The discussion above shows that strategic litigation is an integral part of social change. It shows agency on the part of the LGB community, and also helps to actively force the state to make the changes, even when the state is more or less supportive of LGB rights. All the major legal changes were only made through court decisions. The struggle in Common Law Africa would have been very different without strategic litigation. Even where other factors have played a role, it has been a supportive role to strategic litigation. Legal change cannot therefore be separated from social change. A change in the law galvanises communities to rally behind the group, since such a group will no longer be criminal or illegal. This explains why opinions change soon after courts make their decisions. When legal change is achieved, then the struggle for acceptance has a basis to go on. Social change for LGB rights also takes time, and it is evolutionary rather than revolutionary, unlike legal change, which can be revolutionary as was seen in South Africa. Social change cannot be achieved once and for all and simply be taken for granted. It has to be continuously protected. One thing is certain though, that the general trend is towards positive change rather than retrogression. This is very important for LGB activists as it shows that more efforts towards equality can actually yield results, even though it sometimes appears that there is more backlash than real progress in places like Uganda and Nigeria.

Five

Exogenous Factors and How They Influence LGB Strategic Litigation in Stimulating Social Change

5.1 Introduction

There are relatively low levels of social change in the selected Common Law African countries, as none of the countries has yet achieved significant social change in favour of LGB persons. This is so despite a number of legal victories scored in all five countries. Only South Africa is close to achieving significant social change; Botswana and Kenya have recorded modest gains; Nigeria and Uganda are changing only very slowly. In so far as this study is concerned, ideal social change in respect of LGB rights is a situation in which no one is homophobic or treats people differently because of their sexual orientation. The more realistic level of social change however is 'significant social change'. This chapter uses data from the selected Common Law African countries to identify factors that determine the rate and extent to which LGB strategic litigation is most inclined to stimulate social change. Generally, there are two broad sets of factors – those that are external to the case, referred to here as exogenous factors, and those that are part of the case, referred to as endogenous factors. This chapter is concerned with the exogenous factors. These factors are identified and then discussed for each of the countries. Conclusions are then drawn as to the significance of each factor to stimulating social change. For each of the factors, an assertion is advanced that posits a tentative relationship between the particular factor and the extent of social change. Conclusions are then drawn from the assertion as a whole. It should be stressed that the correlation established in this study does not purport to be statistically accurate, but rather indicative of the strength or weakness of a correlative relationship.

5.2 An overview of the exogenous factors

Gloppen identifies four broad factors that help to ensure that litigation generally leads to social change. These factors are: the existence of opportunities for the marginalised groups to express themselves by turning their concerns into legal claims; how the courts respond to these claims in terms of process; the capability of the courts to give legal redress for the concerns raised; and compliance with the decisions by other bodies.[1] These are broad factors that need to broken down into specific factors that affect how litigation creates social change for marginalised groups. Of these, the first and last factors go to the exogenous factors. Exogenous factors are external to the case, but nevertheless have a huge bearing on how the case fares, and its ability to lead to social change. These factors influence the litigation strategy; determine the success of individual cases; and the ability of the successful cases being implemented or lost cases inspiring elites and the community to demand for change and thus leading to the desired change. The first set of factors to be discussed are political factors, which go to the political setup of the country in question and the state of governance in the country. The second set is that of legal factors, which go to the status of the judiciary and legal culture. The third set are the economic factors, which go to the nature of the economic system in place and the economic conditions of the country, and finally the social factors, which go to the social set up of the society. The last set of factors, are those that do not fall in any of those categories such as the passage of time.

5.3 Political factors

The political set up of a country matters much with respect to the ability of strategic litigation generally and LGB strategic litigation in particular to stimulate social change. This is because constitutional adjudication is a political process and therefore political factors play an influential role in this regard.[2] Political factors largely go to Gloppen's fourth broad factor – 'compliance with the decisions by other bodies.' Judges are usually alive to the political ramifications of their decisions, and to the extent to which they can push the executive and the legislature, which are majoritarian institutions. It is this aspect that usually brings into application the political question doctrine (PQD).[3] This doctrine maintains that within the context of separation of powers, there are questions that are considered to be exclusively within the purview of the executive or the legislature and cannot therefore be looked

1 See generally S Gloppen 'Public interest litigation: Social rights and social policy' in AA Anis & A de Haan *Inclusive states: Social policy and structural inequalities*, New frontiers of social policy (2008) 345.

2 J Oloka-Onyango *When courts do politics: Public interest law and litigation in East Africa* (2017) 1-14. Also see generally, JAG Griffith *The politics of the judiciary* (1991).

3 See for example R Barkow 'The rise and fall of the political question doctrine' in N Mourtada-Sabbah & BE Cain (eds) *The political question doctrine and the Supreme*

into by the courts. The PQD has its origins in the United States (US) case of *Marbury v Madison,*[4] in which the US Supreme Court declared that it had the power to review statutes and executive action.[5] Although the doctrine has been questioned particularly in the USA where it originated, it still rears its head in public interest litigation (PIL) cases the world over.[6] The doctrine typically arises in PIL since such litigation usually challenges the actions of the executive or the legislature and is essentially political in nature.[7] The political factors that play an important role in the success of strategic litigation generally and LGB strategic litigation in particular in creating social change, are discussed below:

5.3.1 The state of democracy in the country

It is posited that the more entrenched democracy is in a country, the more likely it is that LGB strategic litigation will lead to significant social change, and vice versa. This is because the power of the judiciary to influence laws and therefore to change public opinion and check the excesses of both the executive and the legislature is inherently based in the twin democratic doctrines of separation of powers and checks and balances.[8] Encarnación explored the role of democracy in enabling the acceptance of LGB rights in the world. [9] In his view democracy more than economic factors and religion spurs legal change and social acceptance. This is because democracy creates an environment where courts are strong enough to make pro-LGB rights decisions, knowing that such decisions will be respected without the courts facing any repercussions.[10] Also in democracies, space for LGB people to come out of the closet, live more openly and express themselves through pride parades and in other ways is much more readily available.[11] It also affirms the citizenship of all individuals and the rights that come with that facilitates civil society action and international collaborations, all of which help to open up the space.[12] He concludes that whereas democracy can indeed be used to curtail LGB rights as the case was with the backlash that followed the initial legal victories on same-sex marriage in the USA,[13] it provides the best avenue for

Court of the United States (2007) 24.

4 5 US 137 (1803).

5 Above, 177-178.

6 Oloka-Onyango (n 2 above) 50.

7 See generally R Abel *Politics by other means: Law in the struggle against apartheid 1980-1994* (1995).

8 JH Ely *Democracy and distrust: A theory of judicial review* (1980) 153.

9 OG Encarnación 'Gay rights: Why democracy matters' (2014) 25:3 *Journal of Democracy* 90.

10 Above, 99-100.

11 Above, 100.

12 Above, 99.

13 The initial wave of backlash followed the case of *Baehr v Lewin* 74 Haw. 530, 597, 852 P.2d 44, 74 (1993) (decided by the Hawaii Supreme Court) questioning the justification of outlawing same-sex marriages in Hawaii. The backlash that followed eventually led to the enactment of the Defence of Marriage Act (DOMA) at the federal level.

LGB rights to be realised. He demonstrates that most recent progress in LGB equality has been made, by and large, in strongly democratic countries, while most of the regression has been in less democratic ones.[14] This view is also supported by the Human Dignity Trust, which found that the less democratic a country was, the more likely it was to criminalise homosexuality.[15] Tocqueville classically linked social change to democracy, and based his views on the fact that democracy puts the individual at the centre and therefore allows the individual to be free to make different choices and to create change.[16] This implies that barring other factors, successful LGB litigation in a country that is democratic is bound to spur social change, faster than in those countries where democracy is not entrenched.

Table 5: Proximate levels of democracy in the selected countries

Country	Nature of regime as per the Democracy Index 2018	Status of Freedom as per the Freedom House Index 2019	Global Ranking as per the Rule of Law Index 2019	Ranking in Africa as per the Ibrahim Index 2018
Botswana	Flawed Democracy (28th in the world and 3rd in Africa)	Free	44th	5th
Kenya	Hybrid Regime (98th in the world and 17th in Africa)	Partly Free	101st	11th
Nigeria	Hybrid regime (108th in the world and 20th in Africa)	Partly Free	106th	33rd
South Africa	Flawed Democracy (40th in the world and 4th in Africa)	Free	47th	7th
Uganda	Hybrid Regime (96th in the world and the 16th in Africa)	Not Free	113th	20th

Sources*:

Economist Intelligence Unit 'Democracy Index 2018: Democracy Index 2018: Me too? Political participation, protest and democracy' (2019)

Freedom House 'Freedom in the World 2019: Democracy in Retreat' (2019)

Mo Ibrahim Foundation 'Ibrahim Index of African Governance 2018' (2018)

World Justice Project 'The WJP Rule of Law Index 2019' (2019)

* I acknowledge that none of these indices is unbiased, with all of them using westernised conceptions and biases about how democracy should be, which in many cases gives an unfair view of African countries and how they practice their democracy. Specifically for Freedom House indices see, ND Steiner 'Comparing Freedom House democracy scores to alternative indices and testing for political bias: Are US allies rated as more democratic by Freedom House?' (2016) 18:4 *Journal of Comparative Policy Analysis: Research and Practice* 329. Again, quantitative data, which all the indices use, may not correctly bring out the real situation on the ground. See for example RJ Goldstein 'The limitations of using quantitative data in studying human rights abuses' in TB Jabine & RP Claude (eds) *Human rights and statistics: Getting the record straight* (1992) 35.

14 Above, 98-99.

15 See generally Human Dignity Trust 'Criminalising homosexuality and democratic values' 2015 http://www.humandignitytrust.org/uploaded/Library/Other_Material/Criminalising_Homosexuality_and_Democratic_Values.pdf (accessed 16 May 2018).

16 A Tocqueville *Democracy in America* Historical-critical edition of De la démocratie en Amérique trans J Schleifer (2010) quoted in É Keslassy *Question sociale et démocratie chez Tocqueville* (2004).

Among the African countries covered, Botswana ranks highest on the different indices as shown in the above table. It is however classified as a 'flawed democracy' in the Democracy Index.[17] Freedom House noted that although it is ranked as 'free' '… LGBT (lesbian, gay, bisexual, and transgender) people, face discrimination.'[18] The Rule of Law Index shows that it scores 0.58 on the 0-1 scale protecting fundamental rights.[19] The Ibrahim Index noted that although it is one of the best performing countries, it is among the increasingly deteriorating countries in Africa in terms of human rights and participation.[20] Botswana's level of social change is only next to South Africa among the selected African Common Law countries. Parliament in Botswana was able to include protection against discrimination on sexual orientation, among other grounds, in the Employment (Amendment) Act, 2010.[21] The High Court recently decriminalised same-sex relations,[22] and this may increase its rankings for 2019. This implies that the ground is more or less set for social change in Botswana. More LGB strategic litigation needs to be done in Botswana, as the chances of court successes are high, and implementation of court decisions is also likely as the state generally respects court decisions. Societal acceptance of the decisions is also quite high within the current democratic dispensation.

South Africa is also one of the good performers in terms of democracy as shown in Table 6 above. The Economist's Intelligence Unit ranks it as a 'flawed democracy' but ranked as 40th in the world and fourth in Africa.[23] It is also ranked 47th on the Rule of Law Index,[24] and it scores 0.64 on the 0-1 scale for fundamental rights.[25] Freedom House regards it as 'free', albeit with mounting challenges to its democracy.[26] The Mo Ibrahim Index ranks it seventh in Africa, [27] and it is improving.[28] South Africa also lends support to the proposition that the more democratic a country is, the more likely it is that LGB strategic litigation will lead to social change, as the relatively high democracy levels have supported legal change and the country is increasingly achieving social acceptance. Also, activists in South Africa, unlike in Botswana, have effectively used the state of democracy in the country to bring many

17 Economist Intelligence Unit *Democracy Index 2018: Me too? Political participation, protest and democracy* (2019) 32, 33.
18 Freedom House 'Freedom in the World 2019: Democracy in Retreat' (2019) (accessed 1 September 2019).
19 World Justice Project *The WJP Rule of Law Index 2019* (2019) 50.
20 Mo Ibrahim Foundation *Ibrahim index of African governance 2018* (2018) 36-37.
21 Section 23(d).
22 *Letsweletse Moshidiemang v Attorney General*, MAHGB- 000591-61.
23 Economist's Intelligence Unit (n 17 above) 28.
24 World Justice Project (n 19 above) 6, 134.
25 Above, 134.
26 Freedom House 'Freedom in the World Report: South Africa https://freedomhouse.org/report/freedom-world/2019/south-africa (accessed 1 September 2019).
27 Mo Ibrahim Foundation (n 20 above) 16.
28 Above, 36.

cases that have contributed to achieving legal change and relatively high social acceptance for LGB persons.

Kenya is a more recently democratising state having only moved from a period of authoritarianism to democracy with the enactment of the 2010 Constitution. It is ranked as 98th in the world and 17th in Africa, and classified as a 'hybrid regime' on the Democracy Index.[29] It is also ranked as 101th in the world on the Rule of Law Index,[30] and it is scores 0.64 on the 0-1 scale for fundamental rights.[31] It ranks as 'partly free' on the Freedom House Index,[32] and as 11th in Africa on the Ibrahim Index,[33] albeit with increasing improvement.[34] The relatively lower levels of democracy than the first two countries is also reflected in a progressive constitution giving rise to progressive LGB decisions, but with little in terms of implementation, as well as the changing of mind-sets. Nevertheless, the improvement in democracy in recent times can also be seen in increasing court victories in favour of LGB persons, only recently tempered by the refusal of the High Court to decriminalise same-sex relations. The fact that Kenya's democracy is steadily improving reveals a better future for LGB strategic litigation as well as for the potential contribution to social change in the near future.

Nigeria follows Kenya in terms of rankings. On the Democracy Index, it is also ranked as a 'hybrid regime' and as the 108th in the world, 20th in Africa. However, on the Freedom House Index, it is regarded as 'Partly Free'.[35] On the Rule of Law Index, it is the 106th in the world, and it scores 0.46 on fundamental rights.[36] On the Ibrahim Index, it ranks 33rd in Africa.[37] Therefore Nigeria follows Kenya and is ahead of Uganda in terms of the extent of democratisation. This also aligns with the proposition, since Nigeria also shows the least levels of social change among all the countries.

On the various democracy rankings, Uganda consistently ranks lower than the other four countries. It is classified as a 'hybrid regime' in the Democracy Index, the 96th in the world and the 16th in Africa.[38] It also ranks as the 106th in the world on the Rule of Law Index,[39] and scores 0.38 on the 0-1 scale for fundamental rights.[40] It is regarded as 'not free' by Freedom House,[41] and

29 The Economist's Intelligence Unit (n 17 above) 33.
30 World Justice Project (n 19 above) 6.
31 Above, 94.
32 Freedom House (n 18 above) 16.
33 Mo Ibrahim Foundation (n 20 above) 16.
34 Above, 33.
35 Freedom House 'Freedom in the World Report: Nigeria https://freedomhouse.org/report/freedom-world/2019/Nigeria (accessed 1 September 2019).
36 World Justice Project (n 19 above) 117.
37 Mo Ibrahim Foundation (n 20 above) 16.
38 Above.
39 Above, 16.
40 Above, 148.
41 Freedom House (n 18 above) 544-549.

ranks 20th on the Ibrahim Index,[42] but it has made notable improvement.[43] It follows that Uganda's relatively poor record of democracy supports the proposition. It is the second most aggressive country in terms of opposing LGB rights among those surveyed, and where the least legal change has been achieved and also where social acceptance is lowest, only behind Nigeria. Perhaps the fact that it is improving in terms of democracy accounts for the recent court victories on LGB rights, and the fact that the legislature has not yet passed a revived Anti-Homosexuality Act (AHA). However, it is clear that Uganda still has a long way to go if social change in favour of LGB rights is to be achieved within the current political dispensation.

Therefore, there is a positive correlation between the level of democracy and LGB strategic litigation stimulating social change as all the different countries shown. The more democratic a country is, the more likely it is for LGB strategic litigation to lead to social change, barring other factors.

5.3.2 Periods of political and social transformation

This study adopts the proposition that LGB strategic litigation is more likely to lead to social change in favour of LGB persons soon after a country has undergone a transformative event. This goes to Gloppen's first broad factor – the existence of opportunities for the marginalised groups to express themselves by turning their concerns into legal claims.' A transformative event is a set of circumstances that radically alters the existing political or social landscape.[44] Such events can occur at the end of a long-standing political regime, or they can be events such as a defiant action by an individual who in turn inspires others, or a watershed judicial decision, which puts into motion a series of events[45] that 'produce radical turning points in collective action and affect the outcome of social movements'.[46] LGB rights are such social movements that are affected by transformative events, and being a minority movement, it usually takes advantage of such 'concentrated moments of political and cultural creativity' to mobilise.[47] These events are usually associated with a feeling of destiny and euphoria for the future, and people are usually more welcoming and accepting of change at such times. They also usually involve a commitment not to go back to the past. Political transformations also usually starkly portray the difference between the times before, when discrimination was rife and the period after, when diversity is embraced. Political leaders

42 Mo Ibrahim Foundation (n 20 above) 17.

43 Above, 48.

44 See D McAdam & WH Sewell Jr 'It's about time: Temporality in the study of social movements and revolutions' in RR Aminzade (ed) *Silence and voice in the study of contentious politics* (2001) 102.

45 See generally EA Andersen 'Transformative events in the LGBTQ rights movement' (2017) 5 *Indiana Journal of Law and Social Equality* 441.

46 A Morris 'Reflections on social movement theory: Criticisms and proposals' (2000) 29 *Contemporary Sociology* 445, 452.

47 McAdam & Sewell (n 44 above) 102.

usually want this to be seen, and LGB rights are usually the beacons of such displays in some countries.[48]

In terms of political transformations that affected the whole nation, South Africa takes the lead. There, the change from apartheid to democracy affected the whole country. There was a determination especially among the political leadership not to appear hypocritical, claiming rights for themselves while denying them to minority groups, even if this meant recognising the rights of LGB persons.[49] The LGB leadership recognised this and made the strategic decision to align itself with the ANC. Brown regards this action as 'one of the most important strategic decisions' that the movement leadership made in the struggle for equality.[50] As a result, LGB rights were protected within the Constitution, despite many citizens expressing their disapproval during the drafting of the Interim Constitution.[51] The Constitution firmly put LGB persons on the road to equality, despite the fact that the general population did not largely approve of these specific provisions.[52]

For Kenya, the retirement of long-term president Daniel Arap Moi in 2007 saw the adoption of a new, more liberal Constitution, which was intended to consolidate the move from authoritarianism to democracy.[53] This also affected the whole country and political system. Kenya's Constitution was drafted in a mould similar to that of South Africa, but the circumstances are rather different particularly since the former was not entirely born out of a process of national consensus and the power structures remained almost the same.[54] The new dispensation allowed for the filing of the four cases in Kenya, with more progressive outcomes, something that would not have been thought about ten years back.[55]

48 For a discussion on how LGB rights has been used to display transformation in Latin American political transitions, see E Friedman 'Gender, sexuality, and the Latin American left: Testing the transformation' (2009) 30(2) *Third World Quarterly* 415, 431. Also, specifically for Nicaragua see K Kampwirth 'Organising the hombre nuevo gay: LGBT politics and the second sandinista revolution' (2014) 33:3 *Bulletin of Latin American Research* 319.

49 See generally T Brown 'South Africa's gay revolution: The development of gay and lesbian rights in South Africa's Constitution and the lingering societal stigma towards the country's homosexuals' (2014) 7 *Elon Law Review* 455.

50 Above, 475.

51 C Dunton & M Palmberg 'Human rights and homosexuality in Southern Africa' (1996) 19 Current African Issues 46.

52 See generally Brown, n 49 above.

53 See generally, YP Ghai & JC Ghai *Kenya's Constitution: An instrument for change* (2011).

54 See H Varney 'Breathing life into the new constitution: A new constitutional approach to law and policy in Kenya: Lessons from South Africa' International Center for Transitional Justice (2011) 4-5.

55 For example, Ghai & Ghai stated in 2011 that they could not see a court finding the laws criminalising same-sex relations unconstitutional basing on the new Constitution. See Ghai & Ghai (n 53 above) 57.

What comes close to a transformative event in Botswana is the negative decision in the case of *State v Kanane*,[56] which helped to galvanise the LGB movement, and put the courts in the spotlight on how they treated LGB rights.[57] Indeed, the next case that was brought before the courts met with success even though there was no constitutional change on LGB issues,[58] and this trend has continued. It was, however, a more contained change largely affecting human rights groups, and therefore not as transformative as a countrywide political regime change would have been. Therefore, this factor plays a less important role in spurring social change in favour of LGB persons in Botswana than other factors, such as the state of democracy in the country, but nevertheless it made a contribution.

In the case of Uganda, such a moment could be said to have been the tabling of the Anti-Homosexuality Bill (AHB) in Parliament in 2009.[59] The Bill was intended to protect the 'traditional African family' through criminalising homosexuality and its promotion. The harshness of the Bill led to the galvanising of efforts by civil society groups to oppose the Bill, leading to a political struggle that affected largely civil society and the state. It led to six different cases being filed challenging discrimination against LGB persons with a high degree of success.[60] The tabling of the Bill furthermore affected many more people beyond the LGB community, with the aid cuts affecting especially persons living with HIV/AIDS.[61]

Nigeria is yet to have a truly transformative event affecting LGB persons. The tabling of the Same Sex Marriages (Prohibition) Bill would have been such event but the fact that the law remains in place and has largely affected advocacy and activism around LGB rights makes it a less transformative event. This also supports the proposition that where there is no major transformative event, there is little that can be done to make litigation to lead to social change in favour of LGB persons.

The above discussion reflects a positive correlation between the occurrence of a transformative/revolutionary political-legal event and social change in favour of LGB persons. The intensity of the event and its nature are responsible for the differences in the magnitude of social change. Such events are far between in the selected countries, apart from South Africa, and are not as intense thus explaining the low levels of social change despite the LGB litigation.

56 [2003] 2 BLR 67 (CA).

57 See for example the discussion in M Tabengwa & N Nicol 'The development of sexual rights and the LGB movement in Botswana' in Lennox, C & Waites, M (eds) *Human rights, sexual orientation and gender identity in the Commonwealth: struggles for decriminalisation and change* (2013) 339.

58 *Rammoge & 19 Others v* The *Attorney General of Botswana* [2014] MAHGB-000175-13 (High Court of Botswana) (*LEGABIBO Registration* case).

59 The Anti-Homosexuality Bill, No. 18 of 2009, Bills Supplement to the Uganda Gazette No. 47 Volume CII, 25 September, 2009.

60 For details on the cases, see generally Chapter 2 above.

61 'Anti-gay group fires all staff' *The Observer* 1 August 2018.

5.3.3 Strong pro-rights political leadership

Strong, human rights-minded and equality-oriented political leaders coming into power increases the chances of LGB strategic litigation leading to social change. This is because such strong leaders come with what Northouse refers to as major leadership traits, namely: integrity, intelligence, self-confidence, determination, and sociability.[62] They lend credence to what they believe in and persuade others to believe in them and their vision, thus intentionally or unintentionally making many persons to follow their lead and accept LGB persons.[63] Also, leaders at the highest political levels appoint judges for the highest courts in all of the selected jurisdictions. The leaders usually appoint judges whose value systems rhyme with their own,[64] and this therefore increases the possibility of LGB-friendly judges being appointed, and thus the possibility of LGB friendly court decisions being made.

South Africa stands out as a country that has had strong and visionary leaders believing in the idea of equality and then embracing LGB rights. The leadership of the ruling party – the African National Congress (ANC) – moved from hostility against LGB issues to support even before it came into power.[65] It thus became easier for LGB groups to forge alliances with the ANC and be able to drive their litigation agenda once democracy was restored in South Africa.[66] International icon Nelson Mandela, the country's first post-apartheid President, believed in equality for all including LGB persons.[67] As leader of the ANC, he ensured that the equality clause was maintained in the Final Constitution with its express protection of persons against discrimination based on sexual orientation.[68] Mandela appointed judges to the Constitutional Court who in one way or another had supported

62 PG Northhouse *Leadership: Theory and practice* (2016) 24-25.

63 LE Ford *et al American government and politics today* 2017-2018 edition: Without policy chapters (2018) 215.

64 Ideology is an important factor in such selections, and for the situation in the USA, see N Dorsen 'The selection of U.S. Supreme Court justices' (2006) 4:4 *International Journal of Constitutional Law* 652, 655.

65 Despite its earlier stance of hostility to LGB rights, the ANC later became very supportive of LGB rights, to the extent of proposing the constitutional text that best protected LGB rights. For a discussion of this process, see Brown (n 49 above) 462-469.

66 Brown (n 49 above) 462-469.

67 For a detailed discussion of Mandela and his role in the struggle for LGB rights, see 'The overlooked battle: Madiba and the gay rights movement' *The Daily Maverick* 12 December 2013 https://www.dailymaverick.co.za/opinionista/2013-12-12-the-overlooked-battle-madiba-and-the-gay-rights-movement/#.WwhAVKm-mgQ (accessed 25 May 2018). However, Gevisser qualifies this support by explaining that Mandela did not lead the LGB support in the ANC as he was rather conservative in this regard, but he strongly believed in non-discrimination and could see the similarities between racial discrimination and discrimination on the basis of sexual orientation. See 'Nelson Mandela's impact on gay rights discussed by South African journalist Mark Gevisser' *Queer Voices* 12 August 2013 https://www.huffingtonpost.com/2013/12/08/nelson-mandela-gay-rights_n_4406307.html (accessed 25 May 2018).

68 Brown (n 49 above) 462-469.

the anti-apartheid struggle.[69] These same judges were crucial to the eventual LGB court victories, which saw a complete change from a country that criminalised and discriminated against LGB persons to one that does not. His successor, Thabo Mbeki, equally believed in equality and was the first ANC senior official to express the position that the ANC supported LGB rights.[70] He also continued to support LGB rights during his presidency and at one time equated LGB discrimination to apartheid.[71] By the time the more hostile Jacob Zuma assumed the presidency, the legal changes had been completed. Archbishop Desmond Tutu, the influential then-chairperson of the Truth and Reconciliation Commission, also firmly believed in LGB equality.[72] All these key leaders helped to galvanise the acceptance of LGB persons in South Africa and to make the LGB legal victories meaningful.

Conversely, in countries where no strong, human rights-minded leaders have actively supported LGB equality, court victories have not translated fully into social change. For Botswana, Kenya, Nigeria, and Uganda, no strong political leadership has emerged in favour of LGB rights and indeed it is the reverse that is rather true for countries like Uganda, where President Museveni and the Speaker of Parliament, Rebecca Kadaga, were leading opponents of LGB rights. In Botswana, former President Ian Khama was publicly opposed to LGB rights. [73] Former President Festus Mogae only started supporting LGB rights when he left power, when he did not have much influence to drive the agenda.[74] In Kenya, President Uhuru Kenyatta has also spoken out before against LGB rights.[75] It is therefore not surprising that the extent of LGB social change is less than that in South Africa.

69 For some of his first appointees to the Constitutional Court and their backgrounds see 'Mandela swears in first constitutional court' *The Washington Post* 15 February 1995 https://www.washingtonpost.com/archive/politics/1995/02/15/mandela-swears-in-first-constitutional-court/3915edf7-0554-4ed2-980e-b12bf2f14a40/?noredirect=on&utm_term=.17a536600eea (accessed 25 May 2018).

70 See telegram from Thabo Mbeki to Peter Tatchell, dated 24 November 1987 quoted in P Tatchell, 'The moment the ANC embraced gay rights' in N Hoad, K Martin & G Reid (eds) *Sex and politics in South Africa* (2005) 140, 145. Indeed, same-sex marriages became legal in South Africa during his presidency.

71 'Thabo Mbeki compares laws against gays to apartheid' *GBM News* http://gbmnews.com/wp/archives/710 (accessed 25 May 2018).

72 For a detailed discussion of his position on LGB rights, see 'Analysis: Why Tutu's support for gay rights matters' *The Daily Maverick* 29 July 2013. https://www.dailymaverick.co.za/article/2013-07-29-analysis-why-tutus-support-for-gay-rights-matters/#.WwhSJqm-mgQ (accessed 25 May 2018).

73 'Gay row rips Botswana's political elite apart' *Sunday Standard Reporter* 24 January 2016. http://www.sundaystandard.info/gay-row-rips-botswana%E2%80%99s-political-elite-apart (accessed 25 May 2018).

74 'Mogae would not stick his neck out for gays' *Mail & Guardian* 14 March 2011 https://mg.co.za/article/2011-03-14-mogae-would-not-stick-his-neck-out-for-gays/ (accessed 25 May 2018).

75 'Uhuru Kenyatta dismisses gays rights as a non-issue in Kenya' *Daily Nation* 25 July 2015.

It therefore becomes clear that where there is strong political leadership that favours LGB rights, considerable progress will be made towards social change and the inverse is also true.

Overall, the above discussion shows that among the most relevant exogenous political factors for ensuring that LGB strategic litigation leads to social change is the level of democracy. This is the overarching political factor, within which all the others operate. All the other political factors, such as periods of political and social transformations, as well as the presence of strong, human rights-minded leaders, are secondary to the state of governance. Countries that are rapidly democratising such as South Africa, and Botswana are also seeing much faster social change in favour of LGB rights. On the other hand, countries that have weak democracies, such as Uganda, and Kenya have also not made great strides towards LGB equality. Even when cases are successful, in weak democracies they will be ignored and not implemented and no one will value them.

5.4 Legal factors

Closely related to the political factors are the legal ones. These concern the legal set-up of the country. The legal factors go to Gloppen's second and third broad factors – how the courts respond to these claims in terms of process; the capability of the courts to give legal redress for the concerns raised. These factors are discussed below:

5.4.1 The extent to which judicial independence is entrenched in the Constitution and in practice

The principle of separation of powers and the doctrine of checks and balances have their roots in the constitution of a country. It is easier for LGB strategic litigation to spur social change in favour of LGB persons in a country where judicial independence is entrenched in the Constitution and is respected in practice. In such cases, such powers can then be used without the judiciary being accused of usurping the roles of elected officials. Entrenching judicial independence does not necessarily imply that the courts will be immune from the counter-majoritarian criticism, which inherently exists wherever there is constitutionalism.[76] However, they would not have to second guess themselves as to whether they actually have the powers to nullify statutes or executive actions and will not have to fear what will happen if they actually do nullify such statutes or actions. Judicial independence may be included in the Constitution as a principle but in practice the courts are not independent enough to make decisions without fear of backlash.

In many countries, the judiciary is not respected by the other two organs of the state, as it does not control either the 'sword or the purse'.[77] It is the

76 See S Holmes 'Precommitment and the paradox of democracy' in J Elster and R Slagstad (eds) *Constitutionalism and democracy* (1988) 195.

77 A Hamilton 'The federalist papers' (1961) 465 quoted in GN Rosenberg *Hollow hope: Can courts bring about social change?* (2008) 3.

easiest organ to be brushed aside and trampled upon either by stopping or reducing funds that go to it or directly threatening or harming the judges. Judicial independence is generally seen at two levels: the individual judge level, where the judge is free to make impartial and independent decisions; and the institutional level, where the judiciary is able to appoint its own staff and control its own administration.[78]

All the constitutions of the selected countries do indeed give the courts powers to nullify statutes or executive action. They also guarantee judicial independence although in different ways. Once again the country with the most protection is South Africa. The Constitution of the Republic of South Africa, 1996 (Final Constitution)[79] guarantees the independence of the judiciary,[80] and prohibits any other organ of the state from interfering with the courts.[81] The appointment of judges is by the President on the advice of the Judicial Service Commission.[82] Judicial tenure is guaranteed under section 176 of the Constitution, which sets the limit for Constitutional Court judges at the age of 70 or after serving 12 years and for other judges as provided in an Act of Parliament.[83] Removal of judges is guided by section 177 of the Constitution, which requires the Judicial Service Commission to make the decision based on a judge's misconduct, incapacity or gross incompetence. The decision is then confirmed by a two-thirds majority in the National Assembly, after which the President can then dismiss the judge. This was done in order to allow all the organs to have a say before a judge can be removed, something that is in line with the principle of checks and balances.[84] Section 176(3) of the Constitution requires that judges' emoluments may not be reduced.[85] In practice, South Africa has had a slightly longer history of respecting judicial independence than the other selected Common Law African countries, and the courts there have since the end of apartheid been able to make independent decisions which have been respected by the executive and the judiciary. Positive decisions on LGB rights have largely been made by the courts, but nevertheless, for the more controversial issues, the courts couch their remedies in such a way that the legislature and the executive are given an opportunity to remedy the situation first.[86]

78 L Siyo & JC Mubangizi 'The independence of South African judges: A constitutional and legislative perspective' www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/Mubangizi.pdf *(accessed 29 May 2018).*

79 Constitution of the Republic of South Africa 108 of 1996.

80 Above, section 165(2).

81 Above, section 165(3).

82 Above, section 174.

83 This Act is the Judges Remuneration and Conditions of Employment Act, 47 of 2001.

84 Siyo & Mubangizi (n 78 above) 13.

85 This is once again addressed in detail in the Judges Remuneration and Conditions of Employment Act, 47 of 2001.

86 This is for example what it was for same-sex marriages in *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC);

Botswana is another country where judicial independence is taking root.[87] Judges of the High Court and the Court of Appeal are appointed by the President in consultation with the Judicial Service Commission,[88] except for the Chief Justice and the President of the Court of Appeal who are appointed by the President alone.[89] Judges have security of tenure until they reach retirement age and can only be removed for inability to perform their functions or for misconduct.[90] The judges have financial independence as their emoluments are drawn from the consolidated fund[91] and cannot be varied to their disadvantage.[92] In practice, the courts are free to operate.[93] However, the immense powers given by the Constitution to the President to appoint judges as well as to dismiss them make it easy for an incumbent president to abuse judicial independence.[94] An example is immediate former President Ian Khama who used his powers to 'suspend' judges who were largely seen as independent by appointing and dismissing judges in a way that disrupted the judiciary. [95] The relative independence of the courts explains why LGB litigation has been successful more recently, and the increased executive interference with the courts also shows why LGB strategic litigation is yet to lead to significant social change.

After a period of domination of the judiciary by the executive,[96] Kenya is finally picking up in terms of judicial independence. Article 160(1) of the 2010 Constitution provides that in the exercise of judicial authority, the judiciary shall only be subject to the Constitution and the law, and shall not be subject to 'the control or direction of any person or authority'. Appointment of judges is done by the President in accordance with the recommendation of the Judicial Service Commission, and with approval of the National Assembly for the Chief Justice and Deputy Chief Justice.[97] It gives the judges security of tenure,[98] and judges can only be removed on the grounds of inability to

2006 (1) SA 524 (CC) (*Fourie* case) where the legislature was given one year to come up with a law.

87 CM Fombad & EK Quansah *The Botswana legal system* (2006) 134-137.

88 Constitution of the Republic of Botswana, section 96(2) and 100(2).

89 Above, Section 96(1) and 100(1).

90 Above, Section 97(2) and 101(2).

91 Above, section 122(5).

92 Above, section 122(2) and (3).

93 See generally, CM Fombad 'The separation of powers and constitutionalism in Africa: The case of Botswana' (2005) 25 *Boston College Third World Law Journal* 301.

94 Above, 302-303.

95 'Botswana: How a president 'captured' the judiciary' AllAfrica.com 16 June 2017 http://allafrica.com/stories/201706160515.html (accessed 29 May 2018).

96 For discussions of the state of judicial independence under Kenya's Independence Constitution, see W Mitullah, *et al* (eds) *Kenya's democratisation: Gains or losses* (2005) 34. Also see JO Oseko 'Judicial independence in Kenya: Constitutional challenges and opportunities for reform' Thesis submitted for the degree of Doctor of Philosophy at the University of Leicester, November 2011, 124-182.

97 Constitution of the Republic of Kenya, 2010, article 166(1).

98 Above, article 167.

perform the functions of office, a breach of the code of conduct for judges, bankruptcy, incompetence; or gross misconduct or misbehaviour.[99] It provides that their salaries shall not be varied to their disadvantage,[100] the salaries for judges are drawn from the consolidated fund,[101] while the funds to run the judiciary are drawn from the judiciary fund,[102] and judges have immunity for their decisions.[103] The above protections actually do operate in practice as confirmed by Kenyan judges Isaac Lenaola[104] and Monica Mbaru.[105] They both noted that as judges in Kenya they feel independent enough to make decisions that they think are correct, even on issues as controversial as LGB rights. Indeed Justice Lenaola stated that there is need for more LGB cases to be brought to the courts as the state of judicial independence is conducive to making any decisions that are in line with the constitutional guarantees.[106] Justice Monica Mbaru narrated how the issue of her work on LGB rights came up during her interviews with the Judicial Service Commission, and how this did not prevent her from securing the position of a High Court judge.[107] However, these guarantees are more recent, and are constantly being challenged. One scenario that highlights this is the recent wave of disrespect of court orders, particularly in the matter involving political activist Miguna Miguna, who was deported despite court orders to the contrary.[108] Also, the direct attacks on the Supreme Court judges by the President and the Vice President after they nullified the 2017 elections demonstrated that the judges may not be fully immune from attacks by the executive.[109] Indeed, this may explain why, although there have been LGB court cases, they have not necessarily been implemented and have largely not led to much social change.

In Nigeria, judicial independence is regarded as one of the principles of maintaining the State social order.[110] The President is responsible for appointing the Chief Justice and judges of the higher courts on the recommendation of

99 Above, article 168(1).
100 Above, article 160(4).
101 Above, article 160(3).
102 Above, article 173 (1).
103 Above, article 160(5) of the Constitution.
104 Justice of the Supreme Court of Kenya.
105 Judge of the High Court of Kenya.
106 Interview with Justice Isaac Lenaola, Supreme Court of Kenya, Nairobi, 26 July 2017.
107 Interview with Justice Monica Mbaru, High Court of Kenya, Nairobi, 26 July 2017.
108 TF Hodgson and S Sidu '(Re)deportation of activist lawyer highlights continued judicial independence in the face of crumbling rule of law in Kenya' *Opinio Juris* 11 April 2018 http://opiniojuris.org/2018/04/11/redeportation-of-activist-lawyer-highglights-continued-judicial-indepedence-in-the-face-of-crumbling-rule-of-law-in-kenya/. Also see Kenya Human Rights Commission 'Statement on Miguna case and disregard for judicial authority' 29 March 2018 https://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/649-statement-on-miguna-case-and-disregard-for-judicial-authority.html (accessed 9 May 2018).
109 'Kenya president Uhuru terms Supreme Court ruling as 'coup' by four judges' *The East African* 21 September 2017.
110 Nigerian Constitution, 1999, Section 15(2)(e).

the National Judicial Council subject to confirmation by the Senate.[111] Judges have security of tenure but can be removed by the President or Governors as applicable supported by the Senate or House of Assembly,[112] and there is no right to be heard before being removed, which makes them less independent. The funds to run the judiciary are drawn from the consolidated fund and given to the National Judicial Council to be disbursed to the heads of the courts.[113] In practice, the history of Nigeria shows a judiciary that has been subjected to the executive through all the years of military dictatorships.[114] The courts also have powers to nullify statutes.[115] In practice however the courts are yet to fully come out of the shadow of past executive domination and assert their independence fully, although there has been come progress.[116] The executive also uses its powers to keep the judiciary ineffective. An example is the recent sacking of the Chief Justice by the President weeks before a presidential election, which shows the vulnerability of the judiciary.[117] This sort of executive interference with the judiciary may explain why LGB cases have been thrown out by the judiciary.

In Uganda, the Constitution also guarantees judicial independence.[118] The courts are not supposed to be under the control or direction of any person or authority.[119] It also provides for the immunity of judicial officers for their actions,[120] administrative expenses of the judiciary are charged to the consolidated fund,[121] and the salaries of judges must not be varied to the detriment of the judges.[122] However, it is the President who appoints judges on the advice of the Judicial Service Commission.[123] This effectively leaves the President with full powers of appointment, and political cadres without any judicial or scholarly background have indeed been selected to the court.[124] Judges have been threatened by the

111 Section 231(1)
112 Section 292.
113 Section 81(3).
114 See generally HO Yusuf '*Calling the Judiciary to account for the past: Transitional justice and judicial accountability in Nigeria*' (2008) 30 *Law & Policy* 194, 207–219. Also see BO Nwabueze *Nigeria's Presidential Constitution: 1979–83. The second experiment in constitutional democracy* (1985) 443.
115 Sections 6 and 315 (3) of the Constitution.
116 See generally HO Yusuf 'The judiciary and political change in Africa: Developing transitional jurisprudence in Nigeria' (2009) 7:4 *International Journal of Constitutional Law* 654-682.
117 'President Buhari finally reveals why he fired Onnoghen as Chief Justice of Nigeria' Pulse.ng https://www.pulse.ng/news/local/buhari-finally-reveals-why-he-fired-onnoghen/t8357vk (accessed 2 September 2019).
118 Constitution of the Republic of Uganda, 1995 (Uganda Constitution), article 128(1).
119 Above, article 128(1).
120 Above, Article 128(4).
121 Above, Article 128(5)
122 Above, Article 128(7)
123 Above, article 142(2).
124 Among these is the current Chief Justice Bart Katureebe, who worked as a minister in various portfolios. See 'Who is Justice Bart Katureebe' *The Observer* 6 March 2015.

executive before when they make politically-sensitive decisions, and on at least two occasions the army raided court premises to re-arrest persons who had just been released on bail.[125] Again, the courts are perennially underfunded.[126] It is therefore not surprising that Ugandan judges rarely issue orders to the state to do something and keep to issuing mere declarations. Even then, when declarations are made for example invalidating a statute, the legislature usually does not take any steps to take the law off the books.[127] Judges are reluctant to give Parliament a timeframe in which to formally repeal laws declared unconstitutional. It is therefore not surprising that although Uganda has a high number of LGB cases and even victories, most of them are superficial and only apply to the parties to the case.

The above discussion illustrates that the nature of the constitutional provisions concerning the judiciary's powers, as well as the practical realisation of judicial independence is important in determining whether LGB strategic litigation would spur social change.

5.4.2 Inclusion of sexual orientation among the protected grounds against discrimination in the Constitution

A major assertion of this study is that the inclusion of sexual orientation as a protected ground against discrimination is more likely to lead to court victories in LGB cases and eventually the stimulation of social change. It is well known that once a justiciable right is included within the Constitution, it is often given greater priority in the courts of law as it turns political demands into crisp legal claims,[128] although this is not always the case.[129] Nevertheless, constitutional protection helps. Concerning LGB rights, where sexual orientation is included as a protected ground against discrimination, the courts find it easier to find laws and conduct to be discriminatory on the grounds of sexual orientation, as in South Africa. Where it is not explicit, the courts usually do not enforce the right, and where they do they have to find other provisions to rely on.

125 For details see B Kabumba 'The practicability of the concept of judicial independence in East Africa: Successes, challenges and strategies' Paper presented at 2016 Conference of the East African Magistrates and Judges Association (EAMJA), October 30-November 2, 2016, Speke Resort, Munyonyo, 14-19. For the period before 2007, see generally, American Bar Association 'Judicial independence undermined: A report on Uganda' 2007.

126 American Bar Association, above.

127 For example, section 15(6)(d) of the Equal Opportunities Commission Act, remains on the law books despite having been nullified by the Constitutional Court in *Adrian Jjuuko v Attorney General* Constitutional Petition No. 1 of 2009 (*Equal Opportunities* case).

128 See RE Case & TE Givens, 'Re-engineering legal opportunity structures in the European Union? The starting line group and the politics of the racial equality directive' (2010) 48 *Journal of Common Market Studies* 221-241. Also see KM Kelmor 'Legal formulations of a human right to information: defining a global consensus' (2016) 25:1 *Journal of Information Ethics* 101-113, 149-150, where the argument is made that explicit protection gives more meaning to the rights.

129 Also see FB Cross 'The relevance of law in human rights protection' (1999) 19 *International Review of Law and Economics* 87–98.

It is easier to articulate the rights where sexual orientation is a protected ground than where it is not. Inclusion in the Constitution presupposes that the population, or at least its elected representatives, have agreed that there is need for protection of LGB persons from discrimination.

The country that most clearly supports the above proposition is South Africa. The inclusion of 'sexual orientation' among the protected grounds against discrimination in section 9(3) of the Constitution worked like a magic bullet that immediately gave the courts the leeway to decide eleven of the twelve cases brought thereafter in favour of LGB persons.[130] The general population has not vehemently objected to the court decisions and there is increased acceptance of the need for protection of LGB persons. The court cases simply built upon a foundation that was already laid in the Constitution, and the courts did not have to create justifications beyond section 9(3). The inclusion of sexual orientation as a protected ground against discrimination also partly explains why LGB strategic litigation has been able to contribute more to achieving significant social change in South Africa than elsewhere.

All the other sampled countries do not provide such express protection. However, in Botswana, the courts have used their powers to interpret statutes to include sexual orientation among the protected grounds. Sections 15(1) and (2) of the Constitution prohibit the making of discriminatory laws or the discrimination of anyone by public officials, but these are subjected to claw-back clauses which restrict certain areas of the law from being subjected to the non-discrimination clause, including divorces, marriages and personal law, and things done under such laws.[131] Section 15(3) lists the protected grounds in a closed manner, which does not include sexual orientation. In the *Botswana Decriminalisation case*[132] the court dealt squarely with this issue. It stated that the grounds listed for non-discrimination are not closed, and they allow for inclusion of other analogous grounds. The judge also relied on the inclusion of sexual orientation as a protected ground against discrimination in the Employment Act to show that it is generally accepted that sexual orientation ought to be a protected ground, within the concept of sex.[133] Such a progressive interpretation of the Constitution explains why the Court was able to nullify the provisions criminalising consensual same-sex relations. It also underlies the progress that Botswana is making towards protection of the rights of LGB persons.

In Kenya, the 2010 Constitution provides that 'everyone' is equal before and under the law,[134] and then defines equality to include the 'full and equal

130 Each of the eleven LGB cases was based on this right, either exclusively or in combination with other rights.
131 Above, section 15(4)(c).
132 MAHGB- 000591-61.
133 Above, 89.
134 Constitution of the Republic of Kenya, 2010, article 27(1).

enjoyment' of all rights.[135] It lists grounds upon which the state cannot discriminate in an open-ended way, and therefore even if sexual orientation is not included, it can be implied.[136] The majority in the Court of Appeal in the *NGLHRC Registration case* agreed with the High Court's interpretation of the words 'every person' in article 27 and found that they meant exactly that – 'every person'. They held that article 27(4) on non-discrimination was inclusive and therefore sexual orientation could also be implied. This was judicial activism and the court could have easily ruled the other way. Indeed in *COL & GMN v Resident Magistrate Kwale Court & 4 Others,*[137] the High Court found that anal examinations were constitutional as they were crucial for verification that anal intercourse had taken place. This was, however, reversed by the Court of Appeal, which found that the order for anal examinations was made under the wrong law and therefore violated the right to dignity, privacy and freedom from self-incrimination of the appellants.[138] Although there is no express protection, the non-discrimination clause is nevertheless expansive enough. However, the High Court in the combined petitions of *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)*[139] did not see the need to interpret the grounds as including sexual orientation as they focused on whether actual violations had occurred. They also concluded that in the broad scheme of the Constitution, it was not in public interest to decriminalise same-sex relations. Although Kenya had made progress on LGB rights through an expansive interpretation of rights, the recent cases seem to be taking them backwards. Nevertheless, the situation still explains why social change is still limited.

Nigeria's Constitution also protects the right to equality and freedom from discrimination. Section 42(1) of the Federal Republic of Nigeria Constitution 1999, requires that persons shall not be deprived because of their being a 'citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion.' The grounds seem to be closed. The courts have also not read them to allow grounds on sexual orientation, not even using sex. This may explain also why no cases challenging the criminal law have been brought except in the case of the SSMPA. It may also explain why such cases did not succeed.

Uganda also has an inclusive non-discrimination clause, which emphasises that the broad non-discrimination in article 21(1) is paramount.[140] It has a closed list of the grounds upon which someone cannot be discriminated against

135 Above, article 27(2).
136 Above, article 27(4).
137 Petition No. 51 of 2015.
138 *COL & Another v Chief Magistrate Ukunda Law Courts & 4 Others* Civil Appeal 56 of 2016 [2018] eKLR. (*COL* case).
139 Consolidated petitions 50 of 2013 and 234 of 2016.
140 Constitution of the Republic of Uganda, article 21(1).

in article 21(2). Despite this, the whole scheme of the non-discrimination clause is cast in such broad and general terms that it can be argued that sexual orientation can be considered as a protected ground against discrimination in article 21(2).[141] The courts have only once relied on the non-discrimination clause to find in favour of equality and this was in thecase of *Adrian Jjuuko v Attorney General* (Equal Opportunities case)..[142] This was however done in passing without any discussion of the normative content of the right.[143] Where they have found in favour of LGB persons, they have relied on other rights.[144] The right was however expressly discussed by Musota J in the *Kasha Jacqueline Nabagesera & 3 Others v Attorney General and Hon. Rev. Fr Simon Lokodo* (the *Lokodo* case),[145] but he decided to rely on the limitation clause to find that persons breaking the criminal law prohibiting same-sex conduct could not 'enjoy the same protection of the law as persons who were acting in accordance with the law were enjoying'.[146] Indeed, the non-express protection was relied on to deny LGB persons protection with the judge, making it clear that, unlike the other countries referred to by the petitioners, Uganda criminalised same-sex relations, and therefore defined public interest differently.[147] This reasoning was again used to deny registration to an organisation working on LGB issues in *Frank Mugisha, Dennis Wamala & Ssenfuka Warry Joanita v Uganda Registration Services Bureau (URSB)* (*SMUG Registration* case).[148] The limited level of social change in Uganda also reflects this limited interpretation of the non-discrimination clause. Therefore, express constitutional protection is important in ensuring that LGB strategic litigation contributes to social change.

From the preceding it is plausible to conclude that there is a positive correlation between express protection against discrimination based on sexual orientation in the Constitution and the courts' affirmation of LGB rights, which then leads to social acceptance, and eventually social change.

141 Human Rights Awareness and Promotion Forum (HRAPF) *A guide to the normative legal framework on the human rights of LGBTI persons in Uganda* (2019) 18.

142 Constitutional Petition No. 1 of 2009.

143 Above, line 370-380.

144 These will be discussed in the discussion on other rights below. In *Victor Mukasa & Yvonne Oyoo v Attorney General* (2008) AHRLR 248 (High Court of Uganda) 22 November 2008 (*Victor Mukasa* case), the court relied on the rights to privacy and dignity; in *Kasha Jacqueline Nabagesera, David Kato Kisuule & Pepe Julian Onziema v The Rolling stone Newspaper* Miscellaneous Cause No. 163 of 2010 (High Court of Uganda) 30 December 2010 (*Rolling Stone* case), the Court relied on the rights to dignity and once again privacy; while in the *Equal Opportunities case* (n 142 above), the Court relied on the right to freedom from discrimination and the right to a fair trial.

145 High Court Miscellaneous Cause No. 33 of 2012.

146 Above, 23.

147 Above.

148 Miscellaneous Cause No. 96 of 2016.

5.4.3 The formulation of the rights in the Bill of Rights

Beyond the non-discrimination clause, the other rights on which the courts have commonly relied to uphold LGB rights are the right to privacy and the right to dignity. Therefore, much of the court's decisions depend on how these rights are formulated in the Bill of Rights. On this basis, this study makes the proposition that the more open and inclusive the constitutional provisions on privacy and dignity are, the easier it is for courts to find in favour of LGB persons and thus to spur the movement towards social change in favour of LGB persons. This is because the courts would not be seen as labouring too much to affirm the rights, and as such this would give the judgments legitimacy as they flow directly from the Bill of Rights. However much a court is attuned to judicial activism, it would be difficult for it to rule in favour of LGB rights where the provisions are restrictive. Where claw-back clauses exist and where the limitation clause is framed very widely, again, it would be easier for the courts to rule against LGB rights.

The South African Constitution is perhaps the one with the most open and inclusive provisions. In its preamble it denounces the legacy of apartheid and makes a commitment to building an inclusive society based on 'democratic values, social justice and fundamental human rights'.[149] It has an expansive Bill of Rights that binds all the organs of state.[150] It protects the right to 'human dignity,'[151] as well as the right to freedom and security of the person,[152] which protects against violence, torture and cruel, inhuman and degrading treatment.[153] It also includes the right to privacy, which protects from unlawful searching of persons and homes.[154] Therefore, with this wide array of rights that are usually used to vindicate LGB rights, it is not surprising that the courts there are able to make judgments based on various provisions beyond the express protection against discrimination on the basis of sexual orientation in section 9(3).[155] Its limitation clause is also broad and clearly restrictive, giving more effect to the rights than the limitation.[156] The limitation is in section 36 of the Constitution. It subjects the limitation of rights to what is 'reasonable and justifiable in a free and democratic society'. It also goes ahead to state that limiting the right must be with due regard to the importance of the purpose, the nature and extent, and the relationship between the limitation and its

149 The Constitution of the Republic of South Africa, preamble.
150 Above, section 8(1).
151 Above, section 10.
152 Above, section 12.
153 Above, section 12(1)(c)-(e).
154 Above, section 14(a).
155 For example, the *Sodomy* case was decided on the rights to: equality and non-discrimination; dignity; and privacy.
156 For a complete discussion of how the limitation clause applies in South Africa, see I Currie & J De Waal *The bill of rights handbook* (2005) 163-186.

purpose and whether there are other means of achieving that purpose.[157] This expansive protection of human rights may also explain why the Constitutional Court has been able to make the decisions that it has, and the legislature and the executive have implemented the decisions. The general population has accepted the decisions in LGB cases as they are based on constitutional provisions that clearly came out of a general consensus within the population.

Kenya's 2010 Constitution is also more expansive, with the preamble showing the nation's commitment to the 'essential values of human rights, equality, freedom, democracy, social justice and the rule of law.'[158] Like the South African Constitution, its Bill of Rights clearly elaborates the different rights showing that they belong to all persons. Apart from the right to freedom from discrimination, it also contains the rights to dignity,[159] privacy,[160] and freedom and security of the person,[161] which are all more or less couched in the same language as in the South African Constitution. Indeed, the courts have relied on these provisions to find in favour of LGB persons. In the *NGLHRC Registration case*, the court went beyond the right to freedom from discrimination and also relied on the right to freedom of association,[162] as the case concerned registration of an organisation. However, the fact that the Constitution has been in operation for only a few years, means that it has not yet been tested as much as for example the 22-year-old South African Constitution. Therefore, the legal change that it has so far brought about as regards LGB rights is not so great. The expansive nature of the Bill of Rights also explains the recent LGB court victories and the increasing level of social acceptance.

The Constitution of Uganda also contains expansive rights, which can be used to vindicate LGB rights. The right to dignity is couched as the right to freedom from torture, cruel, inhuman and degrading treatment or punishment.[163] It also contains the right to privacy, which is largely restricted to searches.[164] The courts finding in favour of LGB persons have relied on these rights before. In the *Rolling Stone* case, the court relied on the right to dignity and to privacy to issue an injunction against a newspaper for publishing the personal details of LGB persons and calling for their hanging. In the *Victor Mukasa* case, the Court relied on the rights to freedom from inhuman and degrading treatment and the right to property. However, there is an express prohibition of same-sex marriages in article 31(2)(A) of the Constitution, which would easily persuade a court to rule that such an express prohibition within the Constitution clearly showed the intention of the framers not to protect against discrimination on the

157 Section 36 (1)(a)-(e).
158 Constitution of the Republic of Kenya, 2010, preamble.
159 Above, article 28.
160 Above, article 31.
161 Above, article 29.
162 Protected in article 36 and which applies to 'every one'.
163 Constitution of the Republic of Uganda, article 24.
164 Above, article 27.

grounds of sexual orientation. This is what happened in the *Lokodo* case, and more recently in the *SMUG Registration* case, where the judge expressly relied on article 31(2)(A) in addition to section 145 of the Penal Code to uphold the denial of registration to SMUG. As such, the express prohibition of same-sex marriages, despite more inclusive provisions may also explain the low levels of positive social change in Uganda despite the LGB strategic litigation.

Botswana's Constitution is more restrictive with many clawback clauses to the various rights, including to the right to dignity[165] and to privacy.[166] The courts have nevertheless found for LGB persons based on the right to equality, liberty and dignity;[167] and then freedom of association, which directly concerned the matter in issue: the registration of LEGABIBO.[168] The fact that the courts have been able to go beyond the limitations and find in favour of LGB rights does not contradict the proposition but rather supports it. This is because it extends much more to judicial activism and the willingness of the courts to push the constitution to its limits. Indeed, the fact that the state appealed this decision shows that the rights are highly contested and it is largely the fact that democracy has taken root in this country that ensured that the court decision was respected. Botswana's more restrictive constitution thus helps to explain why social change is still relatively low despite LGB strategic litigation cases.

Finally, the Constitution of Nigeria is also not restricted in terms of rights, but has lots of claw-back on the rights themselves, including for purposes of 'defence'.[169] The courts have only in one case used it to protect LGB rights, but that was without expressly discussing the sexual orientation of the applicant.[170] A particularly problematic decision was the one in *Ebah*'s case, which was dismissed on procedural grounds despite the Fundamental Rights (Enforcement Procedure) Rules 2009 (the FREP Rules) under which the case was brought discouraging cases being thrown out for lack of locus standi.[171] The Court in the *Pamela Adie v Corporate Affairs Commission* case[172] upheld the provisions of the Same Sex Marriages (Prohibition) Act when refusing to reverse the refusal to register an LGB organisation. This narrow approach to expanding the rights provided in the Constitution also explains why Nigeria still lags behind among countries where social change on LGB rights is yet to be realised.

165 Section 7.
166 Section 9.
167 *Letsweletse Moshidiemang v Attorney General*, MAHGB-000591-61.
168 *LEGABIBO Registration* case n 58 above.
169 Section 45 of the Constitution. Also see EA Taiwo 'Enforcement of fundamental rights and the standing rules under the Nigerian Constitution: A need for a more liberal provision' (2009) *African Human Rights Law Journal* 546, 573.
170 *Ifeanyi Orazulike v Inspector General of Police and Another* 2016.
171 FREP Rules, preamble, para 3 (e). For a detailed discussion of this case see AC Onuora-Oguno 'Protecting same-sex rights in Nigeria: Case note on Teriah Joseph Ebah v Federal Government of Nigeria' in S Namwase & A Jjuuko (2017) *Protecting the human rights of sexual minorities in contemporary Africa* 238.
172 Suit no: FHC/ABJ/CS/827/2018.

Open and inclusive language in constitutions makes it much easier for courts to rule in favour of LGB persons, which starts a conversation that may eventually lead to social change.

5.4.4 The extent of application of international human rights standards

The extent to which a country applies international human rights standards is another factor that contributes to LGB strategic litigation leading to social change. LGB rights have recently gained more prominence in the international human rights arena. Even though no single international instrument specifically recognises or protects LGB rights, interpretation by the different treaty bodies of the different human rights provisions has largely been in favour of LGB rights. The most outstanding of these is the Human Rights Committee, which has interpreted the inclusion of 'sex' in article 26 of the International Covenant on Civil and Political Rights as including 'sexual orientation'.[173] The Yogyakarta Principles on the application of international human rights law**,** which codify international human rights standards and how they apply to LGB persons, are also increasingly respected as a source of international law, albeit as a soft law source.[174]

At the regional level, the African Commission on Human and Peoples' Rights (African Commission) has interpreted the African Charter on Human and Peoples' Rights (African Charter) in a way that protects LGB rights. This has, for example, been in its concluding remarks upon review of state reports, such as the one for Cameroon in 2006.[175] At the sub-regional level, the East African Court of Justice has heard a case challenging Uganda's Anti-Homosexuality Act,[176] and although it ruled that the case was moot as the Act had already been nullified by the Constitutional Court in Uganda, this was the first time that such a case came before courts in the regional human rights system.

Since international law binds states that are parties to the different instruments, how the states fulfil their obligations under these instruments goes a long way to make international law useful in influencing court decisions at the domestic level, and thus social change. Furthermore, the extent of this

173 *Toonen v Australia* Communication No. 488/1992.

174 Yogyakarta Principles: http://www.yogyakartaprinciples.org/ (accessed 3 March 2018) together with the Yogyakarta Principles plus 10 (YP+10) – Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles http://yogyakartaprinciples.org/principles-en/yp10/ (accessed 31 August 2018).

175 See African Commission on Human and Peoples' Rights 'Concluding observations on the first periodic report of Cameroon' adopted at the Commission's 39th ordinary session, 11-25th May 2005, Para 14.

176 *Human Rights Awareness and Promotion Forum (HRAPF) v Attorney General of Uganda and the Secretariat of the Joint United Nations Programme on HIV/AIDS (UNAIDS)* Reference 6 of 2014 (*HRAPF* case).

adherence translates into the local courts using international decisions to justify the protection of LGB persons. It also theoretically matters whether a country is monist or dualist with regards to the domestication of international law, since international law immediately becomes part of domestic law as soon as a country ratifies a treaty in monist countries, but must be incorporated by an Act of Parliament in dualistic countries.[177] In practice, what matters is how the country itself applies and respects international law rather than whether it is monist or not.[178] Another reason why the extent of respect for international law matters is because states are peer-reviewed by the different treaty bodies and the UN Human Rights Council through the Universal Periodic Review (UPR) process,[179] and for African countries that have consented, also by the African Union through the African Peer Review Mechanism.[180] This leads to accountability to peers, which helps to influence a country to respect human rights, including LGB rights, and enforce court decisions.

South Africa and Kenya have the highest level of application of international law. The South African Constitution specifically declares customary international law to be part of South African law.[181] It however still requires ratification of treaties before they become binding.[182] The interpretation clause expressly requires international law to be considered in the interpretation of the Bill of Rights.[183] Indeed, in many cases international instruments have been expressly referred to,[184] including those on LGB rights.[185] For the case of Kenya, article 2(5) of Kenya's Constitution provides that the general rules of international law are part of the laws of Kenya. Treaties, once ratified, automatically become part of the laws of Kenya.[186] This was a departure from

177 F Viljoen *International human rights law in Africa* (2007) 531.

178 For a discussion of how states apply international law, see M Killander & H Adjolohoun 'International law and domestic human rights litigation in Africa: An introduction' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 1-22.

179 The UPR is a peer review process of the UN Human Rights Council, whereby each of the 192 member states are reviewed after every four years for their human rights record.

180 The APRM is a voluntary peer review mechanism for African countries under the auspices of the New Partnership for Africa's Development (NEPAD). Its base document can be accessed at 'African Peer Review Mechanism (APRM) Base Document' NEPAD/HSGIC/03-2003/APRM/MOU/Annex II, adopted at the 6th Summit of the NEPAD Heads of State and Government Implementation Committee, 9 Mar. 2003, Abuja, Nigeria, (2003).

181 Final Constitution, section 232.

182 Above, section 231(2).

183 Above, section 39(1)(b). Also section 233 requires courts to prefer a position that is in line with international law. Also see the statement of Chaskalson P in *S v Makwanyane and Another* 1995 3 SA 391 (CC), 34 endorsing the use of international law.

184 In the context of children's rights see generally K Ngidi 'The role of international law in the development of children's rights in South Africa: A children's rights litigator's perspective' in in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 173.

185 See for example the judgment of Sachs J in the *Fourie* case (n 88 above) para 99-105.

186 Constitution of the Republic of Kenya, article 2(6).

the purely dualist approach that existed before.[187] However, despite this, the Constitution also maintains supremacy over all other laws, which then includes international law, and parliament maintains power to make its own laws, which makes Kenya more of a hybrid than a purely monist state.[188] Article 20(3)(b) of the Constitution requires the Bill of Rights to be interpreted in a way that most favours the enforcement of the right. Kenyan courts have also been freely referring to international law in their judgments on LGB rights.[189]

Botswana, Nigeria and Uganda are generally dualist. However, Uganda is more progressive as its Constitution requires the country to fully subscribe to all its international treaty obligations ratified prior to the passing of the 1995 Constitution.[190] Principle XXVIII of the National Objectives and Directive Principles of State Policy sets 'respect for international law and treaty obligations' as one of the principles that the state is obliged to follow. According to article 8A, Uganda is to be governed based on these principles, and this has led to the assertion that the principles are now justiciable.[191] Article 123 requires treaties to be ratified, and the Ratification of Treaties Act governs this.[192] This therefore implies that international law is generally binding on Uganda.[193] The courts however do generally refer to international instruments,[194] even in LGB cases. Nigeria's Constitution follows the dualist approach requiring international treaties to be domesticated before they can have force of law.[195] This has also affected the direct application of the more progressive treaties within the country, thus affecting the respect for LGB rights.[196] Botswana's Constitution is silent about international law. However, section 24(1) of the Interpretation Act

187 For a discussion of how the judiciary applied international law before the 2010 Constitution see J Osogo Ambani 'Navigating past the 'dualist doctrine': Yhe case for progressive jurisprudence on the application of international human rights norms in Kenya' in M Killander (ed) (n 184 above) 25.

188 J Maina 'Do articles 2(5) and 2(6) of the Constitution of Kenya 2010 transform Kenya into a monist state?' (September 30, 2013) https://ssrn.com/abstract=2516706 (accessed 31 August 2018).

189 See for example the case *of Eric Gitari v Attorney General* (*NGLHRC Registration case*) Petition 150 of 2016 (High Court of Kenya para 77-87.

190 Constitution of Uganda, article 287.

191 C Mbazira 'Public interest litigation and judicial activism in Uganda: Improving the enforcement of economic, social and cultural rights' (2009) Human Rights and Peace Centre Working Paper No. 24. See also the Supreme Court decision in *CEHURD v Attorney General* Constitutional Appeal No.1 of 2016, judgment of Kisaakye JSC, where article 8A was considered in the court's decision.

192 Cap 204.

193 B Kabumba 'The application of international law in the Ugandan judicial system: A critical enquiry' in Killander (n 184 above) 83-87.

194 Above.

195 Section 12 of the Nigerian 1999 Constitution. The courts have also upheld this. See *Abacha v Fawehinm* May [2000] 6 NWLR (Pt 660) 228 SC; and *Ibidapo v Lufthansa Airlines* [1997] 4 NWLR (Part 498) 124, 15.

196 VO Ayeni.Human rights and the criminalisation of same-sex relationships in Nigeria: A critique of the Same-Sex Marriage (Prohibition) Act' in Namwase, S & Jjuuko, A (2017) *Protecting the human rights of sexual minorities in contemporary Africa* 203, 230-231.

1984 allows the courts to refer to 'any relevant international treaty, agreement or convention…' for the purposes of interpreting enactments.[197] The courts have however adopted the principle of incorporation, which is to the effect that the signed treaties are binding unless they conflict with an express provision of the law.[198] The courts indeed do make reference to international judgments in their decisions including on LGB rights.[199]

Therefore, in all the countries, international law is referred to, and the countries are all amenable to the different international processes, although to different extents. The ones that are more open, particularly South Africa, have also seen more social change. Kenya still lags behind in terms of social change despite a more open framework, but this is attributable more to the limited time within which the Constitution has been in force (eight years). Uganda follows, although its usage of international law in LGB cases has been more to limit rights than vindicate them, as was done in both the *Lokodo* and *SMUG Registration* cases. This also shows the downside of using international law as judges can selectively apply it against LGB rights, since generally positive developments for LGB rights at the international level have also just recently emerged. Botswana applies international law despite a restrictive framework, and it has helped in vindicating LGB rights, thus supporting the quite higher levels of social change compared to countries like Uganda.

One of the factors influencing LGB strategic litigation to spur social change is the extent to which a country adheres to international law standards. South Africa clearly brings this out.

5.4.5 The legitimacy of constitutional protections of LGB rights

LGB rights claims are usually based on constitutions, which either directly protect LGB rights, or indirectly do so through providing for the rights of all persons.[200] Whereas most persons who criticise courts as unable to create social change have discussed this within the context of courts being counter-majoritarian,[201] this proposition rather considers the additional challenge in most of the selected countries that even the constitutions together with their bills of rights as well as the human rights regime generally are not regarded as legitimate. They can therefore be ignored at will. Legitimacy is about acceptance by the people of a certain framework as good for them and

197 EK Quansah 'An examination of use of international law as an interpretative tool in human rights litigation in Ghana and Botswana' in Killander (n 184 above).

198 *Republic of Angola v Springbok Investments (Pty) Ltd* [2005] 2 BLR 159 (HC) – Botswana.

199 In both the *Thuto Rammogge* case and the *Letsweletse Moshidiemang*, as well as the *Kanane* case, international instruments were referred to.

200 See generally, A Jjuuko 'Using the constitution to litigate on the rights of LGBTI persons in Uganda: Successes, challenges, and prospects' Paper presented at Harvard Law School, 18 September 2013.

201 See for example Rosenberg (n 77 above) 339-429, AM Bickel The least dangerous branch: The Supreme Court at the bar of politics (1962) 16-17; JF Handler *Social movements and the legal system: A theory of law reform and social change* (1978) 22.

as binding.[202] In respect of constitutions, this means the acceptance of the constitution as binding and imposing a duty upon people to act as it requires without them being forced to do so.[203] This is brought about by a number of factors, one of which is the origin of the constitution,[204] and the other being whether it is fair or just.[205] Two types of legitimacy have been identified: vertical legitimacy and horizontal legitimacy. Vertical legitimacy is about how people relate with institutions, while horizontal legitimacy is about what the people agree to be binding and important regardless of what the institutions or laws may say.[206] According to Englebert, imposed systems are generally illegitimate, as they are not homegrown and indigenous.[207] If this is to be followed, it implies that when constitutional protections of LGB rights are not homegrown and are rather imposed upon people, then they will not be seen as legitimate by the majority, or the legislature and the executive and will thus be unable to spur social change.

In countries where the constitutions and the human rights framework, which protect LGB rights either directly or indirectly, were imposed, court decisions in favour of LGB rights are less likely to be respected. This is despite the constitutions being regarded as the supreme law of the land. The two strands of the argument are that imposed LGB protections within constitutions will not be regarded as legitimate even when they expressly protect LGB rights, and that for negotiated and homegrown constitutions, the aspect of LGB protection will remain illegitimate since it is usually not expressly agreed upon. On imposition, whereas constitutions are negotiated documents, bills of rights with expansive language, which can be used to include different groups, have become more or less a standard component of such constitutions. Nevertheless, human rights remain largely seen as foreign impositions. This view emanates from three sources: the European origins of human rights,[208] the way they were selectively employed during colonial times,[209] and the way they are promoted

202 AMB Manguown 'Constitutions and legitimacy of power in Southern Africa' Institute for Research and Governance (http://www.institut-gouvernance.org/en/chapitrage/fiche-chapitrage-59.html (accessed 31 August 2018)

203 See generally RE Barnett 'Constitutional legitimacy' (2003) 103 *Columbia Law Review* (2003) 111-148.

204 P Englebert *State legitimacy and development in Africa* (2000) 173.

205 As above.

206 KJ Holsti *The state, war, and the state of war* (1996) 97.

207 Englebert, n 204 above.

208 It should be noted that what is largely western about human rights is the modern conceptualisation and their inclusion in binding documents. Otherwise, African origins of human rights can clearly be traced even long before the Magna Carta, such as the Kurukan Fuga Charter, see J Amselle 'Did Africa invent human rights? (2013) 1 *Anthropetics* XIX. For a broader discussion of African human rights origins see generally, B Ibhawoh *Human rights in Africa* (2018).

209 For a discussion of how human rights were used in the colonial period see, B Ibhawoh *Imperialism and human rights: Colonial discourses of rights and liberties in African history* (2007).

today which largely regards the African as 'savage' and the European/American as the saviour.[210] This triggers a high degree of scepticism about human rights in general.[211] The situation is worse with respect to LGB rights, which are largely considered a western imposition.[212] So, even when LGB rights are included expressly in an otherwise legitimate constitution, that aspect may be regarded as illegitimate, and court decisions made based on it may be simply brushed aside as not based on the values of the people but rather on alien human rights arguments. Where the rights are not expressly included, but rather implied or derived, then the argument of illegitimacy becomes even stronger. However, the second aspect of legitimacy, which is about how people own up to the systems,[213] as well as the internal fairness and checks embedded in the system,[214] also come into play to tamper the effect of the first aspect. The argument would be that many of these constitutions left by the European colonialists at independence were amended or adapted and used as a basis for benefitting society and have thus become more or less accepted and legitimate. Also, the recent constitutional processes have been more inclusive and embracing and are largely seen as legitimate. As such, LGB rights can be vindicated within this very system and accepted by the majority since this is a system that people work with and understand. So where LGB rights are included in a constitution, or general protections for everyone, this is enough to indicate legitimacy.

In almost all countries, imposed constitutions no longer exist, and the current legal systems have largely been embraced and legitimised. All the countries have a hierarchy of laws with the Constitution being the supreme law while customary law is placed lowest in the hierarchy. South Africa is perhaps the only country that has a Constitution born out of a genuine national consensus.[215] Indeed Heinz Klug believes that the level of public participation in this process was perhaps unprecedented in the world.[216] However, even there, the protection of LGB rights was controversial,[217] and there are still voices that want the constitutional protection removed,[218] with arguments

210 See generally M Mutua 'Savages, victims, and saviors: The metaphor of human rights' (2001) 42 *Harvard International Law Journal* 201-245. Also see FPC Endong 'LGBT rights movement in Africa and the myth of the whiteman's superiority' (2016) 7:1 *Journal of Globalization Studies* 139.

211 See Carnegie Council for Ethics in International Affairs 'Why more Africans don't use human rights language' (1999) 2.1 *Human Rights Dialogue* 5 December 1999 https://www.carnegiecouncil.org/publications/archive/dialogue/2_01/articles/602 (accessed 16 June 2018).

212 Endong, n 210 above.

213 See Manguown, n 203 above.

214 Barnett, n 205 above.

215 Varney, n 54 above.

216 H Klug *The Constitution of South Africa: A contextual analysis* (2010) 54.

217 Brown, n 49 above.

218 The House of Traditional Leaders for example called upon the ruling African National Congress party to remove constitutional protection for LGBT people. See 'Stop protecting gays: Traditional leaders tell the ANC' *City Press* 5 May 2012

based on a supposed African culture. This explains why the court decisions have largely been accepted and enforced, but also may be one of the reasons why although the level of social change is quite high, it is yet to reach to the level of 'significant social change'.

For Kenya, despite the fairly inclusive process of constitutional development, which was even subjected to a referendum, the development of the 2010 Constitution cannot be said to have been fully a process of national consensus.[219] More so, express prohibitions of same-sex marriages were introduced in that Constitution[220] indicating that the majority were against recognition and protection of LGB persons, which have been argued to exist,[221] and which have indeed been vindicated by courts in the *NGLHRC Registration case* and the *COL* Appeal. Therefore, protections of LGB persons, which are largely derived, may not be seen as legitimate interpretations of the Constitution. This corresponds with the relatively lower levels of social change as regards LGB persons.

For Uganda, the making of the 1995 Constitution involved different groups of people and representatives. [222] However, some of the matters included were never agreed upon by all at the time, reflecting an absence of real consensus.[223] On the issue of LGB protections, this was not expressly anticipated as seen from a later amendment prohibiting same-sex marriages[224] and laws excluding LGB persons from legal protection.[225] Therefore it is more likely that protections by the judiciary based on the constitution would be regarded more as illegitimate, something shown by the most recent High Court decisions criticising earlier decisions that vindicated the rights of LGB persons. This also corresponds with the limited social change.

Nigeria's 1999 Constitution was developed after a period of instability marked by military coup d'états. It was intended to transform the country. It is thus largely home-grown. However it was not as a result of a consensus by all, and

http://www.citypress.co.za/news/stop-protecting-gays-traditional-leaders-tell-anc-20120505/ (accessed 7 July 2018).

219 Varney, n 54 above.

220 Article 45(2) of the 2010 Constitution provides for marriages only between adult persons of the opposite sex, which was not the case before, when marriage was undefined.

221 See for example M Mutua 'Why Kenya's new Constitution protects gays' *Daily Nation* 11 December, 2010.

222 HBJ Odoki 'The challenges of Constitution-making and implementation in Uganda' Paper read at International Conference on Constitutionalism in Africa, at International Conference Center, Kampala, Uganda (1999).

223 See for example '1995 Constitution wasn't built on consensus' *Uganda Media Centre* 26 September 2017 http://www.mediacentre.go.ug/opinion/1995-constitution-wasn%E2%80%99t-built-consensus (accessed 26 May 2018).

224 See JD Mujuzi 'The absolute prohibition of same-sex marriages in Uganda' (2009) 23 *International Journal of Law, Policy and the Family* 278, 282-283.

225 Section 15(6)(d) of the Equal Opportunities Commission Act, which excluded groups regarded as immoral and socially unacceptable from accessing the equal opportunities Commission.

so many see it as an imposition.[226] This may explain why such a Constitution has not been useful for activists to claim for LGB equality.

Finally, Botswana's Constitution is one of those independence constitutions left by the departing colonialists, which were imposed on Africans without meaningful consultations.[227] It however somehow survived the widespread repudiation of such constitutions soon after independence, which brought in one party rule.[228] It thus continues to reflect the restrictive approaches of those times,[229] however, it is at the same time lauded for having supported one of Africa's most developed democracies,[230] gaining a high level of legitimacy from that, and it has been variously amended to reflect what the people supposedly wanted.[231] The Constitution has recently been used to vindicate LGB rights in the *Botswana Decriminalisation case*. There have been no proposed constitutional amendments to make such protection difficult, or reversal of court decisions to that effect, or even public demonstrations against the courts, or refusal to implement the decision. This shows a high level of legitimacy for the constitutional protection of LGB rights in Botswana's Constitution, which, surprisingly, has only been derived in recent years. This explains the higher levels of social change compared to countries like Uganda and Nigeria.

Although the different constitutions enjoy high levels of legitimacy generally, on the issue of LGB rights, it is almost unanimous among all the selected countries that they are seen as illegitimate. This reduces the levels of legitimacy of constitutional protections of LGB rights. Nevertheless, in countries where the process of constitution-making involved various voices and stakeholders (South Africa and Kenya) the levels of legitimacy are higher than in those where the process involved fewer role-players and citizenry (Uganda and Botswana), showing that such protections are considered as part of the process, perhaps part of the price to pay for other protections.

Therefore it is clear that there is a direct and positive relationship between the legitimacy of constitutional protections of LGB rights, and the ability of LGB strategic litigation to spur social change.

226 See generally Emmanuel Ibiam Amah 'Nigeria – the search for autochthonous constitution' Beijing Law Review 8(1):141-158 · April 2017. FT Abioye 'Constitution-making, legitimacy and rule of law: A comparative analysis' (2011) 44:1 *The Comparative and International Law Journal of Southern Africa* 59.

227 For a deep discussion of what the features and aims of these constitutions were see CM Fombad 'The evolution of modern African constitutions: A retrospective perspective' in CM Fombad (ed) *Separation of powers in African constitutionalism* (2016) 15-18.

228 CM Fombad 'Some perspectives on durability and change under modern African constitutions' (2013) 11:2 *International Journal of Constitutional Law* 382, 389.

229 BR Dinokopila 'The justiciability of socio-economic rights in Botswana' (2013) 57:1 *Journal of African Law* 108, 110.

230 Above, 390.

231 The Constitution of Botswana has been amended a number of times with the Constitution (Amendment) Act, 2005 – Act No. 9 of 2005, being the latest amendment.

5.4.6 The institutional legitimacy of the judiciary among the population

When the population sees the judiciary as legitimate, then the decisions it makes will be seen as legitimate and therefore they will be enforced. Such processes eventually lead to social acceptance and social change, and the inverse is also true. The proposition here is based on the fact that the general population, which is the main constituency that the courts serve, does not see the courts as legitimate. For the judiciary to be viewed as legitimate, it should be established in line with the people's own expectations. The courts themselves have to be seen as protectors of the people, rather than furthering the interests of states that may not care about their citizens. This is the 'legitimacy theory,' which is to the effect that courts can only be effective if they are seen as legitimate by those they serve.[232] Legitimacy extends to the idea of courts being respected by the general public, and the other state organs. Legitimacy is something that is both exogenous and endogenous to the courts. Legitimacy ensures that court decisions are respected even if the majority sees the decisions as wrong.[233] The exogenous factors mainly have to do with how the courts were established, whether imposed upon people or put in place by the people themselves. Where a judicial system was superimposed through colonialism or apartheid and as such the courts are largely seen as part of the machinery of oppression,[234] then it would take a lot for the courts to prove themselves as being on the side of the people. Institutional legitimacy is earned rather than existing as a matter of right. How the courts continue to behave is important. India is a good example. When the courts started serving the interests of former premier Indira Gandhi, they lost their legitimacy in the eyes of the people and only picked it up later after PIL had become popular in India through the courts' own efforts.[235]

All the judiciaries in the selected countries have their origins in colonialism, and as such were impositions that served the purposes of the colonialists rather than protecting the rights of the indigenous populations. In South Africa, after a period of the courts being complicit in apartheid, the Constitutional Court was established which restored legitimacy of the judiciary. Initially the Constitutional Court had very little institutional legitimacy, which led to backlash against its more controversial decisions especially on the death penalty.[236] The Court nevertheless continued to grow in terms of institutional

232 See TR Tyler 'Psychological perspectives on legitimacy and legitimation' (2006) 57 *Annual Review of Psychology* 375-400.

233 JL Gibson 'Reassessing the institutional legitimacy of the South African Constitutional Court: New evidence, revised theory' (2016) 43:1 *Politikon* 53-54.

234 Oloka-Onyango (n 2 above) 26-34.

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

236 JL Gibson & GA Caldeira 'Defenders of democracy? Legitimacy, popular acceptance,

legitimacy.[237] As a result even its most controversial decisions such as that on same-sex marriage have been respected and enforced. Over time, the Constitutional Court has gained increased respect in the country as it has largely remained independent.[238] This legitimacy is also reflected in the largely progressive level of social change.

In Botswana, the courts started out as illegitimate colonial institutions.[239] With time they have gained the respect of the people as they have maintained their independence despite executive interference. Also, this independence has largely seen increased social change for LGB persons.

In Kenya, after a period of executive domination of the courts, the courts are regaining their legitimacy and have been able to make many decisions against the state on sensitive political issues, including being the only judiciary to nullify a presidential election in recent times.[240] Again, increasingly the courts have made LGB friendly decisions and the increasing social acceptance of LGB persons can be partly attributed to this factor.

In Nigeria, the courts have also for long been seen as an extension of the illegitimate state, right from the time of colonialism, through the military dictatorships.[241] They have started to get out of the executive's wings, and to assert themselves,[242] although this is nascent, and recent events show that they are also prone to executive interference as well as allegations of corruption. The Northern states apply the shari'a system and respect these courts more than the judiciary and this also poses a challenge.[243] Generally, Nigeria's judiciary is yet to fully recover from years of domination by the executive, and also faces internal legitimacy issues, especially corruption. Other legal systems also compete with it and this brings about issues. This may explain why the courts have not felt confident enough to go against public interest or the state's views in cases involving LGB persons.

and the South African Constitutional Court' (2006) 65 *The Journal of Politics* 1.

237 JL Gibson 'The evolving legitimacy of the South African Constitutional Court in justice and reconciliation' in F du Bois & A du Bois-Pedain (eds) *Post-Apartheid South Africa* (2008) 229.

238 J Widner 'Building judicial independence in Common Law Africa' in A Schedler, L Diamond & M Plattner (eds) *The self-restraining state: power and accountability in new democracies* (1999).

239 Mackenzie for example refers to the Tswana people regarding the courts and other legal artefacts that the English used to establish colonialism as a way of war. See J Mackenzie 'Austral Africa: Losing it or ruling it' (1887) cited in JL Comaroff 'Colonialism, culture, and the law: A foreword' (2001) 26:2 *Law & Social Inquiry* 305.

240 'Kenya court sets world record' *The New Vision* 1 September 2017.

241 DU Enweremadu 'The judiciary and the survival of democracy in Nigeria: Analysis of the 2003 and 2007 elections: Democratisation in Nigeria' (2011) 10:1 *Journal of African Elections* 114.

242 As above.

243 See generally AA Oba. 'The Sharia Court of Appeal in Northern Nigeria: The continuing crises of jurisdiction' (2004) 52:4 *The American Journal of Comparative Law* 859–900.

Finally in Uganda, after a long period of domination by the executive, the courts had started to make independent decisions and began to appear like the bastion of rights they are supposed to be.[244] In more recent times however, the executive has once again eroded their legitimacy by seeking to appoint cadres of the ruling party as judges[245] and illegally extending the tenure of the former Chief Justice.[246] The continued re-arresting of accused persons released on bail within court premises with only feeble protests from the judiciary reflects on a greatly weakened legitimacy. Regarding LGB rights, the courts initially ruled in favour of LGB persons even if they tried as much as possible to show that the decisions had nothing to do with homosexuality.[247] The level of legitimacy of the judiciary may explain the slow process of social change. Of recent, the decisions are more negative and less protective[248] and this seems to reflect the general political hostility against LGB rights in the country. The decisions that come out of the courts, even when in favour of LGB rights, are regarded as illegitimate by the state and are not enforced.

In conclusion, legitimacy of the court is an important factor determining whether social change would happen as a result of LGB strategic litigation.

5.4.7 The existence of alternative avenues of dispute resolution within the context of legal pluralism

Whereas the formal judiciary is what is usually recognised as the main avenue for resolving disputes, situations of legal pluralism their very nature create alternative ways of resolving disputes. Legal pluralism recognises different legal norms, and therefore different mechanisms of resolution of disputes. Where the other justice mechanisms are equally respected as the courts, or even more respected, then the courts simply become one of the avenues through which disputes can be resolved, and usually the less preferable avenue. This implies that LGB activists have to be able to work with the alternative ways of dispute resolution too, even as they work with the formal judiciary.

244 For a history of the erosion of judicial independence in Uganda prior to 1995 see J Oloka-Onyango, 'Judicial power and constitutionalism in Uganda' in J Oloka-Onyango & M Mamdani (eds) *Studies in living conditions, popular movements and constitutionalism* (1994) 463.

245 One such judge was former Deputy Chief Justice, Steven Kavuma, a long time ruling party supporter, whose decisions on the bench usually were suspiciously in favour of the ruling party. See for example The Spear team 'Political judge Steven Kavuma, a disgrace to justice' *The Spear* 25 February 2017. http://thespearnews.com/2017/02/25/political-judge-steven-kavuma-disgrace-justice/ (accessed 16 January 2017).

246 The President extended the tenure of former Chief Justice Benjamin Odoki by two years, and this action was declared illegal by the Constitutional Court in *Hon. Gerald Kafureeka Karuhanga v Attorney General* Constitutional Petition No. 0039 of 2013.

247 See *Victor Mukasa* case and *Rolling Stone* case (n 144 above).

248 For example the *Lokodo* case (n 144 above) and the *Prof J Oloka Onyango & 9 others v Attorney General*, Constitutional Petition No 8 of 2014 (The Anti-Homosexuality Act case) which did not consider the human rights issues raised.

In Botswana, the Constitution recognises traditional institutions and establishes a *Ntlo ya Dikgosi* – House of Chiefs – which is an advisory body to the upper house of parliament.[249] The Chieftainship Act [250] recognises chiefs and their authority within the areas that they control, subject to the central government's authority.[251] Botswana goes ahead and formally recognises traditional courts. These courts are an important component of the justice system, [252] handling many disputes including criminal matters,[253] and indeed handle more cases than magistrates courts. [254] The courts' powers are laid out in the Customary Courts Act, 1969,[255] and as such the courts are subjected to statutory regulation and therefore do not exactly operate the way they would have operated traditionally. Their jurisdiction is as provided for in their mandate documents, but they handle both civil and criminal matters.[256] Appeals lie from these courts to the High Court.[257] The traditional courts are thus formally part of the justice system, and not an alternative. For the other four countries, the judiciary also administers customary law, and traditional dispute resolution mechanisms are not formally regulated. Nevertheless, they are recognised.

For Kenya, article 159(2)(c) of the Constitution enjoins the courts to promote alternative forms of dispute resolution including traditional mechanisms. However, article 159(3) requires that such mechanisms should not contravene the Bill of Rights; be repugnant to justice and morality, or be inconsistent with the Constitution or any written law. Indeed these justice mechanisms are in use in Kenya, and Chopra identified that many persons in the Northern parts of Kenya choose these mechanisms over the formal judiciary, as they understand them well, and they are in line with their views on what constitutes a crime. [258]

For South Africa, section 211(1) of the Constitution, 1997 recognises traditional institutions, but traditional courts have not yet been recognised, although there is currently a firm proposal to do so pending before Parliament.[259] Nevertheless, traditional justice mechanisms are used. [260]

249 Sections 77-85 of the Constitution of the Republic of Botswana, 1966.

250 Cap 41:01

251 For a detailed discussion on how this system works see, KC Sharma 'Role of traditional structures in local governance for local development: the case of Botswana' Community Empowerment and Social Inclusion Program (CESI), Word Bank Institute https://europa.eu/capacity4dev/file/8471/download?token=om9Pghuq (accessed 22 August 2018).

252 S Roberts 'The survival of the traditional Tswana courts in the national legal system of Botswana' (1972) *Journal of African Law* 103.

253 DG Koko 'Fair trial and the customary courts in Botswana: Questions on legal representation' (2000) 11 *Criminal Law Forum* 455-456.

254 CM Fombad 'Customary courts and traditional justice in Botswana: Present challenges and future perspectives' (2004) 15 *Stellenbosch Law Review* 166, 181.

255 Cap 04:04.

256 Above, sections 11, 12, and 13.

257 Above, section 42(3).

258 T Chopra 'Peace vs Justice in Northern Kenya: Dialectics of state and community laws' in JC Ghai & Y Ghai (eds) *Marginalised communities and access to Justice* (2010) 185, 190-193

259 Traditional Courts Bill B1-2017.

260 For a detailed discussion of the use of these traditional mechanisms in South Africa, see

Nigeria's legal system is pluralistic and thus combines the Common law system, together with customary law.[261] Customary law is divided into two parts: ethnic or non-Moslem customary law and Moslem law. [262] Also, the court systems themselves are quite different in the different states and regions.[263] This results in the courts not having the same significance for everyone. Therefore, some of the decisions they make may not appeal to all the people the same way, particularly on such controversial issues as LGB rights.

Similarly, in Uganda, the Constitution recognises traditional institutions in article 246. Part of the traditional institutions recognised are traditional conflict resolutions mechanisms, which may not necessarily be through courts. These continue to be used in different parts of Uganda.[264]

All the countries therefore have alternative means of conflict resolution that are loosely regulated and are not part of the formal judiciary. Many of these mechanisms are both respected and understood by the people, and they are more geared towards reconciliation than punishment – mainly centring around mediation, reconciliation and diplomacy.[265]

Therefore, from the above, where other viable and respected avenues of dispute resolution besides the courts and other formally regulated systems LGB strategic litigation is less likely to spur social change. This is because the judiciary is not the only legitimate avenue for resolving issues, and as such its decisions may not be respected. In countries where the judiciary and other formal systems operate, the opposite is also correct.

5.4.8 Legal culture

Legal culture refers to the particular way in which the legal system is organised in a country, how much the law is respected generally, how lawyers behave and react, how judges are appointed and respected, the training of lawyers and how society perceives the law and the legal system generally.[266] Legal culture determines whether the law is an important tool in society. Different countries therefore have different legal cultures even though they may all subscribe to

for example R Choudree 'Traditions of conflict resolution in South Africa' 24 Apr 1999 http://www.accord.org.za/ajcr-issues/traditions-of-conflict-resolution-in-south-africa/ (accessed 20 August 2018).

261 AA Oba 'Religious and customary laws in Nigeria' (2011) 25 *Emory International Law Review* 881.

262 BC Uweru *Repugnancy doctrine and customary law in Nigeria: A positive aspect of British colonialism* (2008) 293.

263 Above.

264 Perhaps the most famous of the Ugandan conflict resolution mechanisms is 'mato oput' among the Acholi of Northern Uganda which focuses on cleansing. See for example J Wasonga 'Rediscovering Mato Oput: The Acholi justice system and the conflict in Northern Uganda' (2009) 2:1 *Africa Peace and Conflict Journal* 17-26.

265 See Ben-Mensah, F 'Indigenous approaches to conflict resolution in Africa' in World Bank (ed) *Indigenous knowledge: Local pathways to global development* 39-44.

266 See for example D Nelkin 'Using the concept of legal culture' (2004) 29 *Australian Journal of Legal Philosophy* 1.

one major system of law such as the Common Law system. Generally, the more a country attaches importance to litigation as a way of resolving disputes, the faster LGB strategic litigation will lead to social change.

South Africa leads in terms of respecting the laws and processes. This is something that comes from years of apartheid where legal formalism was used to oppress people.[267] Since the dawning of democracy, South Africa has embraced the use of litigation to ensure transformation.[268] For this reason, lawyers, judges and even the state are committed to make the law, and particularly the Constitution, work. This is followed by Botswana since the country largely respects its Constitution, which has been in place since 1963, and largely respects the legal profession. Kenya follows since the law is respected in an increasing measure since the adoption of the 2010 Constitution.[269] In Nigeria, years of dictatorship caused the courts to be less respected and forced the people to resort to other means of dispute resolution. This is however slowly changing, with the judiciary becoming an important player. In Uganda, people barely respect the formal legal system and its decisions, being more attuned to the traditional justice mechanisms.[270] The same applies to Kenya.[271] The judiciary plays a limited role in peoples' day-to-day lives. It is therefore not surprising that even the level of social change rhymes with the level of respect for the law.

Therefore, the existence of a legal culture that respects the formal laws, in terms of application, enforcement and binding force is necessary for LGB strategic litigation to stimulate social change.

Overall, since strategic litigation is primarily a legal matter, legal factors are critical as to its success, both in terms of successful cases, but also in terms of its ability to mobilise allies and elites. Of these factors, the most important one is the state of judicial independence. Only countries that truly exercise judicial independence have been able to have important decisions made by their courts and respected by the executive and legislature. Botswana and South Africa lead in this regard. Countries where judicial independence still faces major challenges such as Kenya, Nigeria and Uganda also still lag behind in terms of social change. All the other legal factors can be said to be sub-factors. However well written a constitution is, if it cannot be enforced in court then it is not worth much. It also does not matter whether a country adheres to

267 KE Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal of Human Rights* 146, 150.

268 Above, generally.

269 See for example Ghai & Ghai (n 88 above) 57.

270 For the case of Northern Uganda, and within the context of transitional justice, see generally D Zartner 'The culture of law: Understanding the influence of legal tradition on transitional justice in post-conflict societies' (2012) 22 *Indiana International & Comparative Law Review* 297.

271 For the case of Northern Kenya, see Chopra, n 258 above.

international standards, or has a legal culture that respects judgments, if the judiciary is not functional and independent.

5.5 Transnational factors

Another important set of factors goes to what is happening internationally with regard to LGB rights. These are the transnational factors, namely: the extent to which a country is affected by numerous decisions of international bodies on LGB rights**;** and the extent to which the country is affected by developments in other countries as well as the foreign policy of other countries as regards LGB rights. These are discussed below:

5.5.1 The extent to which a country respects international decisions on LGB rights

Where a country respects international political decisions in favour of LGB rights, LGB strategic litigation is more likely to spur social change than in countries which largely ignore such developments. After the Second World War, the world has increasingly moved towards international cooperation and coordination. This is done largely through the United Nations at the global level and through regional and sub-regional bodies at those levels. These bodies deal with human rights issues and make decisions, resolutions and take other political actions that affect individual states. States that depart from what has been agreed are seen as pariah states and may sometimes be subjected to sanctions. This fear of being shamed in the eyes of the international community forces countries to align with what has been collectively decided in these bodies, and would thus respect decisions made by courts of law which are in line with such decisions..[272]

At the global level, the UN General Assembly had by the end of 2019 adopted seven resolutions that expressly include protections based on sexual orientation.[273] Similarly, at the UN Human Rights Council, three resolutions have been adopted on the issue.[274] The African group[275] at the UN usually does

272 D Cassell 'Does international human rights law make a difference?' (2001) 2:1 *Chicago Journal of International Law* 129; S Gopalan & R Fuller 'Enforcing international law: States, IOs, and courts as shaming reference groups' (2014) 39:1 *Brooklyn Journal of International Law* 74

273 These are all resolutions on extrajudicial, summary or arbitrary executions. These are resolutions: A/RES/69/182; A/RES/67/168; A/RES/65/208; A/RES/63/182; A/RES/61/173; A/RES/59/197 and A/RES/57/214. These are all http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBTUNResolutions.aspx (accessed 5 June 2018).

274 These are: Protection against violence and discrimination based on sexual orientation and gender identity (adopted 30 June 2016) – A/HRC/RES/32/2; Human rights, sexual orientation and gender identity (adopted 17 June 2011) – A/HRC/RES/17/19; and Human rights, sexual orientation and gender identity (adopted 26 September 2014) – A/HRC/RES/27/32. These are all available at http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBTUNResolutions.aspx (accessed 5 June 2018).

275 The African group is one of the UN regional groupings and it is made up of all African states. See United Nations organisation: Department of General Assembly and Conference Management 'United Nations Regional Groups of Member States' http://www.un.org/depts/DGACM/RegionalGroups.shtml (accessed 5 June 2018).

not vote in favour of LGB resolutions but they are nevertheless bound by the resolutions once passed. African countries are also bound by the resolutions made by the African Commission on Human and Peoples' Rights, including the resolution on violence against LGB persons,[276] as well as decisions of the Summit and the other organs of the African Union. The African Commission eventually granted observer status to the Coalition of African Lesbians (CAL)[277] after initially refusing to do so.[278] However, the African Union's Executive Committee ordered the African Commission to reverse its decision,[279] something that was the subject of a request for an advisory opinion before the African Court on Human and Peoples' Rights but which the Court refused to hear on jurisdictional grounds.[280] After the Executive Committee gave the African Commission the deadline of 31 December 2018 to withdraw CAL's observer status,[281] the Commission relented and revoked CAL's observer status by a letter dated 8 August 2018 and addressed to CAL.[282] This indicates a decline in protection of LGB persons at the African regional level.

Belonging to these international bodies implies that states have political obligations to respect and protect LGB rights. Even if a state decides not to respect these resolutions, it does so when it is aware of what the political position is. In the usual way that international law binds and makes states to obey it, such resolutions influence states to behave in line with their requirements.[283]

276 The African Commission on Human and Peoples' Rights 'Resolution on the protection against violence and other human rights violations against persons on the basis of their real or imputed sexual orientation or gender identity': Adopted at the African Commission on Human and Peoples' Rights (the African Commission) meeting at its 55th Ordinary Session held in Luanda, Angola, from 28 April to 12 May 2014 http://www.achpr.org/sessions/55th/resolutions/275/ (accessed 5 June 2018). For a full discussion of this and other resolutions, see A Jjuuko 'The protection and promotion of LGBTI rights in the African regional human rights system: Challenges and opportunities' in S Namwase & A Jjuuko *Protecting the human rights of sexual minorities in contemporary Africa* (2017) 260.

277 African Commission on Human and Peoples' Rights '38th Activity report of the African Commission on Human and Peoples' Rights' Para 14. http://www.achpr.org/files/activity-reports/38/actrep38_2015_eng.pdf

278 African Commission on Human and Peoples' Rights '28th activity report' para 33, EX.CL/600(XVII), 8

279 African Union decision on the thirty-eighth activity report of the African Commission on Human and Peoples' Rights, DOC.EX.CL/Dec 887 (XXVII).

280 Request for advisory opinion by the Centre for Human Rights of the University of Pretoria and The Coalition of African Lesbians, Request No. 002 of 2015 (African Court on Human and Peoples' Rights).

281 African Union 'Decision on the Report of the Joint Retreat of the Permanent Representatives Committee (PRC) and the African Commission on Human and Peoples' Rights (ACHPR)' *Executive Council Decisions*, Doc. EX.CL/1089 (XXXIII) I, EX.CL/Dec 1015(XXXIII), para8(vii), EX.CL/Dec.1008-1030(XXXIII), 33rd Ordinary Session 28-29 June 2018, Nouakchott, Mauritania (accessed 31 August 2018).

282 See Coalition of African Lesbians 'Women and sexual minorities denied a seat at the table by the African Commission on Human and Peoples' Rights' https://www.cal.org.za/2018/08/17/women-and-sexual-minorities-denied-a-seat-at-the-table-by-the-african-commission-on-human-and-peoples-rights/ (accessed 31 August 2018)

283 For an in-depth discussion on these reasons, see HH Koh 'Why do nations obey

All five Common Law African countries are affected by international developments on LGB rights both at the UN and at the African Commission level in terms of commitments, but they respect these decisions differently.. However, South Africa has for long been a trailblazer for LGB rights internationally and therefore usually votes in favour of LGB rights, thus differing from the other four countries in that regard. The need to maintain its status as a trailblazer on LGB issues perhaps makes South Africa to live up to these political commitments. Botswana, Kenya, Nigeria, and Uganda, almost always vote 'No' on all international resolutions involving LGB rights.[284] In this regard, they are affected less by the positive resolutions on LGB rights. The fact that South Africa set itself as an international trailblazer on LGB rights partly explains why almost all its court cases succeed and get implemented and lead to social change, while the others are still struggling to achieve this.

Generally, the extent to which a country respects international decisions concerning LGB rights helps LGB strategic litigation to stimulate social change.

5.5.2 The extent to which a country is affected by developments in other countries regarding LGB rights

The more a country is influenced by developments on LGB rights and the foreign policy of other countries, the easier it would be for LGB strategic litigation to lead to social change in that country. Different countries are affected differently by developments elsewhere. There are countries whose historical and economic connections to other countries ensure that they are affected by what happens elsewhere. For example, the golden age of LGB rights in the USA was arguably from 2003 after the *Lawrence v Texas* case and up to 2017 with the end of the Obama presidency. Much was done to promote LGB rights within the USA and through its foreign policy practices elsewhere in the world. Pressure was put on countries to protect LGB rights though US foreign policy. Uganda and Kenya were both affected by this position.

Countries get influenced in at least three different ways by developments in other countries as regards LGB rights. The first is by socialisation where countries relate to each other and to international organisations and are usually influenced by their positions, democracy promotion and aid conditions.[285] The second way is through 'policy diffusion,' which happens as a result of different countries influencing each other's policies as they belong to similar groups.[286] The third way is by 'Global Queering,' which is largely about the influence of popular culture depicting gays in other countries and finding its way into other

international law?' (1997) 106 *Yale Law Journal* 2599. Also see generally, TM Franck *Fairness in international law and institutions* (1995).

284 See Chapter 4 section 4.3 above.

285 See T Risse and K Sikkink 'The socialization of international human rights norms into domestic practices' in T Risse, SC Ropp & K Sikkink (eds) *The power of human rights* (1999).

286 EM Rogers *Diffusion of innovations* (2003).

countries, which also begin to identify with such a culture.[287] Court decisions as well as cultural changes in one country affect the others and this may spur both legal and social change in other countries that follow a similar culture.

South Africa and Uganda have been affected to a much greater extent by developments elsewhere than Botswana, Kenya and Nigeria. For South Africa, the struggle against apartheid was a struggle involving many different countries. Hence, the country was always alive to the need to set an example and not to disappoint, ensuring that LGB persons were also included. Uganda is also largely affected by international developments. Indeed, international pressure on Uganda from the time the Anti-Homosexuality Bill was tabled until it was nullified played an important role in how the passing and subsequent nullification of the law played out. The fact that it took such a popular law five years to be passed, and the fact that it was nullified soon after its adoption, definitely had a connection to international developments including the reaction of the USA to the tabling of the law and its signing.[288] Also important was the USA-Africa Summit that came immediately after the law was nullified.[289] Botswana, Kenya and Nigeria are also affected by international developments on LGB rights, but not to the same extent as South Africa and Uganda, which are more in the spotlight.

Transnational factors are therefore important in determining whether LGB strategic litigation succeeds in stimulating social change in favour of LGB persons. Countries do not exist in a vacuum and do influence each other. Since LGB rights have now become a matter of international significance, how a country responds to developments at the international and regional bodies, as well as in other countries, become very important.

5.6 Economic factors

Marxist theory asserts that the economy forms the base of society, while everything else – including the law – forms part of the superstructure.[290] In this regard, economic factors play an important role in how the law operates and by extension, how the courts of law influence social change in particular societies. The economic factors discussed below are the economic set up and the levels of development in the particular country.

287 PA Jackson 'Capitalism and global queering: National markets, parallels among sexual cultures, and multiple queer modernities' (2009) 15:3 *Gay and Lesbian Quarterly* 357-95.

288 The USA announced a series of sanctions following the signing into law of the Act. See 'US punishes Uganda for anti-gay law: withdraws support to Police, UPDF and Health' Saturday Monitor 20 June 2014

289 'Museveni behind gay law victory?' The Observer 4 August 2014.

290 See generally K Marx *Capital: A critical appraisal of political economy* [trans] D McLellan (1977) *Karl Marx: Selected writings* (1867).

5.6.1 The economic set-up of the country

The economic set-up of the country contributes to how fast LGB strategic litigation can lead to social change. There are two main economic systems in the world: capitalism and communitarianism. Capitalism is where the ownership of the means of production is in the hands of private individuals or entities, while communitarianism is where means of production are owned on a community basis, either by the state on behalf the people or by smaller communities on their own behalf. The more capitalistic a country is, the more likely for LGB strategic litigation to lead to social change; the opposite is also true for communitarian societies. Capitalism comes with a free market economy, which is tied to individualism. [291] At the basic level, human rights are individualistic in nature.[292] According to Charles Ngwena, to be able to pursue and achieve human rights, the society must be attuned to liberal, individualistic thinking.[293] Individualism as well as communitarianism affect the society right from the basic structure, which is the family, and these are the values that people hold dear, and which determine their world views.[294] One of the reasons why capitalism is related to LGB social change is because capitalism allows LGB persons to be much more involved in the economy, implying that they will make a substantive contribution to the economy.[295]

All the countries studied are capitalistic, but the extent to which capitalism is practised in each differs. According to the Africa Competitive Report 2017 South Africa and Botswana were the 61st and the 63rd most competitive economies in the world in the year 2017-2018.[296] However, despite being generally capitalistic countries, they both have aspects of communitarianism still prevalent in different parts of the countries.[297] It is therefore not surprising that both South Africa and Botswana have made progress in the protection of LGB rights through strategic litigation. The pockets of communitarianism are also still reflected in the violations that continue in both countries.

291 A Snitow, C Stansell, & S Thompson (eds) *Capitalism and gay identity from powers of desire: The politics of sexuality* (1983) 100. . For a discussion of capitalism and its contribution to human rights violations, see for example J Dine and A Fagan (eds) *Human rights and capitalism: A multidisciplinary perspective on globalization* (2006). For the link between capitalism and gay oppression see for example S Wolf 'The roots of gay oppression' (2004) 37 *International Socialist Review* http://www.isreview.org/issues/37/gay_oppression.shtml (accessed 30 May 2018).

292 See for example generally M Freeman 'Are there collective human rights?' (1999) 43 *Political Studies* 25-40.

293 Interview with Prof. Charles Ngwena, Pretoria, 27 February 2018.

294 Above.

295 MVL Badgett *et al* 'The relationship between LGBT inclusion and economic development: An analysis of emerging economies' (2014) http://williamsinstitute.law.ucla.edu/research/international/lgbt-incl-econ-devel-nov-2014 (accessed 30 May 2018).

296 World Economic Forum 'The world competitiveness report 2017-2018', ix.

297 Above, ix.

Kenya is also largely a capitalistic economy, but with pockets of communitarianism. Kenya was the 91st most competitive economy in the world for the year 2017-2018. The lower levels of capitalism partly explain why LGB strategic litigation has been successful in recent times but also why social change in favour of LGB persons is not happening at a much faster rate. Uganda is generally a more communitarian society and in terms of competitiveness it comes in at Number 114 in the world. This also partly explains the slow pace of social change despite successful LGB strategic litigation.

Nigeria ranked as the 125th most competitive economy in the world, way behind all the other countries. This also partly explains why it is still lagging behind in terms of social change on LGB issues.

All other factors constant, the level of capitalism or communitarianism in a country become important factors in influencing social change where there is LGB strategic litigation.

5.6.2 The level of economic development of the country

Scholars such as Inglehart have forwarded the post materialistic thesis, which is to the effect that more economic development leads to more respect and recognition for human rights.[298] In this view, the changes brought about by economic development – increased standards of living, more education, specialisation and industrial development – cause people to move away from focusing on material wants to focusing on realisation of immaterial things such as rights and freedoms.[299] Economic development comes with a more exclusive and independent way of living that does not require one to rely so much on other members of the community for basic survival and approval. In less affluent societies however, one has to rely on others, in a more or less communitarian way, and in this way one's sexuality becomes an issue of concern to all. Everyone is affected by what the others do. A good way to illustrate this is by considering how a right such as the right to privacy operates in a setting of poverty. If due to poverty, a family of more than five people stay in one room, one cannot claim the right to privacy in their bedroom, if their bedroom is also the bedroom of other people, or their living room for that matter. Such a right can only be meaningful where housing is adequate and where people do not have to share private spaces. In such situations, what one does in the privacy of the bedroom certainly affects other persons. The links between poverty and sexuality have been examined before and the discourse is largely that being LGB contributes to one's vulnerability and affects one's

298 This is the postmaterialist thesis forwarded by Inglehart. See generally R Inglehart *The silent revolution: Political change among Western publics* (1977); R Inglehart & WE Baker 'Modernization, cultural change, and the persistence of traditional values' (2000) *American Sociological Review* 19-51; and R Inglehart & C Welzel *Modernization, cultural change, and democracy: The human development sequence* (2005).

299 Ingelhart & Baker, above.

education and ability to get employed, thus exacerbating poverty.[300] Inglehart & Baker used acceptance of homosexuality as one of the indicators to show more acceptance with increased economic development, and they found a positive correlation.[301] Indeed the Pew Research Centre found more LGB acceptance in more affluent countries as opposed to less affluent ones.[302] Ormsby also established a correlation between homophobia in Africa and the low levels of economic development.[303]

Another aspect of economic development that must be put into consideration is that economic development must affect not just a few people but the majority of the population, and so should the levels of education, and the specialisation, industrialisation, and the movement from agricultural-based economies to service-based economies.[304] Mere GDP increment, which does not affect the lives of the majority, such as the situation usually is in resource rich countries like Gabon, does not lead to the desired changes.[305] Another aspect to note is the extent of inequality in a country. Where the society is unequal economically, then high GDP levels will not necessarily mean that society is economically developed. Therefore, in such unequal societies, acceptance of LGB rights is generally likely to remain low despite the high economic growth.

South Africa is the most economically advanced among the countries studied. It is however also the most unequal society in the world, [306] with its economic development occurring in pockets and not benefitting the whole society.[307] The more economically advanced parts of the country,[308] where the society is

300 See for example S Jolly 'Poverty and sexuality: What are the connections? Overview and literature review' Swedish International Development Corporation (2010); P Oosterhoff *et al* 'Literature review on sexuality and poverty' IDS Evidence Report 55 (2014). For the case of the LGB community specifically in Africa, see P Haste and TK Gatete 'Law, sexuality, poverty and politics in Rwanda' IDS Evidence Report 131 (2015).

301 Inglehart & Baker (n 298 above) 24.

302 See Pew Research Centre 'The global divide on homosexuality: Greater acceptance in more secular and affluent countries' (2013) 1-2, available http://www.pewglobal.org/files/2013/06/Pew-Global-Attitudes-Homosexuality-Report-FINAL-JUNE-4-2013.pdf (accessed 28 March 2018).

303 See generally, A Ormsby 'Institutional and personal homophobia in Sub-Saharan Africa: A post-materialist explanation' Honours thesis, University of Colorado, 2015.

304 See RB Marthisen 'A Postmaterialist explanation for homophobia in Africa: Multilevel analysis of attitudes towards homosexuals in 33 African countries' Master's thesis, Department of Comparative Politics, University of Bergen, 2018, 17-13.

305 Above, 15-16.

306 See X Greenwood 'South Africa is the most unequal country in the world and its poverty is the enduring legacy of apartheid' says World Bank' *The Independent* 4 April 2018 https://www.independent.co.uk/news/world/africa/south-africa-unequal-country-poverty-legacy-apartheid-world-bank-a8288986.html (accessed 30 May 2018).

307 For a more detailed discussion of the South African economy, capitalism and inequality, see K Hart & V Padayachee 'A history of South African capitalism in national and global perspective' (2013) 81/82 *Transformation: Critical Perspectives on Southern Africa* 55.

308 World Bank Southern Africa economist Victor Sulla was quoted as saying that '[I]f you take the top 10%, they live like in Austria. So it's a very high level even by European

also more individualistic, enjoy access to all the human rights, and this includes LGB persons.[309] The poorer areas[310] are also more communitarian and there are a number of additional challenges that stop people from realising their rights, including LGB persons. In some areas, LGB strategic litigation has been able to lead to social change, while in others such change has been slow, which explains why South Africa as a country has not yet achieved significant social change in favour of LGB persons.

Botswana is among the middle-income countries.[311] It however also remains one of the most unequal countries in the world.[312] The level of economic growth in the country explains why LGB strategic litigation has been more successful in recent times, but the inequality also explains why the change is not happening uniformly across the country for all persons. Kenya is also among the fastest developing countries in Africa, being the largest economy in East Africa and one of the fastest growing economies on the continent.[313] However, the country also underwent recession caused partly by the global depression and partly by political instability. Today, the economy is in recovery mode,[314] but inequality remains high, undermining economic development.[315] The level of economic development in the country therefore explains why LGB strategic litigation has been successful in recent times but also why social change in favour of LGB persons is not happening at a much faster rate. Nigeria is Africa's largest economy, albeit also one of the most unequal, and OXFAM describes the inequality as 'extreme.'[316] The uneven economic development also partly explains why there is still a lot of resistance on LGB issues. Uganda is generally less developed compared to all the others, and its

standards or even by U.S. standards.' See 'SA most unequal country in world: Poverty shows Apartheid's enduring legacy' *Sunday Times* 4 April 2018 https://www.timeslive.co.za/news/south-africa/2018-04-04-poverty-shows-how-apartheid-legacy-endures-in-south-africa/ (accessed 5 June 2018).

309 Human Rights Watch 'We'll show you you're a woman: Violence and discrimination against black lesbians and transgender men in South Africa' (2011) http://www.hrw.org/sites/default/ files/reports/southafrica1211.pdf (accessed 4 May 2018).

310 Victor Sulla also described the very poor as follows 'The people at the bottom in South Africa, they get wages comparable to the people who live in Bangladesh. It's very, very poor.' See n 445 above.

311 Botswana has been seen as an economic miracle, with high and consistent economic development rates and continues to rank among the most developed countries in Africa. See 'Botswana's Economic Miracle' *World News* 26 July 2017 https://intpolicydigest.org/2017/07/26/botswana-s-economic-miracle/ (accessed 30 May 2018).

312 Greenwood, n 306 above.

313 The World Bank 'The World Bank in Kenya' 19 April 2018 http://www.worldbank.org/en/country/kenya/overview (accessed 30 May 2018).

314 Above.

315 For details of the inequality, see Oxfam International 'Kenya: extreme inequality in numbers' https://www.oxfam.org/en/even-it/kenya-extreme-inequality-numbers (accessed 30 May 2018).

316 See generally, OXFAM International 'Inequality in Nigeria: Exploring the drivers' 2017.

economy is slowing down.[317] This also explains the slow pace of social change despite successful LGB strategic litigation.

If all other factors remain constant, the level of economic development is an important factor in influencing social change where there is LGB strategic litigation.

5.6.3 The economic status of LGB persons relative to the general population

Another important economic factor is the economic status of LGB persons in a particular country relative to the rest of the population. The more affluent LGB persons are in a particular country, the more likely is LGB strategic litigation to lead to social change. In most countries, LGB persons are poor and marginalised, but in several of them, openly LGB persons have also become economically successful and have thus been able to develop an infrastructure of support and the political capital necessary for social change in favour of LGB persons. The financial independence of LGB persons allows them to support other members of the community and to contribute to charity, something that greatly builds and boosts their profile, and which leads to them being seen in a more positive light, thus leading to increased acceptance. High economic status of LGB persons makes it easier for LGB strategic litigation to translate into social change as the groundwork would have already been laid.

For the selected Common Law African countries, South Africa has a large number of influential and economically successful LGB persons. Despite these conditions, not all gay persons have openly come out, thus reducing the available information on LGB wealth in the country. Such individuals were able to support the strategic litigation efforts and also to act as positive examples enabling LGB persons to be portrayed in a more positive light, thus contributing to both legal change and social acceptance. Botswana and Kenya also have a few successful out LGB individuals, while Nigeria and Uganda have barely any. This absence of public economically successful LGB persons is reflected in the relatively lower levels of social change in favour of LGB persons as compared to South Africa.

The data therefore shows a positive correlation between the level of economic development of LGB persons and the level of social change. It is clear that the existence of a sizeable number of economically successful LGB persons contributes to successful LGB litigation leading to social change.

The economy remains an important aspect in every country. The level of economic development as well as the economic system that a country adheres to, are all reflected in how people relate to each other in society. This makes

317 The World Bank 'The World Bank in Uganda' 12 October 2017. http://www.worldbank.org/en/country/uganda/overview (accessed 30 May 2018).

these factors significant in determining how LGB strategic litigation leads to social change.

5.7 Social factors

How people relate to each other socially is a major determinant of how fast social change happens in favour of LGB persons. This is because social relationships and interactions largely drive social change as they influence behaviour and conduct. This section of the chapter deals with how social factors influence the stimulation of social change by LGB strategic litigation. These factors are discussed below:

5.7.1 The extent of conservative religious disposition in a country

The extent to which a majority of the population in a country adheres to conservative religious views appears to contribute to the rate at which LGB strategic litigation contributes to social change in favour of LGB persons. Religious grounds are often cited as the main basis for opposition to LGB rights.[318] Religious conservatives usually actively oppose homosexuality, contending that it is against the tenets of their religions. Such opposition is not limited to Christianity but can also be found in Islam as well as African traditional religions. In Africa, both Christianity and Islam, which are the dominant religions, are tempered with African traditional beliefs and customs, which is the main way in which these hitherto foreign religions have managed to maintain a stronghold.[319] As Mbiti posits, Africans are innately religious and many things are largely seen in religious perspectives.[320] Religion is generally supportive of equality and non-discrimination, and has been relied on in some contexts to promote LGB equality.[321] This implies that it is a particular brand of religion that actually opposes LGB rights. Coley posits that such expressions of religious opposition is more about how much a religion focuses on 'individual orientations' as opposed to 'communal orientations'.[322] The Pew Research Centre found that there was less acceptance of homosexuality in more religious countries than in the more secular ones.[323] This implies that in more religious

318 For the USA, for example the Pew Research Centre found in 2003 that 80% of those who hold strong religious views oppose homosexuality far ahead of the national average, which was 50%. See Pew Research Centre 'Republicans unified, Democrats split on gay marriage: Religious beliefs underpin opposition to homosexuality' 18 November 2003. http://assets.pewresearch.org/wp-content/uploads/sites/5/legacy-pdf/197.pdf (accessed 2 July 2018).

319 See generally L Sanneh 'Translatability in Islam and Christianity in Africa: Global religious movements in regional context' in TD Blakely *et al* (eds) *Religion in Africa: Experience and expression* (1994) 22-45.

320 JS Mbiti *African religions and philosophy* (1969) 142.

321 JS Coley 'Reconciling religion and LGBT rights Christian universities, theological orientations, and LGBT inclusion' (2017) 4:1 *Social Currents* 87.

322 Above.

323 See Pew Research Centre 'The global divide on homosexuality: Greater acceptance in more secular and affluent countries' (2013) 3-4 http://www.pewglobal.org/files/2013/06/Pew-Global-Attitudes-Homosexuality-Report-FINAL-JUNE-4-2013.pdf (accessed 28 March 2018).

societies, LGB strategic litigation cases are more likely to create little impact than in more secular countries, and thus lead to less social change.

All the selected Common Law African countries have Christianity as a dominant religion, and there are marked brands of ultra-conservative Christianity. However for South Africa, which has so far made the most progress in protecting LGB rights, there has been a departure from conservative Christian teachings, which are strongly against LGB rights, to more moderate teachings, which favour non-discrimination.[324] This is one of the lasting legacies of the struggle against apartheid. For Botswana, the government does not tolerate extremism that would amount to hate speech even against LGB persons. This was seen when an American evangelical who insulted an LGB activist on radio was deported from Botswana.[325] Such attitudes also help to explain the greater social change in South Africa and the relative social change in Botswana.

Kenya, Nigeria and Uganda are all hotbeds of conservative religious extremism, with evangelicals mainly from the USA continuing to fuel and spread anti-gay hatred.[326] In Uganda religious extremists went ahead to support and have the AHA passed. This level of extremism helps to explain why LGB social change in Kenya, Nigeria and Uganda is still relatively slower compared to the other countries, despite the victories in the courts of law.

As such, one of the key factors that can influence LGB strategic litigation leading to social change is the role conservative religion plays in public life.

5.7.2 The extent to which 'traditional culture' plays an important role in the society

The classic definition of 'culture' is that by Tylor that culture refers to the totality of things like 'knowledge, belief, art, morals, law, customs or any other capabilities and habits acquired by man as a member of society.'[327] However, this is not what is meant by 'traditional culture' as used by those who want to use culture to oppose LGB rights. 'Traditional culture' in most parts of Africa is presented as an important reason why many persons are against homosexuality.[328] It is usually referred to as 'African culture'.[329]

324 For more discussion, see Chapter 4 section 4.4.4.

325 'American anti-gay pastor deported from Botswana for hate speech' Africannews.com 20 September 2016 'http://www.africanews.com/2016/09/20/american-anti-gay-pastor-deported-from-botswana-for-hate-speech// (accessed 31 March 2018).

326 See generally, KJ Kaoma 'Globalising the culture wars: US conservatives, African churches and homophobia' Political Research Associates (2009).

327 EB Tylor *Primitive culture: Researches into the development of mythology, philosophy, religion, language, art and custom* (1871).

328 For a recent discussion on this topic see K Kaoma *Christianity, globalization, and protective homophobia: Democratic contestation of sexuality in sub-Saharan Africa* (2018) 1-12.

329 See for example EO Ezedike *African culture and the African personality: From footmarks to landmarks on African Philosophy* (2009) 455 who sees African culture as 'the sum total of shared attitudinal inclinations and capabilities, art, beliefs, moral codes

'Traditional culture' in this sense is used to mean an imaginary, reified, pure form of culture that is supposedly universal to a particular traditional society, such as Africa, and still subsists.[330] Of course such a culture never existed as cultures vary from place to place, and are always changing, and a whole continent is too big to have the same culture. Homosexuality is presented as being against African culture, and thus as 'unAfrican'.[331] Kaoma refers to this as cultural disposition:[332] the feeling that a culture that may be accepted elsewhere is not accepted here.[333] Thus, whereas homosexuality may be allowed in the west, it is not allowed in Africa, and as such African culture is against it. Many arguments have been put forward to counter this argument but it subsists and many believe in it. One of the main arguments against the claim of an essential 'African culture' is that it is not uniform to all African societies, and that a number of cultures accepted some forms of same-sex expressions, be it woman-to-woman marriage or having young boys apprenticed to older men with sex involved. [334] Others assert that 'traditional African culture' was all about 'Ubuntu' – the concept that 'I am because we are'. [335] As a result, one's sexual orientation was not a primary issue in itself, but rather what mattered was respect for others, dignity and tolerance.[336] All this however does little to dissuade those who believe that African traditional culture is against same-sex relations and is immutable. Therefore, even if a court declares that LGB persons are equal to other persons, the people are likely to perceive such a finding to be influenced by foreign cultures and not African ones.

In all the countries studied, 'traditional culture' plays an important role in stirring homophobia and hostility. It is strongest in Nigeria and Uganda where 'traditional culture' is represented as being against LGB rights, and this has become a dominant discourse.[337] It is also prominent in

and practices that characterize Africans'. Also see generally GE Idang 'Afican culture and values' (2015) 162 *Phronimon* 97.

330 For a discussion of this phenomenon, see S Nyanzi 'Dismantling reified African culture through localised homosexualities in Uganda' (2013) 15:8 *Culture, Health & Sexuality* 953-955.

331 See for example S Mokhobo 'AIDS and the mining industry', in Chamber of Mines Newsletter. August/October, 1989.

332 Kaoma (n 330 above) 10.

333 Above.

334 See for example, OS Murray & W Roscoe Boy-wives and female husbands: Studies of African homosexualities (1998). For a recent discussion of these see M Epprecht *Heterosexual Africa? The history of an idea from the age of exploration to the age of AIDS* (2008) 34-64, and M Mutua 'Sexual orientation and human rights: Putting homophobia on trial' in S Tamale (ed) *African Sexualities: A reader* (2011).

335 B Nussbaum 'African culture and Ubuntu. Reflections of a South African in America' (2003) 17 *World Business Academy* 1-12.

336 See for example B Matolino 'Being gay and African: A view from an African philosopher' (2017) 18 *Phronimon* 59, 60-61.

337 For Uganda, See generally, S Nyanzi, n 482 above. For Nigeria, see generally, AT Adebanjo, 'Culture, morality and the law: Nigeria's anti-gay law in

Kenya with many using it to oppose LGB rights.[338] In Botswana, African culture is interwoven in the country's fabric, but usually the more positive aspects such as 'botho' and seeking consensus are promoted more.[339] In South Africa, the right to culture is also included within the Constitution. Despite this, dignity of all persons, and non-discrimination are key values that are established and respected, thus watering down the 'traditional culture' argument. Nevertheless, protection of the right to culture and preservation of traditional rules has been opposed by particularly the House of Traditional Leaders, which has called for the removal of the protection on sexual orientation in the Constitution based on traditional culture.[340] However, the multiplicity of cultures in South Africa, some of which cannot be termed as traditional African' has helped to weaken this argument. This multiplicity can also explain why more progress towards social acceptance has been made. This factor may thus also help to explain the slower social change despite successful LGB strategic litigation cases.

The role 'traditional culture' plays in society is important, especially in Common Law Africa, as it determines the extent to which decisions that are seen as being contrary to 'traditional culture' will be respected.

5.7.3 The extent of importation and adoption of culture wars from elsewhere

The active spread of anti-gay rhetoric and pro-gay support particularly originating from the USA has played an active role in influencing how LGB strategic litigation can lead to social change. This struggle has been referred to as 'culture wars' and the argument goes that after the religious right losing their stronghold in the USA including through successful LGB strategic litigation, they turned their efforts to other countries particularly on the African continent.[341] At the same time, pro-gay groups that have recently seen much more success in the USA are riding on this wave of success to also protect and defend LGB rights elsewhere, again particularly in Africa.[342] Such groups work hard to oppose the efforts by the religious right. The result is a contestation

perspective.'*International Journal of Discrimination and the Law* (2015) *15*(4), 256.

338 CE Finerty 'Being gay in Kenya: The implications of Kenya's new Constitution for its anti-sodomy laws' (2012) *Cornell International Law Journal* 431, 436.

339 SR Lewis Jr 'Explaining Botswana's success: The importance of culture' https://apps.carleton.edu/campus/president/slewis/speeches_writings/botswana_success/ (accessed 2 July 2018).

340 See 'Stop protecting gays: Traditional leaders tell the ANC' City Press 2012 http://www.citypress.co.za/news/stop-protecting-gays-traditional-leaders-tell-anc-20120505/ (accessed 7 July 2018).

341 See C McCrudden 'Transnational culture wars' (2015) 13:2 *International Journal of Constitutional Law* 434-462

342 For a critical discussion of such support, see 'U.S. support of gay rights in Africa may have done more harm than good' *New York Times* 20 December 2015 https://www.nytimes.com/2015/12/21/world/africa/us-support-of-gay-rights-in-africa-may-have-done-more-harm-than-good.html (accessed 2 July 2018)

between the two groups, with the law being used as a major weapon in the struggle.[343] Where the religious right gets a stronghold, this is also reflected in anti-gay rhetoric and anti-gay laws such as Uganda's Anti-Homosexuality Act. The extent to which people in a country are amenable to such influences also affects the rate at which LGB strategic litigation will spur social change. This is because the anti-gay groups will frame the victories as dangerous to the existing social order and in need of being reversed, spurring a backlash.

Among the selected countries in Common Law Africa, the cultural wars have largely been exported to Kenya and Uganda.[344] This high level of importation of cultural wars partly explains why there is much anti-gay rhetoric and why even successful LGB strategic litigation has led to limited social change. In Botswana and South Africa, the role of the US religious right is more limited, as already discussed under the aspect of religion above. This low level of importation of cultural wars also explains the relatively higher levels of social acceptance in those countries.

The extent to which a country is susceptible to the culture wars from the USA and elsewhere determines how fast social change will happen.

5.8 Other factors

There are a number of other factors that cannot be classified under the political, legal, transnational, economic, and social factors above. These are:

5.8.1 The number of cases and the breadth of issues LGB strategic litigation brought before the courts

The number of LGB strategic litigation cases brought before the courts on different issues within a specified period of time determines the extent to which LGB strategic litigation spurs social change. This is because, with many cases, there are increased chances of victories, and also there is increased exposure of the public to LGB issues. It also implies that a wider range of issues will be brought to the court's attention and decided upon, thereby leading to the creation of more impact on different aspects of society. If Kretz's seven stages are to be progressively achieved,[345] in a country where there is no political goodwill to create change, there would need to be a case at almost every stage to achieve change that would be meaningful. Therefore, one case or two cases cannot be enough to lead to legal change. The cases must be many and on different aspects. This is the incremental approach to litigation, which is

343 This struggle has been referred to as lawfare. For an analysis of the use of this term, see S Gloppen 'Conceptualizing lawfare: A typology & theoretical framework' Centre of Law and Social Transformation, University of Bergen https://www.academia.edu/35608212/Conceptualizing_Lawfare_A_Typology_and_Theoretical_Framwork (accessed 30 May 2018).

344 See generally, Kaoma, n 326 above.

345 See A Kretz 'From "kill the gays" to "kill the gay rights movement": The future of homosexuality legislation in Africa' (2013) 11 *Northwestern Journal of International Human Rights* 207, 211-216.

about chipping away at the different aspects of the law one at a time. [346] How this helps is that the cases keep referring to each other and creating a string of precedents, which make it clear what the position of the law is. It also helps that judges who made the earlier decisions may still be part of the court and make similar decisions. Although unsuccessful cases and successful backlash/ counter mobilisation usually discourage activists from filing more cases, it is only when activists persist and bring more cases that change can happen.[347]

South African activists lead in the number of cases brought before the courts with 12 cases in the last 23 years. Ugandan activists follow with eight cases. Activists in Kenya and Botswana each have three cases. In terms of social change, South Africa holds true to the proposition as it leads, and also covers nine different areas of the law. All the other countries too support the proposition. Uganda has eight cases, but they cover four areas of law. Activists in Kenya have brought four cases covering three areas of law; while those in Botswana also has three cases on three separate issues.[348] This shows that there is need for cases to be covering different aspects of the law.

Therefore, the number of cases and the breadth of the issues they cover is an important factor in determining the extent to which LGB strategic litigation would lead to social change.

5.8.2 The extent to which LGB strategic litigation cases have been successful in the past 23 years

Success in LGB strategic litigation cases is very important. Activists take strategic litigation cases to court with the primary aim of obtaining victories. This is because courts usually issue orders in successful cases, which the executive, the legislature or any other persons against whom the orders are delivered are bound to implement. According to Gloppen, although cases may have indirect effects even when not successful, winning in court is still 'a core issue' as it helps to translate the claims into enforceable legal claims.[349] Handler shows that it was through court victories that various movements were able to obtain their stated aims.[350] Keck also recognises the power of victories when he argues that even if they may lead to backlash, the power of court victories cannot be underrated.[351] The secondary aims may be many,

346 For a description of this see for example HJ *Hacker The culture of conservative Christian litigation* (2005) 34-35. For LGB litigation specifically in Uganda see A Jjuuko 'The incremental approach: Uganda's struggle for the decriminalisation of homosexuality' in C Lennox & M Waites (eds) *Human rights, sexual orientation and gender identity in the Commonwealth: Struggles for decriminalisation and change* (2013) 381.

347 See generally, TM Keck 'Beyond backlash: Assessing the impact of judicial decisions on LGBT rights' (2009) 43 *Law and Society Review* 151.

348 As above.

349 Gloppen (n 1 above) 345.

350 See for example JF Handler *Social movements and the legal system: A theory of law reform and social change* (1978), 20.

351 See generally, Keck, n 347 above,

including drawing attention to an issue. Although losses must be expected, and in some cases, can also be regarded as wins,[352] they are best avoided. Losses may erode gains already achieved, such as was the case with the *Lokodo and SMUG Registration* cases in Uganda, which watered down the positive judgment in the *Rolling Stone* case. They may also lead to allies abandoning the cause as being unworthy.

South Africa has had the most victories – a 91% success rate. It is followed by Botswana with 75%, then Kenya and Uganda with 50%, and Nigeria with 25%. In terms of social change, South Africa leads, followed by Botswana, then Kenya, Uganda with Nigeria coming last which flows directly with the number of victories.

Therefore, the percentage of LGB strategic litigation cases that are successful is likely to increase the rate at which LGB strategic litigation stimulates social change. This however has to rely on the total number of cases, as it applies more when there are more cases.

5.8.3 The length of the period over which LGB strategic litigation has been done

The amount of time over which LGB strategic litigation has been done in a particular country, determines the extent to which LGB strategic litigation can stimulate social change. The longer the experience with LGB strategic litigation, the more likely success will be achieved in court, eventually leading to social change. Time allows the changes to be revealed for what they are and for the contribution of the cases to be seen and appreciated. Time also helps to overcome the initial backlash and allows the situation to normalise. Time allows the courts and the public to be exposed to different matters concerning LGB issues, thus creating precedents and making it easier for the courts to deal with the different matters.[353]

Only South Africa has garnered more than 10 years of LGB strategic litigation, and the litigation has been able to lead to a higher level of positive change. For the other countries, Botswana has had LGB litigation for 16 years, since 2003 when the *Kanane* case[354] was filed while Uganda has been doing LGB strategic litigation for 12 years since the *Victor Mukasa* case was decided in 2007. Kenya has the least number of years of LGB strategic litigation, five years, since the *NGLHRC Registration case*[355] was filed in in 2013, while Nigeria has done litigation for five years since the Ebah case in 2014. There has been more legal and social change in Botswana and South Africa. However,

352 See generally, D NeJaime 'Winning through losing' (2011) 96 *Iowa Law Review* 941.

353 For how this worked to help the US courts to get used to LGB issues in the aftermath of the loss in *Bowers v Hardwick* 478 US 186 (1986), see D NeJaime 'The legal mobilization dilemma' (2012) 61 *Emory Law Journal* 663, 684.

354 n 56 above.

355 *NGLHRC Registration* case, n 189 above.

Uganda has had less social change than Kenya despite longer periods. This points more to the different prevailing political conditions – the state of democracy – than the time factor. The longer period for litigation in Uganda has also corresponded to more state-sponsored persecution of LGB persons, making it difficult for positive social change to occur. The situation in Nigeria fits the assertion.

Time therefore plays a role in measuring the social change that has occurred as a result of a case. As such, for LGB strategic litigation to contribute sufficiently to social change in favour of LGB persons, LGB strategic litigation has to be done over a longer period of time, preferably for more than 20 years.

5.8.4 The level of backlash and counter-mobilisation

The level of backlash and counter-mobilisation that activists face in a country reduces the rate at which LGB strategic litigation will spur on social change and vice versa. Backlash refers to the reversal of gains made in litigation through counter-litigation, legislative reforms or executive actions.[356] Backlash occurs when anti-LGB groups threatened by the very action of LGB groups bringing a case before court, or by a victory, decide to counter-mobilise against LGB persons in order to reverse such steps. The effect of backlash is therefore to erode the gains made, and to reverse any social change that has been gained. Because of the fear of backlash, and reversal of gains already made, many scholars and activists have argued against LGB strategic litigation, [357] and have instead called for the use of alternatives such as lobbying the executive or the legislature.[358] So where there are high levels of backlash and counter-mobilisation, social change is more likely to be slower than where there is no backlash.

Uganda is the only country that has had high levels of backlash and counter-mobilisation, with two adverse court decisions on LGB rights in the past 10 years, one incident of the legislature passing a new law and increased state crackdown on LGB rights. As such, the high levels of backlash against LGB rights in Uganda are clearly linked to the low levels of social change on this issue.

Botswana and Kenya have not had any successful reversals of court decisions or passing of new laws but there have been attempts. In Botswana, the state has appealed against the *Botswana Decriminalisation case* and also

356 See Keck, n 347 above.

357 See for example Rosenberg, n 77 above; See and MJ Klarman 'Brown and Lawrence (and Goodridge)' (2005) 104 *Michigan Law Review* 431-89, 482.

358 See for example generally M Tushnet Taking the Constitution away from the courts (1999); T Stoddard 'Bleeding heart: Reflections on using law to make social change' (1997) 72 *New York University Law Review* 966, 977; and R West 'Progressive and conservative constitutionalism' (1990) Georgetown Public Law and Legal Theory Research Paper No. 11-46.

unsuccessfully appealed against the *LEGABIBO Registration* case, while in Kenya, the executive has appealed the *Eric Gitari* decision and refused to register the National Coalition of Gay and Lesbian Equality. Again, the extent of social change in both countries is yet to reach the level of significant social change showing a correlation between the success of backlash and counter-mobilisation and low levels of social change. Nigeria, falls outside this discourse as the only victory does not expressly mention LGB rights. South Africa has not had any successful backlash or any serious attempts at reversing court decisions by the executive or the legislature. Therefore, it is not surprising that South Africa still has the highest rates of social change among the selected countries.

Therefore, the success of backlash and counter-mobilisation means the failure of LGB strategic litigation to stimulate social change.

5.9 Conclusion

From the discussion above, exogenous factors play an important role in ensuring that LGB strategic litigation stimulates social change. They form the base upon which litigation itself is even made possible, and also for success. Where litigation is successful, they also help to determine whether in the broader scheme of things, it can impact society in such a way that it creates social change. The political factors however, are more important than all the others. Once the political scheme is streamlined, it is easier for the other factors to align and lead to social change. Considering the factors in detail, it is quite clear that all factors do not play the same role in ensuring that LGB strategic litigation spurs social change. Some are more relevant than others. Exogenous factors, overall, are more important than the endogenous factors in predicting whether LGB strategic litigation would lead to social change in any particular context. The experience of activists in Uganda – one of the countries with the lowest 'social change' ranking – shows that it does not matter much what kind of strategy is being followed, or who is actively mobilised or the nature of legal arguments raised, when there is declining rule of law, undermined judicial independence, a legal culture that does not respect formal conflict resolution mechanisms, a proliferation of conservative religions and general economic underdevelopment. In such circumstances, judges will not be independent enough to make decisions that vindicate rights of such an unpopular minority group as LGB persons. But even if they did so, the executive and the legislature frequently simply ignore them at best or physically raid the courts at worst. In contrast to the experience in Uganda, activists in countries like Botswana and Kenya, where judicial independence is more established, have had impressive victories, with little mobilisation of elites and the LGB community, with in-fighting within the LGB community, and with lawyers who are not necessarily very experienced. However, South Africa stands out for both having had a very well-organised litigation strategy

and also prevailing circumstances that favoured LGB strategic litigation. Other factors that show a strong positive correlation are: those that deal with the judiciary: the extent of judicial independence and the legitimacy of the judiciary; then those that deal with the economy: the nature of the economic system; and the level of economic development; and those that deal with social-religious factors: the extent of religious conservatism, the role of traditional culture, and the extent of importation of culture wars. This shows again a positive relationship between these factors and the extent of social change. Having all these factors in one's favour will certainly ensure that social change happens. However, it does not imply that each and every factor must be in place for LGB strategic litigation to stimulate social change. Their importance is contextual and they play different roles in different countries. Nevertheless, the parties should strive to take advantage of the exogenous factors. Better still, LGB activists also ought to be alive to other social justice struggles and be part of them. LGB strategic litigation cannot be undertaken in isolation of struggles for democracy, social justice, and human rights more generally.

Six

Endogenous Factors and How They Influence LGB Strategic Litigation in Stimulating Social Change

6.1 Introduction

Endogenous factors go to how the cases are developed, how the movement is organised, how communities are mobilised as the cases are handled in court and afterwards, and also how the court decisions are enforced after judgment is delivered. Victory in an individual case is important, and victory in a series of cases is even more important. However, even without victory, a case should be able to at the very least do no harm to the movement. In this way, factors that go to how the cases themselves are handled cannot be underestimated. This chapter discusses these endogenous factors at the four stages of a strategic litigation case – the overarching strategy level, the pre-litigation level, the litigation level and the post litigation level. It discusses how LGB strategic litigation is done in each of the selected African Common Law countries. As was done for endogenous factors, factors are discussed and then developed into conditions under which successful LGB strategic litigation can contribute meaningfully to social change in favour of LGB persons.

6.2 An overview of the endogenous factors

Some cases are regarded as groundbreaking, while others, while important, are simply regarded as ordinary. Some cases are lost but nonetheless create an impact. The difference lies in what impact the case has in terms of causing actual legal change, and then going on to influence social attitudes towards LGB persons. This impact can be controlled in a strategic litigation case that has been brought by LGB activists (proactive litigation), but may be more difficult to control if the case is brought by other persons and LGB persons are forced to defensively react to the case – either as *amicus curiae*, as intervening parties or in defence (defensive litigation). Either way, there must be efforts to ensure that the case goes beyond the court's decision. This is where proper strategising and planning comes into the picture. According to Marcus *et al*, nothing replaces proper planning in a strategic litigation case.[1] A case must

1 G Marcus, S Budlender & N Ferreira *Public interest litigation and social change in South Africa: Strategies, tactics and lessons* (2014) 111.

be developed in such a way that it is likely to succeed and establish the groundwork to build upon that success outside court. Dugard and Langford on the other hand are wary of judicial determinism and hold the view that litigation is too complex to predict the outcome.[2] However, both agree that planning litigation is essential.

For a successful case to make a difference, the decision must be framed in the language of legal rights, and the decision must be enforced.[3] In the case of backlash against the LGB community, how this is handled is also part of what determines the impact of the case. For an unsuccessful case, care must be taken to ensure that the 'radiating effects' and 'special effects' that Galanter speaks of,[4] go beyond the parties in the case to everyone else – that they become 'general effects'.[5] It must also be ensured that the decision makes elites and opinion leaders, or people with special influence and authority as Balkin regards them,[6] to feel sympathy for the cause or angry enough that they demand change. While exogenous factors are important, they do not speak to individual cases. It is the endogenous factors that determine what contribution each particular case makes. Marcus *et al* came up with a list of seven endogenous factors that in their view are key to litigation succeeding and eventually leading to social change. These are: proper organisation of clients; overall long-term strategy; co-ordination and information sharing; timing; research; characterisation; and follow-up.[7] These are incorporated into this study and further elaborated.

6.3 Factors that go to the overarching litigation strategy

The most important stage in the strategic litigation process is the overarching strategy stage.[8] At this stage, the success of the series of cases that are to be filed is ensured and set. At this stage therefore, a number of factors influence how LGB strategic litigation contributes to social change. These are:

2 J Dugard & M Langford 'Art or science? Synthesising lessons from public interest litigation and the dangers of legal determinism' (2011) 27:1 *South African Journal on Human Rights* 39-64.

3 S Gloppen 'Courts and social transformation: An analytical framework' in P Domingo *et al* (eds) *Courts and social transformation in new democracies: An institutional voice for the poor?* (2006) 345.

4 M Galanter 'The radiating effects of courts' in K Boyum & L Mather (eds) *Empirical theories about courts* (1983) 117, 121.

5 Above.

6 JM Balkin *Constitutional redemption: Political faith in an unjust world* (2011) 182.

7 Marcus *et al* (n 1 above) 110-126.

8 A strategic case has one phase in addition to the three usual stages of an oridnary case - the pre-litigation stage, the litigation stage and the post litigation stage. This is the overarching strategy stage. It is the stage where the broad strategy involving all the planned cases is developed. This stage is not concerned with only one case, but with a number of cases in a sequence, which is expected to lead to the desired outcome.

6.3.1 The existence of a properly framed and understood strategic objective for the overall litigation

When an overarching goal for the overall strategic litigation is set, it becomes easier for activists to pursue the different facets of the litigation to its end, and until it is able to create the desired legal change and social acceptance. Where the litigation is intended to create significant social change, the objective is well understood by all and everyone concerned knows that it will take more than one case to achieve the desired change. The activists work towards this goal and despite losses and setbacks in individual cases, they continue on the path towards achieving the overarching objective. The overarching goal helps to direct efforts and to guide activists towards that set goal. Where the stated strategic objective is to achieve decriminalisation or to defeat a particular law or to pursue an individual case, once this is achieved the litigation usually falters, as people are not sure of the next direction to take. It has to be noted that it may not be easy to set such a goal right at the beginning of the litigation as the movement may not be well developed, but nevertheless efforts should be made to come to an agreement on this as soon as possible. It requires being organised and working together, perhaps in a coalition setting.

In all the five selected countries, the activists ultimately aimed at changing laws. None of the countries had social change as the overarching strategy right from the beginning as the litigation was largely reactive rather than proactive, except for the case of South Africa, where legal change was expected to spur social change right from the initial planning. The NCGLE clearly aimed at changing the laws and thereby ensuring equality for gays and lesbians.[9] It had a 'shopping list' based on Edwin Cameron's list of demands made in his professorial inaugural lecture in 1992[10] which suggested starting with the easier-to-achieve demands like same age of consent and decriminalisation of sodomy and ending with the more challenging aims, which included same-sex marriages.[11] This strategy was indeed followed and the cases were by and large brought in this sequence and ultimately this proved to be successful in achieving legal recognition of same-sex marriages and contributing to the extent of social change. In Uganda, the litigation so far undertaken was done for the short term aim of obtaining remedies for the violations or to gain protection of a right, but it also eventually took on the framing of decriminalisation of same-sex relations but through the incremental

9 K Botha 1995 'Think strategically' Equality, Newsletter of the NCGLE 1 (March): 4, cited in N Oswin 'Producing homonormativity in neoliberal South Africa: Recognition, redistribution, and the equality project' (2007) 32:3 *Signs: Journal of Women in Culture and Society* 652.

10 E Cameron 'Sexual orientation and the Constitution: A test case for human rights' (1993) 110 *South African Law Journal* 450–472.

11 GG Santos 'Decriminalising homosexuality in Africa: Lessons from the South African experience' in C Lennox & M Waites (eds) *Human rights, sexual orientation and gender identity in the Commonwealth: Struggles for decriminalisation and change* (2013) 313, 323.

approach.[12] Indeed, remedies have been obtained in cases filed as well as positive judgments. However, social change is yet to be achieved partly because it was not directly aimed at. For Kenya, litigation is largely engaged in to vindicate rights,[13] and decriminalisation also eventually became key when a case was filed by one of the organisations.[14] For Botswana, the litigation was initially aimed at decriminalisation but after major setbacks, it became registration of LEGABIBO,[15] and after a case was filed by an individual, then efforts shifted to decriminalisation again.[16] In Nigeria, the immediate aim is to overturn the SSMPA or get organisations registered.[17]

What is clear is that for South Africa where the overall objective was declared from the beginning to be same-sex marriages, rather than decriminalisation or reacting to state actions, this was achieved. Also for other countries whose focus was decriminalisation or reacting to government actions, their aims were also achieved, but not social change to the extent of South Africa as yet. What this shows is that setting an overall strategic objective is very important as it determines the direction of the movement and its aims. Setting goals toward social change right from the beginning of the litigation helps to keep the movement grounded.

Therefore, in order for LGB strategic litigation to achieve the desired change the strategic objective of the litigation must be beyond redressing state violations and even decriminalisation or same-sex marriages, to specifically achieving social change.

6.3.2 The nature of strategy adopted in pursuing the cases

Formal, well-known and countrywide strategic approaches are more effective in making LGB strategic litigation contribute to social change than informal approaches, limited to individual organisations. This is because a more formal strategy makes it clear what the next steps would be in case of a win or a loss, and also helps to plan and schedule the litigation in a logical manner. Actions taken after the delivery of judgment usually determine the extent to which a particular case will stimulate social change in favour or against LGB persons.

12 See generally, A Jjuuko 'The incremental approach: Uganda's struggle for the decriminalisation of homosexuality' in C Lennox & M Waites (eds), above.

13 See interview with Eric Mawira Gitari, National Gay and Lesbian Human Rights Commission (NGHLRC), Kenya, Nairobi, 27 July 2017 Also see 'Kenya: Turning the tide for LGBT rights in Kenya: Interview' AllAfrica.com http://allafrica.com/stories/201703080284.html (accessed 15 January 2018).

14 Joint interview with Lorna Dias, Jackson Otieno, Kelvin N. Washiko, Yvonne Oduor, and Brian Macharia, all of Gay and Lesbian Coalition of Kenya (GALCK), Nairobi, 26 July 2017 – (Lorna Dias and the GALCK team).

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

16 Interview with Caine Youngman, Lesbians, Gays and Bisexuals of Botswana (LEGABIBO), Gaborone, 12 October 2017.

17 Skype interview with Ayo Sogunro, 8 September 2019.

In the selected countries, different strategies were employed in pursuing the cases. In some countries, the litigation was formal, well-defined, and followed a well-known, countrywide incremental litigation strategy. In other countries, the litigation followed informal individual/organisational strategies that were not widely disseminated. South Africa and Uganda both had well-defined strategies that involved consultations and agreement within broader Coalitions. In South Africa, the National Coalition for Gay and Lesbian Equality (NCGLE) ensured maintenance of sexual orientation protection in the Final Constitution and then after that was secured, systematically built upon this foundation through seeking decriminalisation,[18] and then either bringing or joining cases strategically to pursue the other equality objectives.[19] In Uganda, the Civil Society Coalition on Human Rights and Constitutional Law (CSCHRCL) specifically aimed at defeating the Anti-Homosexuality Bill (later Act) and eventually decriminalisation. Its strategy thus involved bringing cases opportunistically in order to undermine the further criminalisation efforts and to build a base of precedents to use in an eventual decriminalisation case, as well as obtain remedies for persons whose rights had been violated. In Botswana, DITSWANELO used the *Kanane v The State* case to bring the decriminalisation issue to the courts.[20] The case of *Letsweletse Motshidiemang v Attorney General* (*Botswana Decriminalisation* case)[21] was filed by an individual without LEGABIBO or other organisations being directly contacted or involved. However, LEGABIBO later joined the case as *amicus curiae*.

In Kenya, there were two different strategies, the first one being a cautious approach which involved getting allies on board, consulting all stakeholders, taking time to prepare well thought-out cases bringing less harm to the community and with high chances of success.[22] This was the preferred approach of the Gay and Lesbian Coalition of Kenya (GALCK)[23] and it is supported by UHAI-EASHRI.[24] The second strategy was that adopted by the National Gay and Lesbian Human Rights Commission Coalition (NGLHRC), which centred around incrementally bringing cases to court and taking advantage of judicial officers who may give favourable decisions. The approach centered

18 CF Stychin 'Constituting sexuality: The struggle for sexual orientation in the South African Bill of Rights' (1996) 23(4) *Journal of Law and Society* 455–83.

19 After the case of *Langemaat v Minister of Safety and Security* 1998 (3) SA 312 (T), the NCGLE pursued the next two cases, the *National Coalition for Gay and Lesbian Equality v the Minister of Justice* 1999 1 SA 6 (CC) (*Sodomy* case) and the *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 1 BCLR 39 (*Immigration* case), directly in its name.

20 2003 (2) Botswana Law Review (BLR) 67 (CA) (*Kanane* case). See Tabengwa & Nicol (n15 above).

21 MAHGB-000592-16. Handed down by the Botswana High Court on 19 June 2019.

22 Joint interview with Lorna Dias and the GALCK team (n 14 above).

23 As above.

24 Interview with Wanja Muguongo, Executive Director, UHAI-EASHRI, Nairobi, 26 July 2017.

on legal approaches rather than movement building.[25] They started with the registration of NGHRLC, pursued a case on the constitutionality of anal examinations and then brought a case seeking decriminalisation. GALCK was also eventually able to bring a decriminalisation case that followed their approach.[26] The court heard the cases together and made a decision together, but without the parties consolidating their cases.

In Nigeria, three of the four cases (the *Teriah Joseph Ebah v Federal Government of Nigeria* case[27]; *Ifeanyi Orazulike v Inspector General of Police & Abuja Environmental Protection Board (Orazulike* case*),*[28] and *Pamela Adie v The Corporate Affairs Commission*[29] (the *Pamela Adie* case) were brought by different persons, without necessarily consulting each other, and thus having no common strategy. However, later the case of *The Registered Trustees of the Initiative for Equal Rights & 18 0rs vs. The Federal Republic of Nigeria & 1 Anor* (*TIERS* case)[30] was brought after thorough consultations and with 19 different persons joining the case. The cases have not been successful with the exception of the *Orazulike* case, which however does not mention LGB rights.

The above trends show that litigation seems to be more successful when brought with a carefully laid out, consultative and countrywide strategy involving the different stakeholders. Divisions usually yield negative results unless efforts are made to reconcile the cases as the case was in Botswana. Where different, multiple and sometimes competing strategies exist, as the case was in Kenya and Nigeria, there are fewer successes and also visible rifts which undermine the litigation efforts.

Therefore, the nature of the strategy followed during litigation is an important factor to ensure that LGB strategic litigation contributes to social change in favour of LGB persons. Having in place a single, flexible strategy that the activists follow to lead to social change, or having multiple strategies but being able to reconcile them and work together towards a common goal increases the chances of LGB strategic litigation contributing to social change.

6.3.3 The nature of organising and collaboration

Where a formal coalition approach is adopted, LGB strategic litigation is more likely to be successful and lead to more social change. This is because of the ability of coalitions to mobilise elites and community members, and to portray the image of unity, which is crucial to convincing judges and other persons about the importance of the cause.

25 Interview with Eric Mawira Gitari (n 13 above).
26 *John Mathenge & Others, v Attorney General & Others Petition* No. 234 of 2016, High Court of Kenya (John Mathenge case)
27 Suit No. FHC/ABJ/CS/197/2014.
28 Suit No. FHC/ABJ/CS/799/2014.
29 *Pamela Adie v Corporate Affairs Commission*, suit no: FHC/ABJ/CS/827/2018.
30 FHC/L/CS/1179/17.

In the selected countries, organising for strategic litigation has also taken both coalition and individualistic approaches or a combination of both approaches. The coalition approach involves pursuing the cases through an organised and broad coalition; while the individualistic approach involves pursuing cases by individuals or individual organisations without the direct involvement of the broader community, beyond seeking cursory support, and the third one is a combination of both approaches – pursue cases individually and then the broader community joins. The coalition approach was perfected by activists in South Africa as almost all the cases on LGB equality were brought under the auspices of or directly supported by the NCGLE, and later by its successor, the Lesbian and Gay Equality Project.[31] This model was also followed in Uganda, which pursued almost all its cases under the auspices of the CSCHRCL. For Nigeria, it has mainly been the individualistic approach with the exception of the *TIERS* case which had many different persons. For Botswana and Kenya, the mixed approach has been used where the main coalitions have taken lead and other organisations or individuals have taken their own paths. For Botswana, DITSWANELO supported the legal challenge in the *Kanane* case.[32] Later the work on the *LEGABIBO Registration* case[33] was undertaken by BONELA, which hosted LEGABIBO and also involved other groups but fell short of a formal coalition.[34] The *Botswana Decriminalisation* case was brought by an individual without the knowledge or involvement of LEGABIBO which later joined as *amicus curiae*. For the *LEGABIBO Registration* case however, LEGABIBO mobilised a broad range of people to join the case, uniting the movement. In Kenya, Eric Gitari and the National Gay and Lesbian Coalition pursued their litigation almost singlehandedly without the involvement of other LGB organisations, until GALCK together with many community members also filed their own case and the cases were heard together.[35] In the *NGLHRC Registration case*, there was direct opposition in court from members of the broader LGBTI movement as two individuals, one from a transgender organisation,[36] and another a parent of an intersex child filed formally to join the case for the purpose of opposing the registration of NGLHRC.

31 The Gay and Lesbian Equality Project emerged in 1999 after the NCGLE ceased being a membership coalition and rebranded as a stand-alone organisation known as the Gay and Lesbian Equality Project. See Oswin (n 9 above) at 650.

32 Tabengwa & Nicol (n 15 above) 342.

33 *Attorney General v Thuto Ramogge & 19 Others* (2014) CACGB-128-14 (the *LEGABIBO Registration* case).

34 Interview with Cindy Kelemi, Executive Director, Botswana Network on Law, Ethics and HIV/AIDS (BONELA), Gaborone, 10 October 2017 and interview with Bradley Fortuin and Botho Maruatone, of Lesbians, Gays and Bisexuals of Botswana (LEGABIBO), Gaborone, 10 October 2017.

35 Interview with Eric Mawira Gitari (n 13 above).

36 Activist Audrey Mbugua from Transgender Education and Advocacy (TEA) intervened in *Eric Gitari v Attorney General & Another* Petition 440 of 2013, [2015] eKLR (*NGLHRC Registration* case).

The model where litigation was undertaken as part of a broader coalition is the more successful of the three models as there is strength in unity. Indeed, where cases have been pursued as part of a broader coalition, there have been more victories than in those countries where litigation has been undertaken by separate entities.[37] Also, there is coherence in terms of how cases are brought to the courts, contributing to what has been referred to as the incremental approach to litigation.[38] Finally, it avoids duplication, as usually only one case is brought per issue rather than multiple fragmented cases as the case was in Kenya, regarding the decriminalisation of consensual same-sex relations.[39] This perhaps explains why South Africa was able to achieve success in terms of cases as well as significant social change. Even Uganda, where there is much political hostility, was able to pull off a number of successful cases with a broad-based coalition, with the slow social change attributable more to the exogenous factors. Kenya and Botswana largely modified their approach to be more mixed and this also explains the progress made in terms of social change. For Nigeria, the coalition model has also been adopted after a spate of individualist cases, but the impact so far is yet to be seen.

Therefore, the nature of organising has an important role to play in LGB strategic litigation leading to social change. The more organised a movement is in terms of coalition-building and coordination, the more likely is LGB strategic litigation to contribute meaningfully to social change.

The overarching stage is an important stage in strategic litigation. If adequately planned, LGB strategic litigation can result into successful cases, and where adverse decisions are given, proper planning would also ensure that the case is discussed and eventually perhaps overturned on appeal or its adverse effects otherwise managed.

6.4 Factors at the pre-litigation phase

The pre-litigation phase determines the nature of the case that is to be filed, and this stage is also critical for the success of the individual cases and the preparation for the aftermath, regardless of whether the case is lost or succeeds. At this stage the factors that determine the possibility of LGB strategic litigation leading to social change are:

6.4.1 The extent of consultations that go into building the case

Where there is more consultation of different stakeholders during the development of a case, the likelihood of social change happening is higher as groups are then able to work together towards the desired change. Marcus *et al* found that at any given time, there are multiple organisations and entities

37 South Africa and Uganda which have more decided cases than other countries also have more victories and are also the ones that had formal coalitions.

38 See for example A Jjuuko (n 12 above) 393-396.

39 The *Eric Gitari v Attorney General* Petition 150 of 2016 (High Court of Kenya) and the *John Mathenge* case (n 26 above).

that are willing and interested in doing strategic litigation.[40] They therefore found that coordination and collaboration is very important in order for the part played by each entity to be clearly understood and to contribute to the overall aim.[41] They had this as their third factor.

In countries where there are single entities or coalitions taking the lead on litigation, there are consultative processes of developing and building cases, while in countries with multiple entities taking lead on litigation, consultation is generally at a minimum. In South Africa, although the NCGLE has been criticised as having been elitist,[42] it at least formally brought together the different groups and made them to work together on the different cases. In Uganda, the CSCHRCL had a Legal Committee and a Steering Committee which played direct roles in the litigation. The Legal Committee led the process of planning for every individual case involving different actors in the process, and agreeing on key points including the petitioners, the grounds of the petition, the respondents, the lawyers, the *amicus curiae*, the sources of funding, the advocacy strategy, and above all, a careful consideration of the implications of bringing the case on all involved.[43]

For the other countries, processes of consultations and planning were less elaborate. In the case of Botswana, a good deal of consultation involving different stakeholders went into the *LEGABIBO Registration* case.[44] The *Botswana Decriminalisation case* initially did not involve any consultations as it was filed by an individual. It was only later when LEGABIBO decided to join the case that consultations took place. For Kenya, consultations were conducted by GALCK for the decriminalisation challenge. However, Eric Gitari of NGLHRC eventually went ahead and filed the case on his own and without involving GALCK because he viewed the collaborative process as unnecessarily lengthy.[45] The approach of limited consultations is what perhaps contributed to other members of the broader LGB and Transgender and Intersex community filing an application opposing the *NGLHRC Registration case*. In Nigeria, the *Ebah* case was filed by someone outside the country without consulting the movement and so was the *Orazulike* case. The *Pamela Adie* case involved some consultations but it was mainly about the individual organisation. However, the TIERs case including the decision to withdraw it involved more consultations.[46]

40 Marcus *et al* (n 1 above) 118-119.
41 Above.
42 Oswin (n 9 above).
43 Interview with Fridah Mutesi, former Legal Officer, Human Rights Awareness and Promotion Forum, chairs of the Legal Committee of the Civil Society Coalition on Human Rights and constitutional Law (CSCHRCL), 29 April 2018).
44 Interview with Cindy Kelemi (n 34 above); interview with Bradley Fortuin and Botho Maruatone (n 34 above); interview with Caine Youngman (n 16 above).
45 Interview with Eric Mawira Gitari, n 13 above.
46 Skype Interview with Pamela Adie, Executive Director, Lesbian Equality and

Where there were more consultations in all cases, particularly in South Africa, and Botswana, there have been more victories, and more social change. Uganda is exceptional here as the victories have not inspired as much social change. Kenya also supports the assertion as disunity and less consultation perhaps contributed to the loss in the decriminalisation cases as each was handled separately. Nigeria has not been able to gain much social change, thus supporting the assertion.

Therefore, the more consultations are done between groups working on LGB litigation, the more likely it is that the LGB strategic litigation will lead to social change.

6.4.2 The extent to which funds are available and the sources of these funds

Availability of funds and the source where the funds are obtained are important in ensuring the success of cases, and play an equally important role in the strategic litigation being able to influence social change in favour of LGB persons. Availability of funds makes it possible to hire the best lawyers, do proper research and mobilise community members. Where funds are not readily available, most of these things cannot be done, and this affects the quality of the case, as well as the likelihood of success. Even when a case is successful, efforts to have it enforced would depend on the availability of funds. Another equally important aspect is where the funds are obtained from, whether locally generated or donated by international sources. Where funds are locally generated, there is more ownership of the cases by the members of the LGB community who are then more likely to support the cases and work towards ensuring the achievement of social change.

Foreign donors funded most of the LGB litigation in all five countries. These are mainly donors based in other countries and indeed other continents, specifically those based in the USA and Western Europe.[47] In some instances, donors based within the countries themselves or the region[48] also contributed funds. However, they either had their headquarters in the USA or Europe[49]

Empowerment Initiatives (LEEI), 9 September 2019.

47 The litigation work done by the Lesbian and Gay Equality Project in South Africa was supported by the Atlantic Philanthropies, a US philanthropic fund which gave core funding to the project. Litigation for Botswana is supported by the Open Society Institute for Southern Africa (OSISA) through its support of the Southern African Litigation Centre.

48 UHAI-EASHRI also provided the funds for the Anti-Homosexuality Act cases in Uganda at the Constitutional Court and at the East African Court of Justice (EACJ); and the Open Society Institute for Eastern Africa (OSIEA) based in Nairobi provided the funds for the case of *Jjuuko Adrian v Attorney General*, Constitutional Petition No 1 of 2009 (*Equal Opportunities* case), in Uganda.

49 For example the Open Society Foundations, to which OSIEA belongs, have hubs in Berlin, London, New York, and Washington, DC. The Atlantic Philanthropies, which supported litigation work on LGB rights in South Africa are based in Ireland.

or they received most of their funds from other donors based in the USA or Western Europe. This overreliance on foreign funding brings into question the independence of the actors when making litigation decisions. Funders usually fund what is in line with their own strategies and grantees therefore may have to change their strategies in order to align with donors' priorities.[50] For the case of Uganda for example, Jjuuko mentions instances where in the campaign against the Anti-Homosexuality Bill/Act, local activists were forced to align with the interests of donors. He calls this 'hijacking of the agenda of local activists.'[51] Where this happens and the change is made in favour of litigation, this raises accusations of litigation actually being a foreigner-motivated strategy. Litigation has largely been successful in countries like the USA which are also incidentally the countries from which most of the donors are based. There are thus many specialists in litigation and mobilisation strategists who work for such donors, and for their partners. They see litigation as a strategy that can work elsewhere and thus promote it in Africa.[52] Funds for litigation on LGB issues also seem to be more readily available than funds for other strategies.[53]

With respect to LGB rights, the allegation that funders influence the choice of litigation as a strategy is a particularly serious concern due to the allegations that the west has an agenda to promote homosexuality in Africa.[54] Despite the allegations, activists pointed out that their strategy simply happened to align with that of the donors, and denied direct influence over the strategy employed or the type of cases taken to court, or the decisions made along the way.[55] LGB groups in Botswana assert that the financial support of the Open Society Institute for Southern Africa (OSISA) and the technical assistance of the Southern African Litigation Centre simply supported ideas that were already in place.[56] UHAI-EASHRI, a local activist fund, also contends that they simply support the ideas of their grantees and do not drive the agenda.[57]

50 See N Banks, D Hulme *et al* 'NGOs, states, and donors revisited: Still too close for comfort?' (2015) 66 *World Development* 707-718, 710.

51 A Jjuuko (n 12 above) 132.

52 S Gloppen 'Public interest litigation: Social rights and social policy' in AA Anis & A de Haan *Inclusive States: Social Policy and Structural Inequalities*, New Frontiers of Social Policy (2008) 343.

53 Above.

54 See S Hyeon-Jae 'The origins and consequences of Uganda's brutal homophobia' (2017) *Harvard International Review* http://hir.harvard.edu/article/?a=14531 (accessed 19 March 2018).

55 Interview with interview with Dr. Chris Dolan, Director, Refugee Law Project, School of Law, Makerere University; Interview with Bradley Fortuin and Botho Maruatone (n 34 above); Joint interview with Lorna Dias and the GALCK team (n 14 above).

56 Interview with Bradley Fortuin and Botho Maruatone (n 34 above); also joint interview with Anneke Meerkotter and Tashwill Esterhuizen Southern African Litigation Centre, Johannesburg, 24 October 2017.

57 Interview with Wanja Muguongo (n 24 above). For more on the work of UHAI-EASHRI see Wanja Muguongo & Alice Miller 'Wanja Muguongo in Conversation with Alice M Miller' in Alice M Miller & Mindy J Roseman *Beyond Virtue and Vice: Rethinking human*

However, there are instances where donors have also directly engaged in the strategising process. For example, UHAI-EASHRI, was part of the legal strategising meetings for the Ugandan case at the EACJ and also applied to join the case as *amicus curiae*.[58] OSISA organises litigation conferences,[59] and supports SALC to provide technical assistance in countries like Botswana.[60] It would therefore not be completely accurate to say that donors do not have a say in the process of strategising.

What is clear is that without foreign funding it would have been difficult to pull off the massive campaigns led by the NCGLE in South Africa[61] or the CSCHRCL in Uganda.[62] Donor funding is critical for such processes as structures must be put in place and lawyers must be well resourced,[63] and this requires large amounts of money. Domestic funding is limited due to the homophobia and the generally low levels of economic development in these countries. Activists find themselves with no option but to engage foreign donors. The real concern therefore is how to remain in charge of the process while at the same time using donor funds.

All the successes so far obtained in the selected countries have been as a result of foreign funding with the exception of South Africa to some extent which has some local support, and this affects how these efforts are perceived, and this may slow down the rate of social change. At the same time, this very same funding makes the litigation possible. Therefore, where funds are available and are raised locally, the extent of social change is higher, and where the funds are more limited and raised from outside the country, the rate of social change is slower.

The pre-litigation stage is an important stage for each individual case, and it determines its ability to create social change. Success alone is not the aim at this stage, but how it goes beyond the courtroom to affect everyone else, thus spurring social change.

6.5 Factors at the litigation stage

The litigation stage is where all the planning for the individual case comes to fruition in terms of whether the case will be successful and thus vindicate the rights of LGB persons or if it will be unsuccessful and thus lead to backtracking on the rights or stagnation. It is also the stage that lays the ground for the next stage (the post litigation stage) as the outcome at this stage determines how

rights and criminal law, 2019, 173.

58 *UHAI-EASHRI v Attorney General of Uganda*, Application No. 20 of 2014.

59 OSISA has so far organised two litigation conferences in recent times in Africa, one in Durban, South Africa in 2014 and the other in Swakopmund, Namibia in 2017.

60 Joint interview with Anneke Meerkotter and Tashwill Esterhuizen, n 56 above.

61 Marcus (n 1 above) 10-12.

62 A Jjuuko (n 12 above) 133.

63 Epp sees this as the most important factor for successful litigation. See CR Epp *The rights revolution: Lawyers, activists and Supreme Courts in comparative perspective* (1998) 197.

the next stage is implemented. The factors at this stage that influence whether LGB strategic litigation will lead to social change are:

6.5.1 The choice of forum

Cases that come before the highest courts are more easily enforced than those that are brought at lower courts, and are thus more likely to lead to legal change and inspire social change. This is because of the binding nature of the decisions of the highest courts, as well as their norm-setting power. Also, cases brought before international bodies may have more impact than those brought before domestic courts, as they affect more than one country, and as they help to clarify on the position of international law concerning a particular matter. There is also the aspect of bringing cases before courts of other jurisdictions that have control over the persons who instigate LGB hate. This is also effective in that it limits the power and influence of such persons in the countries where they spread their hate.

Strategic litigation cases are taken to courts with powers to decide on the constitutionality of the laws, and where required and possible, appealed to the highest courts or brought for confirmation, where such a procedure exists. All except three of the South African cases[64] ended at the Constitutional Court. In Botswana, all three cases have reached the highest court – the court of Appeal. In Kenya, one case has now reached the Supreme Court.[65] In Uganda, although cases have reached the Constitutional Court, no single case has reached the Supreme Court yet. However, two appeals are currently pending before the Court of Appeal and may therefore reach the Supreme Court in due course. In Nigeria too, no LGB case has reached the Supreme Court yet, but an appeal is pending in the *Ebah* case and the *Pamela Adie* case.[66] Aiming at the final courts ensures that the resultant decisions cannot be overturned or departed from by the lower courts under the Common Law principle of precedent.

In Uganda, activists have initiated litigation in other countries against their nationals. The *Sexual Minorities Uganda v Scott Lively*[67] (*Scott Lively* case) in the USA is interesting because for the first time, an LGB group in Africa took the fight against US evangelicals back to the USA. The real benefit from this strategy lies in the fact that US evangelical extremists have been given the message that the LGB community in Africa is ready to fight back, including in the USA.

64 The *Langemaat* case which was concluded at the High Court level; and the case of *Du Plessis v Road Accident Fund*, 2004 1 SA 359 (SCA) was still on appeal by the end of 2019. The case of *Gaum and Others v Van Rensburg NO and Others*, Case 40819/17 (Gaum case) was also on appeal by the end of 2019.

65 This is the case of *Eric Gitari v Attorney General & Another,* Petition 440 of 2013 [2015] eKLR 24 April 2015., which the state lost on appeal and then appealed.

66 Skype Interview with Mike Ebah, 9 September 2019.

67 No. 17-1593 (United States Court of Appeals for the First Circuit)

Activists in Uganda have used the regional fora as an avenue for LGB litigation, most prominently with the *Human Rights Awareness and Promotion Forum (HRAPF) v Attorney General of Uganda and the Secretariat of the Joint United Nations Programme on HIV/AIDS (UNAIDS)* (*HRAPF* case) at the EACJ.[68]

Since most of the cases by South African activists reached the Constitutional Court, the position of the law was set, and what remained was for the norms set to become more socially acceptable, and this has been going on over time, and this can partly explain the increased social change. Botswana is the other country that has had all its cases now reaching the highest Court, and as such, all the rights so far secured may soon be firmly established, and this also explains the promising levels of social change. Kenya is following closely with a case now reaching the Supreme Court. Uganda has not had a case reaching the highest court, but has taken cases before regional courts and before courts in other countries, therefore creating precedents that bind at regional level, and exploiting the exogenous factors prevalent in the other countries to create positive change back home. Nigeria has also not had a single case reaching the Supreme Court, which is the highest court and also has less social change. Thus, all the country scenarios fit well in the above assertion.

As such, cases making it to the highest court in the land or an international court which ensures that the decisions create norms that have to be respected as they are binding on all other courts or state respectively is an important factor in ensuring that LGB strategic litigation influences social change.

6.5.2 Timing of the filing of the case

Timing is another important factor in ensuring that a case eventually leads to social change. This is Marcus *et al*'s fourth factor. A case must be filed at the 'right' time in order to be successful or even if unsuccessful, have the most impact in driving social change. The right time goes to the political opportunity structure and the legal opportunity structure. These are to the effect that strategies employed are always in line with the access that those employing them have to the political system and the legal system respectively.[69] Therefore, if an opportunity to mobilise through the political channels or the courts exists, then this should be done as such opportunities keep on shifting. It thus goes to the prevailing political-socio-economic factors as well as to the availability of evidence, proper preparation as well as exhaustion of the other available remedies.[70] It is about taking advantage of the exogenous factors and proper planning. For LGB cases, timing is even more critical due to public sentiments.[71]

68 Reference 6 of 2014 (East African Court of Justice).

69 G Fuchs 'Strategic litigation for gender equality in the workplace and legal opportunity structures in four European countries' (2013) 28 *Canadian Journal of Law and Society* 189, 192.

70 Marcus *et al* (n 1 above) 119-120.

71 For a discussion of the importance of timing in case of the USA see E Bazelon 'Why advancing gay rights is all about good timing: Lessons for same-sex marriage

In South Africa, the litigation begun with the decriminalisation challenge soon after the Final Constitution confirmed that discrimination on the grounds of sexual orientation was prohibited. Then the other cases on pertinent issues followed in sequence. In Botswana, the case of *Kanane v The State*[72] largely failed because the timing was not right as the activists simply chanced upon an on-going criminal trial to launch their decriminalisation challenge. This was at a time when the case of *State v Banana*[73] had failed in neighbouring Zimbabwe, although the successful South African case of *National Coalition for Gay and Lesbian Equality v the Minister of Justice* (The *Sodomy* case)[74] had also been decided. Indeed, when the approach was changed from seeking decriminalisation to a challenge to the refusal to register LEGABIBO, this was clearly a matter of good timing, and the case of *Attorney General v Thuto Rammoge & 19 Others* (2014) (*LEGABIBO Registration* case),[75] was eventually successful. In Kenya, timing issues were very important in the filing of the *Eric Gitari v Attorney General* (*NGLHRC Registration case*) (High Court of Kenya (the *Eric Gitari decriminalisation* case)[76] challenging the criminalisation of consensual same-sex relations, as calculations about an LGB rights friendly Chief Justice who was about to retire came into the picture.[77] Although the circumstances later changed after the case was filed, nevertheless, the calculations regarding the timing of filing were well-advised. The case of *COL & Another v Chief Magistrate Ukunda Law Courts & 4 Others*[78] was also initially wrongly timed, as there were high levels of anti-gay sentiment in the coastal area of Kenya at the time. It was only saved on appeal. In Uganda, only the case of *Victor Mukasa & Yvonne Oyoo v Attorney General*[79] and the *Adrian Jjuuko v Attorney General*[80] cases preceded the Anti-Homosexuality Bill. All the others were aimed at demonstrating the impact of further criminalisation on LGB persons, and above all the *Prof. J Oloka-Onyango & 9 Others v Attorney General*[81] case was filed just before the President had to travel to the USA for the Africa-USA summit, and this helped to turn the political winds in favour of the case.[82] In Nigeria, the

from the Supreme Court's terrible decision in *Bowers v. Hardwick*' 19 October 2012 http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2012/10/the_supreme_court_s_terrible_decision_in_bowers_v_hardwick_was_a_product.html (accessed 16 June 2018).

72 n 20 above.

73 *Banana v State* [2000] 4 LRC 621 (Zimbabwe Supreme Court).

74 1999 1 SA 6 (CC).

75 CACGB-128-14 (CA).

76 Petition 150 of 2016.

77 Interview with Eric Mawira Gitari, n 13 above.

78 Civil Appeal 56 of 2016 [2018] eKLR (*COL* case)

79 (2008) AHRLR 248 (High Court of Uganda) 22 November 2008 (*Victor Mukasa* case).

80 Constitutional Petition No. 1 of 2009 (*Equal Opportunities* case).

81 Constitutional Petition No. 008 of 2014 (Constitutional Court of Uganda) (*Anti-Homosexuality Act* case).

82 See for example 'Museveni behind gay law victory?' *The Observer* 4 August 2014.

Ebah case[83] was brought soon after the SSMPA was passed with minimal consultations and when the law was still novel and chest thumping was still ongoing, and so it was not surprising that the case failed to succeed. Therefore, all the successful cases in Common Law Africa were largely well timed, and this contributed to their success as well as eventually to social change, and the reverse is true for the unsuccessful cases.

Therefore there has been more social change where cases were brought at the right time, with South Africa leading the fray followed by Botswana, with Kenya and Uganda following and finally Nigeria. For Uganda, most of the cases were timed well, but again, Uganda's exceptional circumstances marked with low democracy and active state persecution of LGB persons as well as a lack of judicial independence contributes more to low social change.

6.5.3 The extent of elite and community mobilisation

The community plays an important role in ensuring that LGB strategic litigation cases succeed and that social change happens faster. This is because the case is seen as representing interests of persons beyond the petitioners. Community mobilisation is about both constituents and elite members of the community, all of whom have impact as regards social change.[84] Community members ensure that the courts and the general public see that the cases have not been brought by mere busybodies but by persons who have the LGB community firmly behind them. Elites, on the other hand, are crucial in changing mindsets and driving social change, and it is thus important that they join the cause.[85] For the general public, the fact that many persons identify with the cause will attract many others to do so too, as they then do not have to stand alone.[86] Therefore cases, which have had the LGB community behind them along with elites, have generally been successful and have eventually contributed to the occurrence of social change.

Many of the cases in South Africa had mass support from the LGB community but they were nevertheless criticised as not being fully inclusive, as the majority of active supporters were white people, who are a minority group, and as such they did not qualify as mass movements but rather as elitist campaigns.[87] In Uganda, there was mass mobilisation of the LGB community and allies for all the cases. The *Anti-Homosexuality Act* case[88] stands out as persons from different sectors of society were part of the case both as petitioners and

83 n 27 above.

84 D NeJaime 'The legal mobilization dilemma' (2012) 61 *Emory Law Journal* 663, 663, 666.

85 See JM Balkin Constitutional redemption: Political faith in an unjust world (2011) 182. Also see D NeJaime 'Constitutional change, courts and social movements' (2012) 111 *Michigan Law Review* 897. Also see generally D NeJaime 'Convincing elites, controlling elites' (2011) 54 *Studies in Law, Politics and Society* 175.

86 Interview with Prof. Charles Ngwena, Pretoria, 27 February 2018.

87 Oswin (n 9 above).

88 n 81 above.

also through attending court proceedings and commenting about the cases online.[89] In Kenya, mobilisation was done, but divisions over consultations between NGHRLC on one hand and the broader LGB community on the other largely affected the effectiveness of this mobilisation. In Botswana, cases have been filed without consulting others but LEGABIBO managed to reconcile tensions in the most recent decriminalisation case.[90] Community mobilisation is also connected to organising. In Nigeria, the first two cases were not consultative but the latest two involved consultations.[91] Activists in countries where there are formal broad coalitions easily mobilise LGB persons and others to attend court. On the other hand, in countries where activists are fragmented, there is usually little attention drawn to the cases. Coalitions are an important part of community mobilisation. In South Africa and Uganda, coalitions were used effectively. Court hearings were always well attended by movement members. For those where there are no effective coalitions, mobilisation is still an issue. Therefore, the difference in the extent of such mobilisation explains the difference in terms of social change.

Therefore, adequate mobilisation of members of the LGB community, as well as civil society actors and elites is important in determining the success of a strategic litigation case and how these contribute to social change.

6.5.4 The choice of petitioners

One of the factors that contributes to the success of a strategic litigation case is the nature of the persons used as petitioners in the case. Marcus *et al* refer to this as 'proper organisation of clients' and it is their first factor. The choice of which petitioners to use depends on a variety of considerations. Strategic litigation in countries that rely on multiple petitioners in the same case, as well as those that have different petitioners with different interests for different cases, usually are more successful, and usually in such cases, social change is deepened. This is because multiple petitioners also indicates more buy-in from different interested persons and groups, and thus communicates the importance of the matter to many different persons. Marcus *et al*, relying on the broader South African experience, suggest that using collective entities – organisations or movements – as petitioners is more likely to lead to success since these interested parties are well-grounded and have a direct interest in the matters being litigated.[92] However, this study adopts the view that specifically for LGB strategic litigation, the choice of petitioners depends on the nature of the case and, in certain cases, having individuals directly affected may be more

89 Jjuuko discusses the efforts taken to mobilise communities through mass media and publications. A Jjuuko (n 12 above) 403-404.

90 Bradley Fortuin and Botho Maruatone confirmed that the decriminalisation petition for example was filed without involving LEGABIBO (Interview with Bradley Fortuin and Botho Maruatone, n 34 above).

91 Interview with Pamela Adie, n 46 above.

92 Marcus *et al* (n 1 above) 111-114.

strategic than having institutions. Often, there may be a need to have faces, since invisibility of openly LGB persons in public spaces is one of the challenges with which the LGB movement has to grapple.

The persons who file the cases, or in whose names the cases are brought, are also strategically determined. The main categories of applicants identified are: a single individual; two individuals; multiple individuals; a single organisation; multiple organisations; and a combination of individuals and organisations. Single individual petitioners are less common and usually exist in circumstances where a case is brought by an individual with little consultation with other groups, as the case was in Kenya with the *NGLHRC Registration* case and the *Ebah* case in Nigeria. The community could also make a strategic decision to use only one individual who has the characteristics that would appeal to the court, as the case was in Uganda for the *Equal Opportunities* case[93], where a lawyer who did not identify as a member of the LGB community was the petitioner; and in South Africa for the case of *Satchwell v President of the Republic of South Africa and Another* (*Satchwell* case),[94] where the petitioner was a well-respected judge who was in a permanent same-sex relationship. A single individual may also be used where the matter directly affects only that one individual as the case was in the case of *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being and Another* (the *De Lange* case)[95] in South Africa, where the petitioner had been dismissed from the church as a minister because she decided to marry her same-sex partner.

Two individuals usually file together when the matter jointly affects them. An example is the *Victor Mukasa* case[96] in Uganda where the two people directly affected by the actions of the state officials filed the case.[97] Another is the case of *Du Toit and Another v Minister of Welfare and Population Development and Others*[98] (the *Du Toit* case) in South Africa, where two women in a permanent same-sex relationship brought the case for joint custody of the children of one of the partners.

Multiple individuals are more than two individuals filing a case together. Multiple individuals usually represent persons with diverse characteristics but with similar interests; or persons who have together been directly affected by a situation. This usually occurs when a matter affects a huge number of people, and those who come up as petitioners, do so to represent broader interests. This was the case in the *LEGABIBO Registration* case in Botswana, which had 18 individual petitioners. It was also the case in the case of *Kasha Jacqueline Nabagesera, David Kato Kisuule & Pepe Julian Onziema v The Rolling Stone*

93 n 80 above.
94 2004 1 BCLR 1 (CC) (17 March 2003).
95 2016 1 BCLR 1 (CC)
96 n 79 above
97 As above.
98 2001 (12) BCLR 1225 (T).

Newspaper (*Rolling Stone* case)[99] and the case of *Kasha Jacqueline Nabagesera & 3 Others v Attorney General and Hon. Rev. Fr Simon Lokodo* (the *Lokodo* case),[100] in Uganda, where all the individuals were affected by the same actions of the defendants. Another instance where multiple individuals were joined as petitioners was the case of *Minister of Home Affairs and Another v Fourie and Another*[101] in South Africa. The NCGLE and lawyers handling the case wished to ensure that it was evident that there was support for marriage of people of the same sex across the various ethnic groups that make up the diverse South African population.[102] Consequently, 18 same-sex couples, from various ethnic groups and representing all nine provinces in the country were joined as petitioners.[103] In Nigeria the case of *The Registered Trustees of the Initiative for Equal Rights & 18 0rs v. The Federal Republic of Nigeria & Anor*,[104] was brought by 19 different petitioners, although it was eventually withdrawn.

A number of organisations may agree on a particular organisation to file a case due to specific attributes such as being registered or taking the lead on legal issues in the country as the case was for Uganda in the *HRAPF* case. Two organisations are usually used to bring different perspectives to the case. The case that stands out in this regard is the *Sodomy* case, in South Africa, which was brought by the NCGLE and the South African Human Rights Commission (SAHRC), which is an independent institution created under Chapter 9 of the Constitution.

Finally, a combination of individuals and organisations usually results out of wider consultations and different interests that have to be represented. This explains the South African model of having the NCGLE filing alongside the Commission for Gender Equality and 12 individuals in the *Immigration* case[105], and the Ugandan *Anti-Homosexuality Act* case, which had ten different petitioners: eight individuals and two organisations. The major determinant of how many people are involved is the level of consultations and mobilisation in the particular country. The more extensive the consultations and mobilisation, the more actors involved.

The petitioners can further be classified into those who only come in for one case, and those that are petitioners in more than one case. Those who only come in for one case have been termed by Galanter as 'one-shotters':[106] they file one case and leave the scene. The other group of petitioners appear in different

99 Miscellaneous Cause No. 163 of 2010
100 Miscellaneous Cause No. 33 of 2012 (High Court of Uganda).
101 CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (*Fourie* case)
102 Interview with Crystal Cambanis, Johannesburg, 8 February 2018.
103 As above.
104 FHC/L/CS/1179/17.
105 2000 1 BCLR 39.
106 M Galanter 'Why haves come out ahead: Speculations on the limits of social change' (1974) 9 *Law and Society Review* 1.

cases. The 'one-shotters' are more common in countries where the levels of homophobia are relatively low, for example South Africa and Botswana. This is because in such countries, many persons would feel empowered and protected enough to bring cases without necessarily belonging to coalitions or needing to hide behind the same organisations or individuals. This partly explains why no two cases have the same petitioner in Botswana, and only two cases have the same petitioner (the NCGLE) in South Africa. For countries where the levels of homophobia are still relatively high, such as Uganda and Kenya, there are more repeat petitioners. The phenomenon of repeat petitioners points to the existence of a few spirited individuals who are in position to bring the cases due to their status as already well-known LGB persons or activists, thus lowering the risks to the individual. In some instances, it may also be because these activists have enough power and influence within their communities, and so they are usually seen as the natural choices to bring cases. In Kenya, Eric Gitari stands out in this regard while in Uganda, Kasha Jacqueline, David Kato, Pepe Julian Onziema and Frank Mugisha, the leading LGB activists in the country, as well as HRAPF the organisation that chaired the legal committee of the CSCHRCL stand out as repeat petitioners. In South Africa, the NCGLE was a repeat petitioner since it is the body under which litigation was organised. Besides the level of homophobia, the level of organising also seems to have an effect on the existence of repeat petitioners. There are more repeat-petitioners in countries with organised coalitions such as South Africa and Uganda, as the same organisations or faces are more likely to be bringing cases, while one-time petitioners would appear where there is no formal coalition, as then anyone may come up and file a case. This points more to access to resources or power in the country by specific individuals or organisations than to homophobia. The Ugandan example shows that more powerful organisations and individuals within coalitions are also the ones who appear in most cases, pointing to the role of power structures within coalitions in determining who appears as a petitioner. Indeed, being a petitioner seems to be a role that is much cherished by the leading activists.[107] For Kenya, since the GALCK has not largely been favouring litigation as a strategy, the repeat petitioners have instead been from individual organisations which view GALCK's position as gatekeeping and have therefore decided to follow their own litigation strategies.

In Botswana, Nigeria and Uganda,, there have been petitioners who do not identify as LGB. In Botswana, two of the 18 petitioners in the LEGABIBO Registration case did not identify as LGB.[108] In Nigeria, the applicant in the *Ebah* case did not identify as LGB, and this was the reason why the court dismissed the case. In Uganda, the majority of the petitioners in the *AHA* case did not specifically identify as LGB persons and represented different

107 Interview with Fridah Mutesi, n 43 above.

108 Interview with Thuto Rammoge, Petitioner, *LEGABIBO Registration* case (Gaborone, 12 October, 2017).

interest groups beyond the LGB community. Besides the three LGB activists and a gay medical doctor, there was a professor of law, two politicians – a ruling party Member of Parliament and a former leader of the opposition party in Parliament, who is also a professor of entomology and ecology; a leading media personality and activist for freedom of expression, and two mainstream human rights organisations. Another example is the petitioner in the *Equal Opportunities case*, who brought the case as a lawyer and human rights activist. The *HRAPF* case at the EACJ was brought by a mainstream organisation that operates a legal aid clinic for LGB persons. This trend is important as it shows that it is not only LGB persons who fight for LGB rights, but rather it is an issue that concerns and should indeed concern everyone.

The other notable thing about the petitioners is their race. In South Africa almost all the petitioners in all cases concerning LGB rights were white, representing the peculiar racial-economic set up of that country which has the minority white population as generally the more economically empowered and thus more visible in social-political processes than the majority black population. Prof David Bilchitz, a Constitutional Law scholar and LGB rights activist who was involved in the *Fourie* case, confirms that the LGB movement as a whole in South Africa has been run by white elite members of society and there has been little input from grassroots organisations and people of the lower classes of society.[109] On the other hand, there is total absence of white petitioners in the other four countries. This is of course understandable since the populations of these countries are by and large black, and it is only in South Africa that there is a relatively large white population. Nevertheless, there was a conscious decision to leave white people out as petitioners in cases, due to the fear of feeding into the popular belief that homosexuality is an import from the west.[110] Having black petitioners makes it clear that this is an issue that affects black people too, and that it is not a foreign agenda.

All petitioners were not paid for their role and volunteered to be petitioners.[111] Being a petitioner comes with specific challenges, particularly being exposed to the media and being marked. One individual petitioner who stood out was Thuto Rammoge who was not an activist before being the lead petitioner in the *LEGABIBO Registration* case, and was thus outed and thrown into the limelight by the media in the case. His parents got to know about his sexual orientation from the media. He was aware that all this would happen, but he did so because he believed in the cause and thought that being part of the case was

109 Skype interview with Prof David Bilchitz, Director of the South African Institute for Advanced Studies in Constitutional, Human Rights, Public and International Law, University of Johannesburg, 10 July 2018.

110 Interview with Dr Chris Dolan (n 55 above).

111 Interview with Thuto Rammoge, n 108 above; phone interview with Anna-Marié de Vos, petitioner, 24 November 2017; interview with Eric Mawira Gitari (n 13 above); interview with Frank Mugisha, Executive Director, Sexual Minorities Uganda, 27 July 2017, Kampala; interview with Caine Youngman (n 16 above).

for the good of himself and everyone else.[112] In Uganda, ruling party Member of Parliament, Fox Odoi was not re-elected to Parliament, perhaps due to his participation in the *AHA* case.[113] Crystal Cambanis, a seasoned human rights lawyer from South Africa, noted that exposure to the media usually takes a huge emotional toll on the petitioners, and therefore there was need for support to the petitioners from both the broader community and their lawyers.[114]

For Common Law Africa, in South Africa and Botswana where there were rarely repeat petitioners, there is more social change compared to Uganda and Kenya, where activists are routinely repeat petitioners. Again, strategic litigation in these two countries also tends to use more petitioners with different capacities and interests than strategic litigation in Kenya and Uganda. Comparing these two countries, strategic litigation in Uganda does tend to use multiple petitioners more often than Kenya, which reveals the importance of using multiple petitioners with different interests to ensure the success of LGB strategic litigation and eventually to achieve more than superficial social change. Nigeria however stands on its own as it has only used individual petitioners, but not repeat petitioners. This goes to the mode of organising and collaboration, and in this sense corresponds to the low levels of social change in that country.

Therefore, the nature of petitioners used in a case as well as the avoidance of repeat petitioners makes it easier for cases to be won and for different interests to be represented and presented which also helps to spur social change.

6.5.5 The nature of the respondents

State institutions as well as private individuals are targeted as respondents, the likelihood of the resultant decision prompting social change is high. Whereas states usually are the right entities to target, as they are the primary duty bearers, sometimes it pays dividends to also target individuals outside the state who are responsible for human rights violations. This helps to isolate them, but also to act as a cautionary tale to others that it is not acceptable to violate the rights of LGB persons. Even if such a case was not successful, the fact that someone can be taken to court to account for violations against LGB persons sends a clear message to others in the same position. Its only downside is that it also gives a platform to the violators to adopt the posture of victim and claim that they are being persecuted, and this may lead to backlash as happened in Uganda when Pastor Sempa claimed that he had been sued in the USA by 'gays' when in reality he had been subpoenaed to appear and testify in a US court in the *Scott Lively* case.[115]

112 Interview with Thuto Rammoge (n 108 above).

113 See for example 'Pro-gay MP Fox Odoi booed at Oketcho burial' *The Observer* 28 April 2014. Interestingly however, Prof. Ogenga Latigo, a former leader of the opposition in Parliament who had lost his seat in the last election, regained it after the case.

114 Interview with Crystal Cambanis (n 102 above).

115 Interview with Frank Mugisha (n 111 above).

In all the selected countries, almost all the cases are brought against the state or its agents, including state bodies with their own legal personality. The South African cases were mainly against specific state institutions or officials responsible for the violations.[116] Only two cases were brought against non-state institutions: the Methodist Church[117] and the Dutch Reformed Church.[118] In Uganda, most of the cases were against the state or its agents, with the *Rolling Stone* case as an exception, as it was against a private media house and its editor, as well as the *Scott Lively* case which was against an individual US citizen. The *Lokodo* case included Rev. Simon Lokodo, the Minister of Ethics and Integrity in his personal capacity, in addition to the Attorney General. In Kenya, all the cases are against the state or state agencies, and this is the same with Botswana as well as Nigeria. Targeting the state is important since the constitutions impose a duty on the state and all its agencies to fulfil, protect and respect human rights. The approach of targeting state officials and institutions with corporate personality is also important because such officials are singled out and, where they are targeted in their individual capacities, they have to appear in court and handle their defence rather than hide behind the Attorney General. Going against them in their personal capacity in situations where they exceed their mandate is also critical for purposes of preventing the abuse of office and power. Interestingly, in almost all cases, the state defends the cases, even when the laws or actions challenged are clearly unconstitutional. For the case of South Africa, it was to the great surprise of the lawyers and others involved in handling the cases that the African National congress (ANC) government actually opposed the *Sodomy* case,[119] as well as every other LGB strategic case after that.[120] Such a step seemed to be out of line with the strong human rights agenda which the party and its leaders supported prior to 1994, and many had simply considered the LGB strategic cases to be routine measures to bring the laws of the country in line with its new, transformative Constitution.

Therefore, the choice of respondents is important in influencing the extent of social change. Inclusion of state actors, state officials in their official and personal capacities as well as private individuals where applicable as respondents is important to ensure success and more social change. All the countries have had the state and its organs as the respondents in the majority of cases, but also included other respondents in their official and private capacities, with varying degrees of success. This implies that the differences in social change are largely attributable to factors other than this one

116 These included the President in the *Satchwell* case (n 94 above).
117 The *De Lange* case (n 95 above).
118 *Gaum* case (n 64 above).
119 n 74 above.
120 Interview with Crystal Cambanis (n 102 above).

6.5.6 The involvement and the nature of third parties in the case

The involvement and nature of third parties in the cases, including interveners, *amici curiae* or interested persons, depending on the jurisdiction concerned is important to LGB strategic litigation influencing social change. Public interest cases have long moved from being about two parties to involving multiple parties.[121] Among these multiple parties are interveners, *amici curiae*, and interested parties. Interveners are persons not otherwise involved in a case, who are allowed to submit specialised information of expertise to the court supporting one or the other of the main parties.[122] *Amici curiae* are 'friends of the courts'. They apply to join cases as *amici curiae* in order to help the court to resolve the issues in the case.[123] Interested parties can be either amici curiae or fall in their own category depending on how the jurisdiction classifies them. It has been noted that amici applications have become important in human rights cases today,[124] and indeed this is so also for LGB cases. Third parties are usually allies or opponents that join the case to argue for one side. These therefore indicate to the court the importance of the matter at hand and therefore give more weight to the case,[125] but some also come with reputations which help to bolster the parties, although some can just as easily bring down a party's case. When drawn from allies, third parties come in to support the LGB groups and this shows that many more persons beyond the applicants are concerned and affected by the violations. Therefore, how interveners are involved and keeping them on one's side is an important factor in ensuring the success of the litigation and eventually ensuring that the case achieves the desired social change.

Some cases have had parties applying as interveners in order to join the cases. This is more common in Kenya and South Africa, less so in Botswana, and Uganda and has not yet been done in Nigeria. This perhaps has to do with individual country constitutions and the PIL culture that has developed around them, which makes different parties feel free to intervene in different cases. Nigeria for one still has *locus standi* requirements which is what failed the Ebah case. South Africa stands out with the highest number of *amici curiae* in LGB strategic cases, with six separate *amici curiae* in three cases.[126]

121 S Bandes 'The idea of a case' (1990) 42 *Stanford Law Review* 227, 250–55. Also see also A Chayes 'The role of the judge in public law litigation' (1976) 89 *Harvard Law Review* 1281, 1282–84.

122 The Public Law Project 'Third party interventions – A practical guide' (2008) 3.

123 The term '*amicus curiae*' literally translates as 'friend of the court.' This however is largely deceptive as *amici curiae* go way beyond being friends of the court to being advisors of the court. See JC *Mubangizi* & C *Mbazira* 'Constructing the *amicus curiae* procedure in human rights litigation: what can Uganda learn from South Africa?' (2012) 16 *Law Democracy and Development Law Journal* 199.

124 Mubangizi & Mbazira, above.

125 JJ Karastelev 'On the outside seeking in: Must interveners demonstrate standing to join a lawsuit?' (2002) 52 *Duke Law Journal* 455-456.

126 In the *Du Toit* case, the Lesbian and Gay Equality Project was admitted as *amicus curiae*.

There were two sets of interveners in the case of *Gory v Kolver NO & Others* (the *Gory* case).[127]

Kenya follows with 10 interested parties and two *amici curiae* in the *EG v JM* case, as well as three interested parties in the *NGLHRC Registration* case, and one *amicus curiae*.[128] This makes Kenya to have the most contested case among the selected Common Law countries. The interveners in the *NGLHRC Registration case* were the most surprising. This is because these were: Audrey Mbugua, the Director of Transgender Education and Advocacy; and Daniel Kandie, a father of an intersex child who both opposed the application on the grounds that registering the organisation would lead to a confusion of sexual orientation and gender identity issues yet the two are distinct. This was a rather surprising intervention, which indicated division between the members of the broader LGBTI community in Kenya or a lack of adequate consultation.

In Uganda, the Inter-Religious Council and two other entities applied to join the *AHA* case on the side of the respondents in order to handle the defence of the petition.[129] However, there was no time to hear them before the main petition was decided.[130] Uganda also had one *amicus curiae* joining the *HRAPF* case.[131] Botswana had LEGABIBO joining as *amicus curiae* in the *LEGABIBO Registration* case. Nigeria has so far had no case with third party interventions.

The role of religious groups in opposing such cases ought to be noted, as it illustrates the role of these groups in accelerating hate against LGB groups in the name of religion. The Transgender Education and Advocacy (TEA) opposition in Kenya to a case seeking registration of an LGB organisation shows that interveners can also be persons within the same movement seeking to push their agenda not only separately but also in a way that curtails progress for others. When admitted, the interveners make submissions which, although helping the court to reach a decision, are usually more helpful to one party or the other. Almost half of the *amici* applications have been supportive of

In the *Fourie* case there were three *amici*: Doctors For Life International, John Jackson Smyth and Marriage Alliance of South Africa and in the *De Lange* case, Freedom Of Religion South Africa (FOR SA) had applied to join as *amicus* but were not allowed as they had brought new matters. The *Gaum* case had two *amici curiae* – the Commission for Gender Equality and the Alliance Defending the Autonomy of Churches in South Africa.

127 2007 3 BCLR 249 (CC).

128 The interested parties were Audrey Mbugua and Daniel Kandie, while the *amicus curiae* were the Katiba Institute.

129 Inter Religious Council of Uganda (IRCU), the *Family Life Network and the Uganda Centre for Law and Transformation v The Attorney General of Uganda & 10 Others*, Miscellaneous Constitutional Application No. 23 of 2014.

130 See A Jjuuko & F Mutesi 'The multifaceted struggle against the Anti-Homosexuality Act in Uganda, in N Nicol *et al Envisioning global LGBT human rights: (Neo) colonialism, neoliberalism, resistance and hope* (2018) 342.

131 This was UNAIDS which was admitted in the *HRAPF* case (n 68 above) at the East African Court of Justice.

the LGB groups and the other half have not. There has been at least one supportive *amicus curiae* for each of Botswana, Kenya, South Africa and Uganda. *Amici curiae* that tend to be supportive of LGB positions are usually organisations that work on democracy or human rights, while those that do not support LGB rights positions are largely conservative groups, particularly religious groupings.

In South Africa, where most of the third party interventions were mostly on the side of LGB groups, there is more positive and increased social change. For Kenya however, despite the high number of interveners on the side of LGB groups, social change is so far less. This therefore comes as a surprise but it is explained by the fact that one case had an overwhelming number of intervenors and so they were not as spread out as in South Africa. Kenya also in particular had interveners who opposed the cases, and the fact that social change is limited points to interveners who are against LGB groups derailing the case and delaying social change. Also six of the individual interveners were saying exactly the same things and did not file separate affidavits which basically condenses them into one. Botswana had LEGABIBO being admitted as *amicus curiae* and its submissions in support of the petition relied on by the judges for a favourable decision. Botswana is ahead of Kenya and Uganda as regards social change. Nigeria has no third party interventions and thus fits in with the assertion that the number and nature of interveners matters in terms of determining the ability of LGB strategic litigation to stimulate social change.

Therefore, the extent and nature of third party intervention in a case is an important factor contributing to the case's success but also its significance beyond the court verdict. As such, the presence of interveners and *amici* that are supportive of LGB rights helps to ensure success of a case and eventually social change.

6.5.7 The nature of lawyers handling the case

Lawyers make legal arguments before the judges, and they bring more than legal arguments and pleadings, as they also bring their personal relationships with the judges, their reputations and beliefs. The nature of lawyers speaks to Marcus *et al*'s fifth factor: research. Therefore, the choice of lawyers who argue cases before the judges is an important factor, not only in ensuring the success of the case, but also in convincing the general public that the cause for which the lawyer stands is right, thus contributing to social change. As such, lawyers who have specialised in human rights or who otherwise have experience handling a multiplicity of cases, may come in handier as lead lawyers in such cases. Cause lawyers or lawyers who identify as LGB or who specialise in handling LGB cases are more suited to handle such cases, but there is also the added advantage of using lawyers in private practice who have had years of experience. International lawyers tend to have much to offer where a comparative perspective is needed. The lawyer should be able to

work well with the clients and to follow instructions as usually lawyers largely see matters through 'rights claims' lenses.[132] The choice of the lawyer/s to use therefore depends on the circumstances surrounding the case and the jurisdiction. In most cases, a multiplicity of lawyers bringing in different skillsets is what is needed.

There are three categories of lawyers involved in the cases that have been filed in the selected countries: lawyers in private practice, 'community' lawyers and international lawyers. Lawyers in private practice are those lawyers working in private law firms and who handle a wide array of cases beyond LGB issues. These are the most common lawyers in LGB litigation in Common Law Africa. Despite being lawyers in private practice, they are usually selected because of their experience, closeness to the LGB community or the key individuals therein, respectability, and because of their social and political standing. They charge 'pro bono' rates for LGB cases, which are lower than the rates that they would ordinarily charge for other cases. The rates are mostly negotiable and the lawyers usually take what the clients are able to pay. In South Africa, the attorneys' firm of Nicholls Cambanis & Associates handled several cases for the NCGLE,[133] and would thus instruct advocates who were experienced in constitutional law and sympathetic to the cause. Advocates would frequently do the cases on a pro bono basis. Attorneys would often also do cases pro bono and only received funds to cover disbursements and administrative expenses in running their cases.[134] In Uganda, renowned human rights lawyer Ladislaus Rwakafuuzi has handled most of the cases on the instructions of the CSCHRCL and HRAPF, or by the individual petitioners.[135] Onyango Owor, and Caleb Alaka are the other lawyers in private practice who have handled LGBT cases. In Kenya, Sande Ligunya, a lawyer in private practice, has handled all the cases brought by Eric Gitari/NGLHRC.[136] In Botswana, DG Boko, a lawyer in private practice, handled the *Kanane* case;[137] while Unity Dow and LN Nchunga handled the *LEGABIBO Registration* case[138] and Tshiamo Rantao handled the Letsweletse Motshidiemang case. In Nigeria, Enahoro Mike Ebah has handled all the four LGB cases.

132 SA Scheingold *The politics of rights: Lawyers, public policy, and political change* (1974) 3-10.

133 The law firm is well entrenched in the history of LGB rights in South Africa for its work on leading cases. Two of its partners, Caroline Heaton-Nicholls and Crystal Cambanis, were anti-apartheid activists. See N Hoad *et al* (eds) *Sex and politics in South Africa* (2005) 9, 246.

134 Interview with Crystal Cambanis (n 102 above).

135 He has handled four decided cases: *Victor Mukasa* case; *Equal Opportunities* case; the *Anti-Homosexuality Act* case; and the *HRAPF* case. He is currently handling the *Lokodo* appeal; and the *SMUG registration* case.

136 *NGLHRC Registration* case; *COL* case; and the *Kenya Decriminalisation case*.

137 The *Kanane* case (n 20 above).

138 The *LEGABIBO Registration* case (n 75 above).

The 'community lawyers' are lawyers who work for organisations or coalitions as in-house lawyers. This model was used in Uganda where the Legal Committee of the Coalition, made up of in-house lawyers working for the different organisations, actively worked on developing and handling the cases.[139] It was also used in South Africa where the Legal Resources Centre, which is a public interest law firm, used to instruct advocates to represent clients in the cases.

International lawyers are those based in countries other than the Common Law African countries under analysis. Lawyers from INTERIGHTS in the UK, and from the Human Dignity Trust again based in the UK, the International Commission of Jurists based in Geneva, and SALC based in South Africa have all directly advised on litigation in Uganda. SALC has also been active in Botswana. The inter-country collaboration of lawyers is well-developed in the East African region with Kenyan, Ugandan and Rwandan lawyers exchanging ideas and lessons on LGB cases.[140] The lawyers who represented SMUG in the *Scott Lively* case, from the Centre for Constitutional Rights in the USA, worked with HRAPF and other lawyers in Uganda on the case. In Nigeria, the Initiative for Strategic Litigation (ISLA) lawyers supported the *TIERS* case.

There are differing benefits in using the different types of lawyers, depending on the nature and stage of the case. Community lawyers are more important at the overarching strategy stage, international lawyers at the pre-litigation phase while lawyers in private practice are key at the litigation stage, and in the post-litigation period. The main benefit of using community lawyers is that they understand the issues well as this is usually their day-to-day work and in most cases also their passion, while lawyers in private practice are usually detached from the community and may not fully understand the issues, and in some cases may not even want to be identified with the clients.[141] In practice, all three categories of lawyers are often used simultaneously during the cases although those arguing the cases in court are the ones that get to appear in the court records. The community lawyers help to mobilise people and do research, while international lawyers advise on the international perspectives.

Activists that use a combination of experienced lawyers in private practice, community lawyers and international lawyers have had more successes in litigation and more social change. Activists in South Africa fall in this category, and so do those in Botswana. Those in Kenya, Nigeria and Uganda generally use lawyers in private practice and the rates of social change there are not to the level of South Africa and Botswana. As such having different types lawyers who are experienced and knowledgeable on LGB issues, and who can

139 For more details about the Legal Committee see Jjuuko & Mutesi (n 130 above).

140 For example the *HRAPF* case, involved regional meetings of lawyers and activists. Interview with Fridah Mutesi, n 43 above.

141 Interview with Frank Mugisha, n 111 above.

do proper and quality research, relate well to the community and the judges and make effective arguments helps to lead to successful litigation which in turn helps to stimulate social change.

6.5.8 The nature of the legal and factual arguments raised during the hearing of the case

Preparation of the arguments to make before court is of paramount importance if a case is to be won. The arguments help to 'characterise' the case and determine how the case is viewed by the court and the public; an issue that Marcus *et al* regard as their sixth factor among factors that are crucial for the success of strategic litigation.[142] As regards LGB litigation, currently the best arguments to make before court are human rights arguments as the likelihood of success is high but it also directly characterises the case as a human rights case. The rights to privacy, dignity, and non-discrimination are very important and have been used successfully in many different cases. Also discussing the limitation clause is very important as this is usually relied on to limit rights. Procedural aspects are also other grounds that should be well considered and addressed. Indeed, an analysis of the different LGB decisions in the US courts found that they were all grounded in proper legal analysis rather than simply being a result of judicial activism as many have attempted to brand such cases.[143] Therefore properly researched and well framed legal arguments are critical to how a case is perceived and how the judges come to decide it.

For the selected countries, the majority of the decided cases were determined based primarily on human rights arguments. The only exceptions are the *AHA* case and the *HRAPF* case in Uganda; and the *De Lange* case in South Africa, which, although filed based on human rights arguments, were decided on the basis of other issues. The primary human rights principle relied upon in the majority of cases is the right to equality and freedom from discrimination. In South Africa, it is the primary ground upon which the majority of the cases were decided.[144] This is based on the fact that sexual orientation is a protected ground against discrimination in the South African Constitution. The equality ground has also succeeded in Kenya[145] and Botswana[146] despite the absence of express protection in the Constitution. It has, however, not largely been relied upon in Uganda despite the fact that it has been raised in almost all cases. Ugandan courts tend to rule on the basis of other rights other than the right to freedom from discrimination on the basis of sexual orientation.[147] The other

142 Above, 121-122.

143 See generally, SJ Becker 'The evolution toward judicial independence in the continuing quest for LGBT equality' (2014) 64 *Case Western Reserve Law Review* 863.

144 All the cases with the exception of the *De Lange* case (n 90 above) had this right as the primary ground upon which they were decided.

145 This was in the *NGLHRC Registration* case (n 76 above).

146 The *Letsweletse Moshidiemang* and *LEGABIBO Registration* cases.

147 It was only discussed by the judge in the *Lokodo* case but the court found that the limitation was justifiable. See *Lokodo* case (n 100 above) 22-23.

right that is usually relied upon is the right to dignity, which has found favour in all countries: Botswana,[148] Kenya,[149] Nigeria,[150] South Africa,[151] and Uganda.[152] The right to privacy was also successfully relied upon in South Africa despite the earlier reservations expressed by Edwin Cameron,[153] which were also discussed and dismissed in the *Sodomy* case as being applicable to the period in which they were made.[154] The right to equality and freedom from discrimination has been used in South Africa most recently in the *Gaum* case, and in Botswana in the *Botswana Decriminalisation case*.[155] The right to freedom of expression has been relied on in the registration cases in Kenya[156] and Botswana,[157] while the right to a fair trial argument has succeeded in Uganda.[158] In Nigeria, the other successful grounds were on personal liberty, and freedom of movement.[159] The *Ebah* case focused on the right to assembly and the right to freedom of association.

The counter-argument to the human rights arguments in these cases is 'limitation of rights'. All constitutions create standards according to which rights may be limited. Human rights of one person or group oftentimes have to be balanced against the human rights of others and can furthermore be limited by the law if predetermined conditions are met. It is up to the courts to ensure that the limitation of a right or the balancing of rights is carried out in accordance with the spirit of the country's constitution. The respondents usually use these limitations to convince the courts to limit the rights, and indeed some courts have done so. The most notable cases are: the Kenya *Decriminalisation* case where the judges looked at the broad scheme of the Constitution and found that it was in line with continued criminalisation of same-sex relations; the *Lokodo* case in Uganda where the judge held that the criminal law was a limitation to the right to freedom of association; and the *Kanane* case in Botswana, where the court referred to public opinion in refusing to apply the right to equality and freedom from discrimination. It also met with success in the *COL* case[160] in Kenya at the High Court level, where the right to dignity had to be balanced with the need for criminal investigations where same-sex conduct is criminalised. In Nigeria, it was used to justify the refusal to register Lesbian Equality and Empowerment Initiatives (LEEI).[161]

148 The *Botswana Decriminalisation* case, n 21 above.
149 It was relied on in the *NGLHRC Registration case*, n 46 above.
150 The *Orazulike* case (n 28).
151 It was based on in the *Sodomy* case; *Fourie* case; and the *Du Toit* case.
152 It was relied on in the *Victor Mukasa* case and the *Rolling Stone* case.
153 Cameron (n 10 above) 450, 464.
154 The *Sodomy* case, n 74, Above Paras 29-32.
155 The *Botswana Decriminalisation* case (n 21 above).
156 *NGLHRC Registration* case (n 76 above).
157 *LEGABIBO Registration* case (n 75 above).
158 The *Equal Opportunities* case in Uganda (n 80 above).
159 The *Orazulike* case (n 33 above).
160 n 78 above.
161 The *Pamela Adie* case (n 29 above).

Besides the human rights arguments, courts have also relied on other legal grounds including procedural aspects to find in favour of LGB groups. In Botswana, flouting of administrative procedures was used as another ground to find the actions of the Registrar to be unconstitutional.[162] In Uganda, the *Anti-Homosexuality Act* case was decided solely on the basis of the unconstitutional procedure followed in the passing of the Act and the human rights grounds were not considered by the Court.[163] The courts have also used justiciability issues to dismiss cases. In two of the cases considered, the preliminary question of justiciability was not answered favourably and the courts subsequently did not delve deeply into the merits of the matters. In the *HRAPF* case, the EACJ decided that the case was not justiciable on the basis of mootness since the Constitutional Court of Uganda had already nullified the AHA. The Court did not consider whether or not the actions of the government of Uganda, in passing a law that intensified homophobia, contravened the principles of the EACJ Treaty. However, the Court's attitude, expressed in its handling of the question as to whether or not the 'public interest exception' should apply in order to enable the Court to hear a moot matter, was in no way encouraging and played down the severe discrimination and danger faced by the LGB community in East Africa.[164] The *De Lange* case in South Africa's Constitutional Court was dismissed on the preliminary ground that the applicant failed to show good cause as to why she set aside an arbitration agreement that was reached before the case was instituted in the lower courts.[165] The *Ebah* case in Nigeria was dismissed on the basis that the applicant did not have the standing to sue. In all these cases, the courts conveniently used procedural grounds to avoid hearing the more controversial substantive matters raised.

Therefore, the nature of arguments made is an important factor, and reliance on human rights arguments is a good strategy in ensuring success of cases, and eventually spurring social change.

6.5.9 The nature of the prayers made

The nature of the prayers made before court also influence the success of the case and eventually social change. Prayers guide the judges on what to do in case they find in favour of a party. Usually, the judges will not grant prayers that have not been asked for. Remedies such as 'reading in' and nullification of laws are usually criticised for violating the principle of separation of powers, and for being counter-majoritarian, and as such judges may not be eager to issue them unless specifically asked by the parties.

162 *LEGABIBO Registration* case.
163 *The Anti-Homosexuality Act* case (n 80 above).
164 *HRAPF* case, n 68 above, para 60.
165 *De Lange* case, n 90, para 30.

For the selected countries, the lawyers in the different countries pray for different orders, depending on the jurisdiction. For South Africa, the prayers made are usually specific: declarations, and remedies such as 'reading in,' and statutory interdicts. This is also largely because of the unique nature of the South African Constitution which allows for such remedies to be prayed for. For other countries, the prayers are usually framed around declarations, for example for nullity of the laws, and for damages and costs as well as 'any other remedies as the court deems fit'. These are common in Botswana, Kenya, Nigeria and Uganda where constitutions do not go into details on what orders can be asked for. This also explains why South Africa has been able to achieve impressive legal change and made important steps towards significant social change. This has not influenced the other countries that much as the courts usually only issue declarations which can easily be ignored.

Therefore, how prayers for remedies are couched and what is asked for is important in determining the success of LGB strategic litigation and eventually social change.

6.5.10 The extent of judge mapping

Whereas lawyers make arguments, judges take the decisions. Therefore, knowing the backgrounds and dispositions of the judges and whether the judges are generally liberal or conservative is important in determining the success of cases and anticipating how the cases will eventually change public perceptions and opinions. According to Dugard and Langford, the outcome of a case depends ultimately on the judge, and this is what makes judicial mapping important.[166] This is in line with the legal realist position that judicial decisions determine what the law is.[167]

LGB issues are usually met with very conservative societal views. As members of society themselves, judges are biased by their own belief systems and values, and therefore it becomes critical that judges who are more open to LGB issues should be identified. It should be noted that it is not always guaranteed that a particular judge will rule in a particular way, but nevertheless general trends can be studied and mapped. If the judges are mapped well, then the parties can more easily strategise on how to approach the judges and which arguments to raise, and also, where possible, to do forum shopping in order to find the best court in which to file the case. It must be noted however that parties will not always be in a position to know which judge out of a large pool of judges will be assigned to hear a case. In Kenya, for instance, this is done more easily as the various High Courts have a specific Human Rights Division to which only particular judges are assigned. The judges who will hear a human rights case filed in the Kenyan High Court are therefore narrowed down. Apex

166 n 2 above, 63.

167 For a deeper analysis of legal realism as a theory of law see MS Green 'Legal realism as theory of law' (2005) 46 *William & Mary Law Review* 1915.

courts, such as the Supreme Court of Kenya and the Constitutional Court of South Africa, will require a large coram of judges to sit on a particular case and the parties will not be able to know ahead of time which particular judge will be assigned to write the judgment. Precise mapping for a specific judge would not be possible and parties could only work with the dispositions of the various judges that occupy the bench of the particular court at the time the case is instituted. Precise judge mapping is perhaps of lesser importance when it comes to apex courts since individual judges, may pen judgments with which the majority of the bench could concur. The disposition of all the judges on a large bench should thus be taken into account.

An important factor in determining the success of litigation is the value system, background, and worldview of the judges hearing the cases. Many of the judges on the South African Constitutional Court who authored some of the ground-breaking decisions on LGB rights in Common Law Africa played important roles in the anti-apartheid struggle. Most of the lead judges on these cases, such as Lourens Ackermann (the *Sodomy* case), Albie Sachs (the *Fourie* case), Kate O'Regan (the *Satchwell* case), Thembile Skweyiya (the *Du Toit* case) and Pius Langa (the *Gory* case) as well as members of the coram in many of those judgments for example Justices Dikgang Moseneke, Edwin Cameron and Richard Goldstone were all active in the anti-apartheid struggle in one way or another, and have a record of careers in which they displayed respect for human rights of all.[168]

In Uganda, Justice Arach Amoko, who authored the *Victor Mukasa* decision, is a highly respected judge, and currently a justice of the Supreme Court of Uganda. The judge in the *Rolling Stone* case, Kibuuka Musoke J, is a respected Ugandan judge, known for making independent decisions even when they are not in line with the ruling party's position.[169] As for the *AHA* case, Ugandan Deputy Chief Justice at the time, Steven Kavuma, who led the panel of judges, is a career politician who, during his tenure as Deputy Chief Justice, was known for 'toeing the party line'.[170] Therefore, the apparently progressive decision reached in that case may not have much to do with the progressive stance of the judges but rather the political need to get rid of a law that had made Uganda a pariah state. The fact that the decision was hurriedly made, even against the wishes of the Attorney General who wanted the hearing postponed, and at a time when

168 For brief biographies of the first bench of the newly created Constitutional Court, see N Bohler-Muller, M Cosser & G Pienaar (eds) *Making the road by walking: The evolution of the South African Constitution* (2018) 19-24.

169 He for example stopped a recount of the votes in the highly politically charged Mbarara municipality parliamentary votes in 2011, which the ruling party candidate had requested in *Byanyima Winnie v Ngoma Ngime* (Civil Rev. No. 9 Of 2001) [2001] UGHC 92 (17 July 2001). Also see 'High Court judge opts to retire early' Daily Monitor 9 September 2014.

170 See for example 'Political judge Steven Kavuma, a disgrace to justice' The Spear 25 February 2017. http://thespearnews.com/2017/02/25/political-judge-steven-kavuma-disgrace-justice/ (accessed 16 January 2017).

the President was due to attend the US-Africa Summit in the US, shows a link between the decision and the President's positive reception at the summit.[171]

In Kenya, Justice Isaac Lenaola and Justice Mumbi Ngugi are both well-known for being liberal and progressive and their judgments in the *NGLHRC Registration case* reflect this outlook. Justice Lenaola opines that human rights should be at the centre of the judicial system.[172] None of these judges sat on the bench that decided the *EG & JM* cases. In Botswana, Justice Leburu who led the panel that decided the *Botswana Decriminalisation case* was described as humble and intelligent,[173] and indeed his judgment in the case did not disappoint. Justice Rannowane who decided the *LEGABIBO Registration* case is known as an independent judge who has made decisions against the ruling party's position.[174] In Nigeria, the judge who decided the *Ebah* case, the now Chief Judge of the Abuja Federal High Court, Justice Karafati is a controversial judge who was the subject of an investigation and who has delivered rulings regarded as controversial.[175]

Therefore, in many of the cases, the school of thought that the judge generally subscribes to is reflected in their judgments. However, despite this, where the constitution is very clear, such as the case is in South Africa, there is little wiggle-room for judges not to find in favour of LGB rights.[176] Even in Botswana, Kenya, and Uganda, where the Constitution does not expressly protect against discrimination on the basis of sexual orientation but uses phrases like 'every person', judges have in many instances found in favour of LGB rights using such provisions. Nevertheless, there have been instances where judges have used the absence of express protection of sexual orientation as a ground of discrimination and the limitation provisions in order to justify their decisions not to realise the rights of LGB persons. This was the course of action taken by the courts in the Kenyan *EG & JM* cases and in the *Lokodo* case in Uganda and the *Kanane* case

171 For discussions around the real motive behind the passing of the law see for example 'Museveni behind gay law victory?' *The Observer* 4 August 2014. For the process of hearing the petition, see Jjuuko & Mutesi, n 130, above.

172 Interview with Justice Isaac Lenaola, Nairobi, 27 July 2017.

173 See for example 'The humble Justice Leburu' Mmegi online 29 Jan 2010 http://www.mmegi.bw/index.php?sid=6&aid=10&dir=2010/January/Friday29 (accessed 6 September 2019).

174 See 'Is Khama right on the Independence of our Judiciary?' *Weekend Post* 17 August 2015 https://weekendpost.co.bw/wp-column-details.php?col_id=187 (accessed 16 January 2018).

175 See for example 'Nigeria: The controversial Kafarati' AllAfrica.com, 22 January 2014, https://allafrica.com/stories/201401230270.html (accessed 20 October 2019). Also see 'Justice Abdul-Kafarati sworn in as Chief Judge of the Federal High Court' Sahara Reporters, http://saharareporters.com/2017/09/16/justice-abdul-kafarati-sworn-chief-judge-federal-high-court (accessed 20 October 2019).

176 It has been established before that where the law is clear and unambiguous, it is the law that dominates and not the judge. See generally, A Orley *et al* 'Politics and the judiciary: The influence of Judicial background on case outcomes' (1995) Cornell Law Faculty Publications, Paper 417.

in Botswana. In Nigeria, reliance was on the grounds of standing in the *Ebah* case and the SSMPA in the *Pamela Adie* case. At the end of the day it is the judge that interprets and therefore gives meaning to the constitution.

In South Africa, where cases were filed in the euphoria of the move from apartheid to democracy, and after activist judges had been appointed to the new Constitutional Court, the litigation was successful, and clear headway is still being made towards social change. It was more about the general spirit of the times rather than specifically about judge mapping. Botswana and Kenyan activists filed cases when the timing was good. Kenyan activists deliberately filed cases targeting more progressive judges, in a more favourable context brought about by the introduction of the new Constitution characterised by an altered judicial system and more independent judges. Botswana activists took the disposition of the judges into account when developing the *LEGABIBO Registration* case and allowed the bench to rule on clear constitutional issues without having to make declarations about LGB rights. Ugandan activists were largely reactive to developing situations and filed cases without deliberately aiming at any particular judges and indeed, the rate of victory in Uganda is reducing, and the level of social change is still low. As such, judge mapping is important for court victories. In Nigeria, the *Orazulike* case deliberately left out the applicant's sexual orientation as a way of avoiding the possibility of the judge going into issues of sexual orientation and the SSMPA.[177]

Therefore, judicial mapping is an important factor determining the success of LGB strategic litigation, although not very significant in all cases.

6.5.11 The incidence of costs

Awarding costs against public interest petitioners inhibits litigation,[178] and thus dims the prospect of successful strategic litigation. Therefore, avoiding being ordered to pay costs is important if litigation is both to continue and to lead to social change. Costs are used to penalise a party that loses a case or wastes the court's time. If condemned in costs, a public interest litigant can easily become insolvent, and others may fear to be involved in litigation lest they face the same fate. Costs are usually part of the pleadings, and the court deals with them in the final part of the judgment.

The trends on costs in LGB litigation in Common Law Africa have not been uniform. In South Africa, the rule is that in constitutional litigation between a private party and the state, if the government loses it is to pay the costs of the other side but if the government wins, each party is to bear its own costs.[179] In Uganda, the rule is that costs follow the event, except where the judge

177 Skype Interview with Mike Ebah, n 66 above.

178 See C Tollefson, 'When the "public interest" loses: The liability of public interest litigants for adverse costs awards' (1995) 29 *University of British Columbia Law Review* 303.

179 *Affordable Medicines Trust and Another v Minister of Health and Another* [2005] ZACC 3.

decides otherwise considering the circumstances.[180] Indeed, in LGB strategic litigation, despite the CSCHRCL taking a deliberate decision not to ask for costs in many of the cases, the main trend is that costs have been awarded in almost all cases where the LGB community has won. Similarly, in the *Lokodo* case, costs were awarded to the state and a minister against the petitioners. In Kenya, the rule has been that all parties settle their own costs and the court upheld this even in the recent *EG & JM* case. In Botswana, the courts did not make orders as to costs in *Kanane* and the *LEGABIBO Registration* case. However, in the *LEGABIBO Registration* appeal, costs were awarded against the state. In Nigeria, the respondents were to pay the costs of the applicant in the *Orazulike* case. In the *Pamela Adie* case, no order as to costs was made.

Apart from the Ugandan case, costs have not been awarded against unsuccessful petitioners, and yet in some cases they have been awarded against the state, mostly where the state loses. This is a good practice, and the isolated trend of awarding costs against public interest litigants should be addressed through advocacy as the effect on such litigants is usually to deter them from further litigation.

Where the rules on costs favour LGB strategic litigation, such as the case is in South Africa, Botswana and Kenya, LGB strategic litigation is thriving and social change is progressively happening. For Uganda however, where the strategic cases are largely treated as any other case, not much progress has been made in terms of social change.

Therefore, where costs are not awarded against LGB petitioners, LGB strategic litigation is more likely to thrive and this therefore is one of the factors that determine LGB strategic litigation leading to social change.

6.5.12 The extent to which the cases are supported by advocacy efforts

Litigation in isolation from advocacy, media exposure and broader social mobilisation is unlikely to lead to social change. The nature of advocacy and other strategies employed to support the court cases are critical to how a case leads to social change. Media coverage is key and important in this regard as it ensures that the cases are more widely known and the outcomes widely disseminated.[181] This is important as the actual import of the case, as well as the challenge itself and what it means, are publicly discussed and debated and LGB issues start receiving the level of attention required to initiate social change.

Strategic litigation cases are usually supported by advocacy in order to be effective. The main way of engaging in advocacy is through the media. The media was part of the hearings in South Africa and cases were well reported. In Uganda, the Coalition usually organised press conferences at the filing

180 As above.

181 Interview with Nicholas Opiyo, human rights lawyer, Executive Director, Chapter 4 Uganda, Kampala, 19 March 2018.

of cases and delivery of judgments.[182] The Coalition also published its own statements on the various cases/judgments, and social media conversations thrived on the cases and their outcomes. In Kenya, the different entities engaged the media, including social media.[183] Case digests also exist online on the different cases that NGHRLC has done.[184] In Botswana, booklets on the *LEGABIBO Registration* case were made by SALC and LEGABIBO in a bid to make the case easier to understand.[185] There was also a social media campaign with the hashtag #legabiboregistration. It is important to note that access to traditional media for LGBT groups is both limited and expensive. In Uganda for example, the biggest media group – the Vision Group – has a policy according to which they do not report on anything about homosexuality except where the source is the office of the president, Parliament or the courts.[186] This policy may seem to include court cases in the scope of reporting, but it is generally a polite way of banning publication of such stories except where reporting is requested or required by political leaders. In Nigeria, the filing of the *TIERS* case in 2017 went hand-in-hand with an advocacy campaign run on social media and the publication of opinion pieces in newspapers. Advocacy and communication with the public was viewed as essential in order to garner public support ahead of challenging the Act. Since the case was withdrawn, the effectiveness of this campaign cannot be determined.[187]

In those countries where advocacy was extensively used, such as in South Africa, LGB strategic litigation was successful and has largely contributed to increased social change. In Botswana and Kenya where there was moderate advocacy, this is also reflected in the extent of social change. For Nigeria and Uganda where advocacy was limited due to strategic reasons or practical challenges, the level of both legal change and social acceptance is still low.

Therefore, the level and extent of advocacy is crucial in enabling LGB strategic litigation to stimulate social change, and so having extensive advocacy efforts targeting the general public and elites in particular is helpful.

In general, the litigation stage is also key to the success of a case both in court and outside court. The court in which a case is filed, the parties to the case, preparations of the case, the orders given and the extent of advocacy are all

182 Interview with Dr Chris Dolan (n 55 above). For a detailed discussion of the mobilisation efforts done during the *AHA* case, see Jjuuko & Mutesi (n 130 above).

183 Interview with Eric Mawira Gitari (n 13 above).

184 See for example The National Gay and Lesbian Human Rights Commission 'The National Gay and Lesbian Human Rights Commission case Digest, February 2017' https://www.nglhrc.com/s/NGLHRCcaseDigestFeb2017docx.pdf (accessed 17 January 2018).

185 See Southern African Litigation Centre 'A victory for the right to freedom of association: The LEGABIBO case' https://southernafricalitigationcentre.org/2016/09/24/the-legabibo-case-a-victory-for-the-right-to-freedom-of-association/ (accessed 17 January 2018).

186 Vision Group (2014) 'Editorial Policy' https://issuu.com/newvisionpolicy/docs/243661083-editorial-policy-complete (accessed 24 July 2017).

187 Interview with Ayo Sognuro. 8 September 2019.

key determinants of how a case fares in court, and its impact after a decision is made.

6.6 Factors at the post-litigation stage

The post-litigation stage is a critical stage that determines if LGB strategic litigation will spur social change. It would be a great mistake to assume that once a court victory is achieved, social change has also been achieved. At the same time, losses do not mean that a case will not have any positive impact that can create social change. What happens at this stage determines the real value of strategic litigation. This stage is largely not limited in terms of timeframes, but nevertheless certain things must happen immediately and others later if legal change and social acceptance are both to be realised. The factors that contribute to LGB strategic litigation leading to social change at this stage are:

6.6.1 The extent to which successful decisions are actively enforced

Enforcement is the process through which the decision turns into tangible rights for LGB persons. It is when a judicial pronouncement is translated into a change in law or policy. Decisions which do not require further action and enforcement on the part of the state or another losing party, are infrequent. Even simple declarations have to be given meaning: people have to test them out. The executive or the legislature needs to change their conduct in response to the court decision.[188] This therefore makes this stage very important if LGB strategic litigation is to meaningfully contribute to social change. It is what Marcus *et al* identify as the last and seventh factor: follow up.

For the selected Common Law countries, enforcement differs from one jurisdiction to the next. Some jurisdictions strictly enforce court decisions while others simply ignore them, and yet others implement them in accordance with what appeals to whoever is responsible for such action. Some court decisions are self–enforcing, requiring no further action on the part of any state organ except not to act contrary to what the judgment requires. An example is a declaration of nullity of a law. Others need proactive enforcement, for example those that require the payment of damages and costs which have to be complied with by the party against whom such damages/costs were awarded. Decisions that do not require much action on the side of the state seem easier to comply with, as the court's judgment is in itself enough to change the status quo, while for those that require action to be taken, the status quo remains the same until what the court ordered is complied with. South Africa and Botswana so far lead as regards compliance, while Kenya, Nigeria, and Uganda are not making the same progress on this front. Kenya has still not registered the NGLHRC as required by the court orders.[189] In Uganda, the Anti-Homosexuality Act was nullified and this did not require any action on the part of the legislature. However, the

188 Marcus *et al* (n 1 above) 122-126.

189 Interview with Eric Mawira Gitari (n 13 above).

legislature responded by collecting signatures to pass the Bill again, this time vowing to pass it with the right quorum.[190] The Minister of Ethics and Integrity has threatened to pass it again, although the government has denied this.[191] While the state paid the damages and costs in the *Victor Mukasa* case.[192] In Nigeria, damages are yet to be paid in the *Orazulike* case.[193]

In South Africa, where implementation of all the victorious cases was achieved, the level of social change is higher. For Botswana, the successful *LEGABIBO Registration* case was actively enforced, and even the lost *Kanane* case[194] did not lead to further arrests. There is also a relatively higher level of legal change and social acceptance than in Kenya, Nigeria and Uganda. For Kenya, and Uganda, enforcement is largely non-existent except where declarations have been given. The level of social change is slightly higher in Kenya than in Uganda, and in Nigeria, it is much lower.

Therefore, the extent to which successful decisions are enforced is an important factor in ensuring that LGB strategic litigation leads to social change.

6.6.2 The extent to which adverse decisions are appealed

Appeals help to determine the final position of the law on an issue, and for issues as controversial as LGB rights, there is need for such a definitive position to be reached. Where a system of precedent is followed, final judicial decisions significantly reduce the possibility of the decisions being reversed, at least in the foreseeable future. Finality in decisions facilitates implementation and can serve as a basis for clear communication about the position to the general public.

Both activists and the state tend to favour taking the cases all the way to the highest courts, and as such there is a high number of appeals in the lost cases. In South Africa, all the cases except one have reached their final stages without the possibility of further appeal. This may be attributed to the fact that in South Africa, orders by lower courts invalidating legislation have to be confirmed by the Constitutional Court, which is the highest court in the country.[195] In Uganda, two of the lost cases were appealed. A deliberate decision was made not to appeal the case at the EACJ as the aim of taking the case to the court had nevertheless been achieved.[196] Scott Lively appealed against the language used in the judgment, even though the decision was not against him.[197] The *AHA* case was not appealed, despite the state filing a notice

190 'MPs start process to re-table gay Bill' Daily Monitor 3 September 2014.

191 See 'Gov't rules out plans to reintroduce Anti-gay bill' The Observer, 13 October 2019, https://observer.ug/news/headlines/62296-gov-t-rules-out-plans-to-reintroduce-anti-gay-bill (accessed 28 December 2019).

192 Interview with Advocate Ladislaus Rwakafuzi, Kampala, 20 July 2017.

193 Skype onterview with Mike Ebah (n 56 above).

194 *Kanane* case (n 20 above).

195 Section 167(5) of the Constitution of the Republic of South Africa.

196 Interview with Patricia Kimera, Head, Access to justice Division, Human Rights Awareness and Promotion Forum (HRAPF), Kampala, 24 April 2018.

197 See Center for Constitutional Rights 'Sexual Minorities Uganda v. Scott Lively'

of appeal immediately after the judgment.[198] In Kenya, the state has appealed the *NGLHRC Registration case*,[199] while in Botswana the state appealed in the *LEGABIBO Registration* case and the *Botswana Decriminalisation case*.[200] Appeals help to ensure that the highest court makes a final decision. Appeals were concluded in South Africa and Botswana, while they are still ongoing in Uganda, Kenya, and Nigeria, and perhaps this will help to finally clarify the pending issues in those cases.

South African activists have seen more social change as the law is now definite, and those in Botswana and Kenya are also making progress. Those in Uganda and Nigeria on the other hand continue to have lower levels of social change. Therefore, one factor that contributes to whether LGB strategic litigation may lead to social change is whether the decisions are appealed to the highest courts.

Generally, the post-litigation phase determines how the case will go down in history: either as a case to be forgotten, or a case that prompts deep-rooted change. How appeals are handled, and how the decision is interpreted and communicated are all key components of ensuring this form of change.

6.7 Conclusion

The extent to which favourable decisions are enforced appears to be the most significant endogenous factor inducing social change through strategic litigation. However, LGB rights activists must make a proactive effort to litigate for LGB equality. A favourable decision that is not enforced stands little chance of leaving its mark. Even where the conditions are good but cases have not been brought before courts, no social change will happen as a result of litigation. For example, it is quite obvious that fewer cases have been brought in Botswana yet the conditions there favour social change more. Inversely, more cases have been brought in Uganda in circumstances that are very hostile to LGB litigation. This would imply that activists in Uganda may need to study the environment and decide how to proceed with LGB strategic litigation, and so should those in Botswana. Even those in South Africa seem to have stalled in terms of bringing cases before the courts yet the broader factors still favour LGB strategic litigation. Therefore, the interplay between the exogenous factors and the endogenous factors is important in ensuring social change. They must all be in place if litigation is to lead to the desired change. The existence of the right political climate but with only a few cases being brought to courts as the case is in Botswana means that social change

https://ccrjustice.org/home/what-we-do/our-cases/sexual-minorities-uganda-v-scott-lively (accessed 17 January 2018).

198 'Gov't Appeals against Annulment of Anti-Gay Law' Uganda Radio Network https://ugandaradionetwork.com/story/govt-appeals-against-annulment-of-anti-gay-law (accessed 17 January 2018).

199 *NGLHRC Registration* case (n 76 above).

200 *LEGABIBO Registration* case (n 75 above).

will not be driven by strategic litigation, and at the same time, the existence of the best planned case in an unfriendly political environment as the case is in Uganda would not lead to much social change either. This would remain true whether in Africa or any other place. These factors are more or less universally applicable to all Common Law countries. This therefore implies that those designing LGB strategic litigation initiatives have to be alive to the broader context and pay more attention to enforcement of decisions and changing hearts and minds.

Seven

Making LGB Strategic Litigation More Effective in Stimulating Social Change

7.1 Introduction

None of the Common Law African countries studied – including South Africa – has achieved significant social change. This implies that in most of these countries, the exogenous and endogenous factors identified in chapters 5 and 6 above do not fully align. South Africa nevertheless stands out from the rest of the African countries in that activists there have been able to achieve significant legal changes, and have made at least some distinct headway towards social acceptance. Again, activists in other countries also take advantage of some factors more than South Africa. This implies that all the countries have something that they can learn from others, including South Africa. This chapter makes recommendations to activists in the case study Common Law African countries on how to strategically use their political, legal, economic, social and movement realities in order to make LGB strategic litigation contribute more meaningfully towards the creation of social change. The chapter begins with a discussion of how the factors exogenous to court cases can be used and influenced and then goes on to consider how the factors endogenous to the cases can be managed. The discussion generally puts the realities of Common Law Africa into consideration and thus makes suggestions that are in line with these realities. As such, more 'African' ways of doing strategic litigation, such as tempering the adversarial nature of litigation generally by maintaining dialogue and being open to alternative dispute resolution mechanisms drawn from African traditions, are also discussed. The chapter then focuses on other strategies that can complement strategic litigation. It then discusses the question of whether there are any typically 'African' ways of doing strategic litigation, which can then replace the need for using strategic litigation. The chapter concludes with a summary of the main suggestions and recommendations.

7.2 Strategic engagement with the exogenous factors

The exogenous factors cover those issues over which LGB activists largely have no direct control. Even though LGB activists cannot directly control these

factors, they can nevertheless take advantage of them in order to stimulate social change in favour of LGB persons, and can contribute to the positive effects of LGB strategic litigation. The following are the recommendations in respect of each of these factors:

7.2.1 Managing the political factors

The political opportunity structure theory requires that activists use available political conditions and opportunities to advance their causes.[1] LGB activists need to make use of what they have even in unfavourable circumstances. They need to be alive to the political dynamics around them and plan their cases with these dynamics in mind. Winning a case in which the judgment will never be implemented is largely a hollow victory, and yet politics determines if judgments will be enforced, and who enforces the judgments. The LGB activists need to be aware of other struggles, take part in them and avoid being exclusive and only caring when their own rights are on the line. The political factors need to be managed in different ways such that they do not negatively affect how LGB strategic litigation leads to social change. Some of these ways include:

a) Joining the wider struggle for democracy and human rights

In situations of autocratic and poor governance, those seeking to stimulate social change in favour of LGB persons must also engage in seeking to effect changes to the political leadership and set-up of the country. LGB activists and LGB persons therefore need to actively join the pro-democracy struggles and demand for political change. One way to do this is to ally themselves with the different political parties seeking political change. Activists in South Africa were able to look forward and strategically align themselves with the African National Congress even before it won the 1994 elections in South Africa.[2]

Furthermore, LGB persons and activists can strive to be part of the struggles that go beyond LGB rights by encompassing related issues such as women's rights and racial equality. In Uganda, strategic alliances with primarily the women's movement ensured that the Anti-Homosexuality Act was defeated.[3] LGB activists need to embrace other movements in order to make their own movement stronger, thereby creating a situation of unity in diversity. Such a broadened focus would not only help to win over allies but also provide the basis for others to recognise LGB persons as people legitimately interested in wider democratic struggles, rather than as a selfish group only interested in

1 G Fuchs 'Strategic litigation for gender equality in the workplace and legal opportunity structures in four European countries' (2013) 28 *Canadian Journal of Law and Society* 189, 192.

2 See EC Christiansen 'Ending the apartheid of the closet: Sexual orientation in the South African constitutional process' (2000) 32 *New York University Journal of International Law and Politics* 997, 1029-1032.

3 See generally A Jjuuko & F Mutesi 'The multifaceted struggle against the Anti-Homosexuality Act in Uganda in N Nicol *et al Envisioning global LGBT human rights: (Neo) colonialism, neoliberalism, resistance and hope* (2018) 342.

achieving their own goals. Supporting other activists/causes in seeking change would put other people in the debt of the LGB persons who supported their own cause, thus building a wide support base for LGB activists.

The approach serves another role in countries where LGB rights are restricted, as it helps to keep LGB persons safe, seeing that they are engaged in the broader social struggles, which are the legitimate demands of every individual.[4] It is thus important that LGB persons play an active role within the broader democracy struggles in order for LGB strategic litigation to stimulate social change.

b) Strategically engaging during periods of political and social transformation

LGB activists and persons should strategically engage other persons and groups during periods of social and political transformation. One of the ways to do this is by joining active and partisan politics in countries that are undergoing constitutional building processes or major changes in leadership. This is because the politicians would need the support of large groups of persons, and a united LGB group, even if they are generally a minority, would make a significant difference to an election outcome. This would enable the activists to place their agenda on the table, and be strategically placed to take on key positions in case the group that they supported wins. The above strategy worked well in South Africa at the end of apartheid and was the basis for the major constitutional changes, which included the inclusion of sexual orientation as a protected ground against discrimination within the new Constitution.[5]

Another way to do this is through active lobbying during constitution making processes, to ensure that sexual orientation is included as a protected ground in the resultant constitution. In South Africa, the express protection of sexual orientation as a ground upon which someone cannot be discriminated against has been the main gateway for the recognition of LGB rights. The best time to achieve such a goal is during political transition and the drafting of new constitutions as was done in South Africa. Such a strategy was attempted but did not succeed during the making of the new Constitution for Kenya in 2010.[6] In Uganda, the reverse is true as the anti-gay groups managed to secure the insertion of the prohibition of same-sex marriages into the Constitution during the 2005 constitutional amendment.[7]

4 See for example, H El Menyawi 'Activism from the closet: Gay rights strategising in Egypt' (2006) 7 *Melbourne Journal of International Law* 27, 49-51

5 See Christiansen, n 2 above.

6 CE Finerty 'Being gay in Kenya: The implications of Kenya's new Constitution for its anti-sodomy laws' (2012) 45 *Cornell International Law Journal* 448. See also joint interview with Lorna Dias, Jackson Otieno, Kelvin N. Washiko, Yvonne Oduor, and Brian Macharia, all of Gay and Lesbian Coalition of Kenya (GALCK), Nairobi, 26 July 2017.

7 See generally, JD Mujuzi 'The absolute prohibition of same-sex marriages in Uganda' (2009) 23 *International Journal of Law, Policy and the Family* 278.

Therefore, transformative events must be taken advantage of, as during such periods, change is most likely to occur. Such periods are when most of the usual justifications for restricting LGB rights would not make sense as other groups are also claiming change, and the general atmosphere in the country favours human rights and equality in breaking away from the oppression of the past.

c) Strategically using LGB friendly leaders

Since strong and visionary leaders do much to help in changing people's minds in favour of LGB equality, it is important that LGB activists and leaders support visionary LGB friendly leaders' ascend to key positions where they can effect change. In South Africa, LGB groups actively supported the African National Congress (ANC) and its transformative leader, Nelson Mandela. The alliance greatly helped them when it came to ensuring changes were effected in favour of LGB persons. Mandela reciprocated through the appointment of outstanding LGB persons to important positions, most notably the openly gay and HIV positive Justice Edwin Cameron, who was first appointed to the High Court, and then rose through the ranks to the Supreme Court of Appeal and eventually to the Constitutional Court. A number of openly LGB politicians have also been elected and appointed to key positions, including Lynne Brown, the Minister of Public Enterprises under the Zuma presidency, and the sixth Premier of the Western Cape.

Although he does not identify as gay, former Chief Justice Willy Mutunga was openly supportive of LGB rights during his time working with the Ford Foundation and, despite admitting to this, he was appointed the Chief Justice of the Supreme Court of Kenya.[8] Another prominent LGB rights activist, Monica Mbaru, was appointed as a Justice of the High Court of Kenya. In her view, her being on the court has helped to demystify the court – since even LGB activists can be High Court judges. She is of the view that activists should support allies to get to such positions, and that people should always make an effort, regardless of who they are, because 'such positions do not come on a silver platter.'[9] Only Botswana and Uganda have no openly LGB persons or LGB activists serving in key State positions.

More of this needs to happen in all countries, as it not only renders respect to LGB persons but also puts them directly in positions of influence, something that helps to maximis e the impact of LGB strategic litigation, thus stimulating social change.

8 See T Maliti 'For all to see and hear: Part I' *International Justice Monitor* 9 June 2011 https://www.ijmonitor.org/2011/06/for-all-to-see-and-hear-part-i/ (accessed 20 August 2018).

9 Interview with Justice Monica Mbaru, Nairobi, 26 July 2017.

7.2.2 Leveraging the legal factors

The legal opportunity structure for LGB persons lies in the fact that in all the different countries studied, there is equal access to the courts by all persons, including LGB persons. LGB persons should therefore make the legal factors work for rather than against them through the following ways:

a) Playing a role in ensuring judicial independence

All the selected countries protect judicial independence in their constitutions. Such protections provide an opportunity to demand that judicial independence be upheld in practice. To maintain its independence, the judiciary needs popular support. In the Common Law African countries, LGB persons need to join other groups and vehemently oppose the violation of judicial independence, demand better conditions for judges and other judicial officers and support reforms that would help further judicial independence. If the courts are not independent, they cannot make decisions independent from what the legislature or the executive wants them to do. In particular, LGB persons should continue using the courts by bringing cases of violations against them before the judiciary, thus bolstering the courts' exposure to LGB cases, and their increased legitimacy when they make decisions on such cases. LGB persons should also be involved in lobbying for fair and transparent judicial selection processes and criteria, including proposing persons to be appointed as judges or magistrates to the relevant bodies, and lobbying support for them. LGB activists should also make it one of their aims to provide support to magistrates and judges wherever possible in the area of human rights and international law. For example, in Uganda, the Uganda Human Rights Commission has been supporting trainings of magistrates on LGB issues, and engaging LGB activists and organisations as facilitators.[10] In order to protect the legitimacy of the judiciary, it is also important to ensure that cases of corruption within the judiciary are exposed and prosecuted.

b) Testing the non-discrimination clauses in the constitutions

Activists in South Africa whose constitution protects against discrimination on the grounds of sexual orientation have been able to move courts to make positive judgments in favour of LGB persons. In other countries, activists have been able to achieve the same result by testing the non-discrimination clauses in the constitutions for their applicability to LGB persons. Usually, the right to equality and freedom from discrimination is for 'all persons', and thus it would be difficult for a court to specifically exclude LGB persons. This is why it is important for these provisions to be interpreted by the courts. The usual limitation to the use of the non-discrimination clause in countries without express protection of sexual orientation as a ground upon which someone cannot be discriminated is the list of grounds, which is sometimes a closed list. However, it has already

10 Interview with Frank Mugisha, Executive Director, Sexual Minorities Uganda (SMUG), Kampala, 20 July 2017.

been established in international law that protection from discrimination on the grounds of sex includes sexual orientation.[11] The framing is also usually in such a way that the list is open-ended, and thus protection based on analogous grounds can be allowed. This implies that even without a constitutional amendment, the constitution can be interpreted positively to include sexual orientation either as an analogous ground or as part of the category of 'sex'. In Botswana, the High Court recently read sexual orientation into the non discrimination clause, under sex, taking into consideration recent actions of the legislature.[12] In Kenya, the High Court in the case of *Eric Gitari v Attorney General & Another*[13] expressly included LGB persons among persons protected from discrimination in the Constitution.[14] In Uganda, the Constitutional Court has clearly spoken out against discrimination of marginalised persons in *Adrian Jjuuko v Attorney General* (*Equal Opportunities case*).[15] However, recently in Kenya, the High Court in the 2019 Kenyan case of *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)*,[16] relied on formal equality to find that the penal code provisions criminalising same-sex relations were not discriminatory as they applied to 'any person' and to 'any male person.'[17]

c) Seeking interpretation of the different rights in the Bill of Rights

Incremental LGB strategic litigation should target the judicial interpretation of the various rights in the Constitution, with a particular emphasis on the rights to dignity, privacy and due process. This is because these rights have been crucial for the vindication of LGB rights in other jurisdictions.

The rights to dignity, privacy and liberty have been the basis of key decisions on LGB rights in the selected countries.[18] If activists bring various rights of LGB persons to the table and convince the courts to interpret them in favour of LGB persons, this would translate into greater protection for LGB persons. All the different constitutions have these rights, and all that is required is linking them to the situation of LGB persons. Once declared applicable to LGB persons, then numerous demands can be made in different circles, including from the police for protection of LGB persons, and the health sector for inclusion of LGB persons among persons to whom services are provided.

d) Ensuring adherence to international and regional human rights standards

Civil society organisations working on LGB issues should constantly put their governments to task on how far they are living up to their human rights

11 *Toonen v Australia* No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994) (*Toonen* case).
12 *Letsweletse Moshidiemang v Attorney General*, MAHGB- 000591-61.
13 Petition 440 of 2013 [2015] eKLR 24 April 2015 (The *NGLHRC Registration case*).
14 Above, paras 126-138.
15 Constitutional Petition No. 1 of 2009.
16 Consolidated petitions 50 of 2013 and 234 of 2016.
17 Para, 295-297.
18 See discussion in Chapter 6, section 6.5.8.

obligations at the international level. Beyond political commitments, states have binding legal obligations at the international level, which arise out of ratifying treaties as well as from customary international law. No human rights treaty or rule of international customary law excludes LGB persons from protection, and all treaties use inclusive language that shows that 'every person', including LGB persons, is protected.[19] This implies that the mechanisms available for enforcement of these legal obligations can be used by LGB activists to ensure adherence.

One available international mechanism is bringing a communication before the relevant treaty body challenging a violation of the state's obligations as set out in the particular treaty. It should be noted that these international remedies only become available after domestic remedies have been exhausted. Nevertheless, most of the treaties have provisions allowing for individual complaints. However, although all the selected countries have ratified the ICCPR, only South Africa and Uganda have ratified the First Optional Protocol which allows for individual complaints.[20] This implies that this avenue is open to activists in South Africa and Uganda. Indeed, two communications have so far been submitted to the Committee against South Africa, but they were not on LGB rights.[21] For article 22 of the CAT, only South Africa has made the declaration allowing individuals to bring complaints before the Committee.[22] However, no complaint from South Africa has been filed on LGB rights or any other issue. The Optional Protocol to the CEDAW has only been ratified by Botswana and South Africa.[23] This implies that activists in these two countries can bring individual complaints to the CEDAW Committee, but those in Kenya, Nigeria and Uganda cannot. Nevertheless, no such compliant has been filed, including on LGB issues. Therefore, even where the avenues are open, they have not been effectively utilised by activists from these countries, including LGB activists.

At the African regional level, individual communications can be brought under article 55 of the African Charter on Human and Peoples' Rights (African Charter).[24] Ratification of the African Charter automatically gives

19 For these protections, see discussion on the extent of adherence to international and regional human rights standards in Chapter 5, section 5.4.4 above.

20 UN Office of the High Commissioner of Human Rights website, 'Status of ratification interactive dashboard: Optional Protocol to the International Covenant on Civil and Political Rights' http://indicators.ohchr.org/ (accessed 18 August 2018).

21 *Prince v South Africa*, Comm. 1474/2006, U.N. Doc. A/63/40, Vol. II, at 261 (HRC 2007) and *McCallum v South Africa*, Communication No. 1818/2008.

22 United Nations Treaty Collection 'Chapter IV: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984' https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=_en#EndDec (accessed 21 August 2018)

23 See UN Entity for Gender Equality and the Empowerment of Women website https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&lang=en (accessed 18 August 2018).

24 African Charter on Human and Peoples' Rights (ACHPR) OAU Doc. CAB/LEG/67/3

the African Commission the jurisdiction to hear communications brought by individuals and entities other than State Parties.[25] For individuals and NGOs to lodge petitions with the African Court on Human and Peoples' Rights (African Court) however, an additional step is required from the State Parties beyond ratification of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court. In terms of Article 34(6) of the Protocol, States Parties need to make a declaration accepting the jurisdiction of the Court to receive cases from individuals and NGOs with observer status against the State.[26] To date, none of the five countries covered in this study has filed this declaration. However, individuals in these countries can still go to the African Court through the African Commission, which has jurisdiction to refer cases to the court.[27] Only one request for an advisory opinion has been brought before the Court on LGB rights.[28] This was the request for an advisory opinion in respect to the powers of the Executive Council of the African Union when 'considering' the report of the African Commission, which arose out of the Executive Council's directive to the African Commission to 'take into account the fundamental African values, identity and good traditions' and therefore to withdraw the observer status granted to the Coalition of African Lesbians (CAL). The African Court declined to give the opinion on the grounds that the entities bringing the case were not organisations 'recognised by the African Union.'[29]

At the sub-regional level, the only case on LGB rights is *Human Rights Awareness and Promotion Forum v Attorney General of Uganda* (the *HRAPF* case)[30] that was brought before the East African Court of Justice (EACJ), which challenged the passing of the Ugandan Anti-Homosexuality Act (AHA). However, it was dismissed on ground that it was moot, as the AHA had already been nullified in Uganda by the time the case came up for hearing in the EACJ.[31] As such, the sub-regional African bodies have not yet

rev. 5, 21 ILM 58 (1982) (African Charter).

25 See Arts 55 and 56 of the African Charter, above.

26 *Femi Falana v* African *Union*, Appl. No. 001/2011 (African Court on Human and Peoples' Rights)

27 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of An African Court on Human and Peoples' Rights, article 5(1)(a).

28 See *Request for advisory opinion by the Centre for Human Rights of the University of Pretoria and the Coalition of African Lesbians*, Request No. 002 of 2015 (African Court on Human and Peoples' Rights).

29 Centre for Human Rights 'African Court rejects Centre for Human Rights and CAL request, leaving political tension in AU unresolved' 6 October 2017 http://www.chr.up.ac.za/index.php/centre-news-a-events-2017/1930-press-statement-african-court-rejects-centre-for-human-rights-and-cal-request-leaving-political-tension-within-au-unresolved-.html (accessed 2 July 2018).

30 *Human Rights Awareness and Promotion Forum (HRAPF) v Attorney General of Uganda and the Secretariat of the Joint United Nations Programme on HIV/AIDS (UNAIDS)* Reference 6 of 2014 (the *HRAPF* case).

31 Above.

heard and decided an LGB case, and it has not yet been proven that this can be undertaken successfully. There is therefore a need for this avenue to be explored more as regards LGB rights.[32]

With all these mechanisms available to activists to engage the state on their international commitments, it would be useful to use them, as then the state would remain alive to court decisions and implement them or else risk international condemnation.[33]

e) Popularising the Constitution and demystifying human rights

The status of the Constitution as the supreme law of the land needs to be emphasised such that a culture of constitutionalism is adequately nurtured. In a situation of legal pluralism, constitutional supremacy may be declared on paper but is constantly under challenge. That is why Okoth Ogendo famously described African countries as having 'constitutions without constitutionalism'.[34] Needless to say, whatever the manner in which the constitution was adopted, it is the supreme law of the country and needs to be respected and defended.

LGB activists can participate in this process through awareness campaigns about the constitution and the bill of rights. They also need to demystify human rights and portray them for what they are: inherent and inalienable claims that accrue to everyone because they are human beings. This is opposed to the view that human rights are aimed at eroding 'African' cultures and traditions in favour of western values, which is the sentiment expressed by a large section of Africans. For the case of Uganda, Boyd suggests that there is a general feeling that rights and freedoms related to sexuality are focused on the autonomous and independent individual, in direct contravention of the celebrated Ganda norm of 'ekitiibwa', translated to mean honour, which is about reciprocal obligations among the members of the society.[35] One of the ways this can be dealt with is by raising awareness of the bill of rights in the constitutions and popularising the concept of individual rights and freedoms.

As the bill of rights is interpreted in court, people should be able to understand why this is important. There is a need for public sensitisation about the bill of rights generally and about equality and non-discrimination specifically. The importance of the human rights-based approach (HRBA)

32 AM Ibrahim 'LGBT rights in Africa and the discursive role of international human rights law' (2015) 15 *African Human Rights Law Journal* 263, 278.

33 See generally D Cassell 'Does international human rights law make a difference?' (2001) 2:1 *Chicago Journal of International Law* 129; Also see S Gopalan & R Fuller 'Enforcing international law: States, IOs, and courts as shaming reference groups' (2014) 39:1 *Brooklyn Journal of International Law* 74.

34 HWO Okoth-Ogendo 'Paradox of constitution without constitutionalism' in IG Shivji (ed) *State and constitutionalism: An African debate on democracy* (1991)

35 L Boyd 'The problem with freedom: Homosexuality and human rights in Uganda' *Anthropological Quarterly* (2013) 86:3 697.

to development needs to be communicated to ordinary citizens. This kind of sensitisation and popularisation does not have to be about LGB rights. Understanding the concept of human rights and its key aspects such as equality and non-discrimination, and the inherent nature of human rights, is enough to start the process of shifting mindsets. The HRBA to development is particularly important in this regard as it focuses on ensuring that everyone is meaningfully included in development processes,[36] and this would certainly include LGB persons.

f) Encouraging the continued use of the judiciary by LGB persons

For the judiciary to be regarded as legitimate, it has to be effectively used by the population. As Chopra shows, avoiding or ignoring courts in favour of other mechanisms of dispute resolutions is an indication that the courts are not seen as relevant or useful,[37] thus contributing to their being illegitimate. One way of making sure that courts are seen as useful and legitimate is their increased usage as a way of resolving conflicts. This is because increased usage shows increased trust in the institution by the people. Although the extent of trust depends largely on how the judiciary conducts itself, the judiciary alone cannot determine its own legitimacy, and as such it needs the support of activists. They are the ones to bring cases before the courts in order to test how the judges will react to them. Another important reason as to why more cases on LGB rights should be taken to court is to help the courts to get over the novelty of such cases, and view them as normal. According to Justice Isaac Lenaola of the Supreme Court of Kenya, it is like:

> '… chipping on a rock. Every time you do a case, something gives, some judge learns. You will lose some cases, but every case is a gain. Strategic litigation is always a win. Even by losing, you are winning – winning over minds, and may be things may be better the next time.'[38]

Indeed, if the LGB community in South Africa did not bring many cases on LGB rights, the courts would never have made the many decisions that they did. Therefore, even losses in the courts should not discourage more cases being brought to court since this is part of the process of gaining legitimacy for the courts.

36 For details on what it entails, see UNICEF 'The human rights-based approach: Statement of common understanding' https://www.unicef.org/sowc04/files/AnnexB.pdf (accessed 16 June 2018).

37 T Chopra 'Peace vs justice in Northern Kenya: Dialectics of state and community laws' in JC Ghai & Y Ghai (eds) *Marginalised communities and access to justice* (2010) 185, 190-193.

38 Interview with Justice Isaac Lenaola, Justice of the Nairobi Supreme Court of Kenya, 17 July 2017.

g) Encouraging the use of traditional justice mechanisms for LGB issues

LGB activists should also increasingly use traditional justice mechanisms on LGB rights. This approach is usually seen as negative since traditional culture has constantly been portrayed as being against LGB rights. However, there is a need to embrace these mechanisms and use them to engage on LGB rights. Many LGB activists are of the view that recourse to 'customary law' in a traditional court would undermine protection for LGB persons, since opposition to LGB rights has largely been based on the view that such rights are un-African, and against African culture.[39] While these fears are certainly not unfounded, it would be wrong to simply assume that such mechanisms would by default be hostile to LGB rights. The supremacy of the Constitution is well established, and remnants of the colonial repugnancy clause still exist to ensure that cultural practices that do not align with the constitution could be found to be unconstitutional.[40] A traditional court's decision that is unconstitutional would be struck down. Again, customary law evolves with time and it is not set in stone, and that is why sometimes it is referred to as 'living customary law'.[41] Such a system is therefore capable of incorporating the constitutional principles of equality and non-discrimination on the basis of sexual orientation and putting it in language that the common people understand very well. Many people respect and understand their traditions and customs as well as the traditional institutions, and prefer them to the more formal justice systems.[42] Indeed, even international human rights law recognises such justice systems, provided that they meet certain criteria such as handling minor criminal or civil matters, following principles of a fair trial and providing for appeals against their decisions to the civil courts.[43] A decision

39 See for example 'The traditional courts bill threatens LGBT South Africans' *The Guardian* 26 May 2012 https://www.theguardian.com/commentisfree/2012/may/26/south-africa-gay-lgbt-traditional (accessed 16 June 2018).

40 For example the South African Constitution in section 211(3) requires the courts to apply customary law if it is in line with the Constitution. For how it is used see generally, TW Bennett *Human rights and African customary law under the South African Constitution* 1999.

41 See for example C Himonga 'The living customary law in African legal systems: Where to now?' in J Fenrich, *et al* (eds) *The future of African customary law* (2011).

42 See for example United Nations Office of the High Commissioner for Human Rights 'Human rights and traditional justice systems in Africa' (2016) 17-20.

43 For example see UN Human Rights Committee (HRC), *General Comment No. 32, Article 14, Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, para 24 http://www.refworld.org/docid/478b2b2f2.html (accessed 16 June 2018). See also United Nations Development Programme 'Informal justice systems: Charting a course for human rights-based engagement' 38-40 http://www.undp.org/content/dam/undp/library/Democratic%20Governance/Access%20to%20Justice%20and%20Rule%20of%20Law/Informal-Justice-Systems-Charting-a-Course-for-Human-Rights-Based-Engagement.pdf (accessed 2 July 2018).

of a customary court emphasising *'ubuntu'*[44] *'botho'*[45] or *'obuntu-bulamu'*[46] in South Africa, Botswana or Uganda respectively in respect to LGB rights would go a long way in making people realise the importance of everyone, including LGB persons. This would make it easier for decisions made based on the constitution on LGB rights to also be appreciated more, leading to much desired social change.

In the different countries, customary traditional institutions play different roles, and these can be tapped into. In Botswana, traditional courts are an important component of the justice system. Generally, although chiefs have expressed their hostility to homosexuality,[47] there are no reported indications that they would automatically decide against LGB rights. Indeed, LEGABIBO reports having had meetings with chiefs and working with traditional courts- *kgotlas*, and they are slowly getting to appreciate LGB issues better.[48] In Nigeria, the Constitution recognises customary courts, which can be established by state assemblies.[49] At the apex of this system is the Customary Court of Appeal of every state, and that of the Federal Territory of Abuja.[50] These apply the native and customary law, which they apply subject to the written law, and are regulated by laws passed in the different states. However, the rules of natural justice and the right to a fair hearing must be respected.[51] This is indeed an avenue that can be used more.

Kenya, South Africa and Uganda, unlike Botswana and Nigeria, do not formally recognise traditional courts, but have unified court systems that apply both statute law and customary law. For Kenya, this integration of the courts was done under the Magistrates Court Act, 1967.[52] For South Africa, section 211(1) of the Constitution, 1997 recognises traditional institutions, but the traditional courts have not yet been recognised, although there is a firm proposal to do

44 This term is mainly used in Southern Africa and now largely across the world to denote the African conception of an individual being part of the community as a whole, and therefore having to behave in a compassionate way towards the others. See JK Khomba 'Redesigning the balanced scorecard model: An African perspective' PhD thesis, University of Pretoria, May 2011, 126-164.

45 This is the Tswana word used for Ubuntu. See Republic of Botswana 'Presidential task group on a long-term vision for Botswana, 1997' 47.

46 This is the Luganda term for 'Ubuntu'. See for example ES Kirunda *The fourth republic: A possible future for the Uganda nation* (2011) 81-82.

47 For reports of such hostility, see DITSHWANELO Botswana – The Centre for Human Rights 'Customary law and its impact on women's rights, children's rights and LGBTI-people in Southern Africa – the Botswana example' Nr. 14 / 2013, Friedrich-Naumann-Stiftung für die Freiheit (FNF), April 2013, 4(c).

48 Interview with Bradley Fortuin and Botho Maruatone, of Lesbians, Gays and Bisexuals of Botswana (LEGABIBO), Gaborone, 10 October 2017.

49 Constitution of Nigeria, section 6(4)(a).

50 Above, section 6(h) and (i).

51 *Falodun v. Ogunse* (2010) All FWLR (Pt 504) 1404.

52 Act 17 of 1967. For the significance of this and its effect on the application of African customary law, see E Cotran 'Integration of courts and application of customary law in Kenya' (1968) 4 *East African Law Journal* 14.

so in the Traditional Courts Bill[53] which is still pending before Parliament. In Uganda, the Constitution recognises traditional institutions in article 246. Part of the traditional institutions recognised are traditional conflict resolutions mechanisms, which may not necessarily be through courts. In Kenya, traditional justice mechanisms are still used to resolve conflicts within the communities in Northern Kenya without recourse to the courts.[54] In South Africa, such mechanisms too have been documented[55] as well as in Uganda.[56] Many of these mechanisms are both respected and understood by the people, and they are more geared towards reconciliation rather than punishment – mainly centering around mediation, reconciliation and diplomacy.[57]

As such, in areas that still respect traditional mechanisms, there have always been ways of dealing with controversial issues, and LGB issues too can be dealt with through these mechanisms. They should thus be exploited and utilised.

h) Taking advantage of the legal culture of the different countries

Understanding and appreciating a country's legal culture is important in adequately planning for litigation. Knowing how a country generally respects the law and treats its conflict resolution and norm producing institutions[58] helps to determine how to approach the litigation. For Botswana, Kenya and South Africa, there is quite a high level of respect for the law, accountability of the judiciary to the people, and lawyers respecting their professions and being perceived as persons contributing to justice in the country.[59] This therefore marks these countries out as those where litigation would make more sense. In Uganda, the legal culture is largely one of avoidance of the courts,[60] disrespect for the courts and their judgments, judges being perceived as corrupt and unable to stand up to the executive, and lawyers being seen largely as an exploitative group that cannot generally be trusted.[61]

53 B1-2017.

54 Chopra, n 37 above.

55 For a detailed discussion of the use of these traditional mechanisms in South Africa, see for example R Choudree 'Traditions of conflict resolution in South Africa' 24 April 1999 http://www.accord.org.za/ajcr-issues/traditions-of-conflict-resolution-in-south-africa/ (accessed 20 August 2018).

56 Perhaps the most famous of the Ugandan conflict resolution mechanisms is 'mato oput' among the Acholi of Northern Uganda, which focuses on cleansing. See for example J Wasonga 'Rediscovering mato oput: The Acholi justice system and the conflict in Northern Uganda' (2009) 2 (1) *Africa Peace and Conflict Journal*, 17.

57 See F Ben-Mensah 'Indigenous approaches to conflict resolution in Africa' in World Bank (ed.) *Indigenous Knowledge: Local Pathways to Global Development*. (2004) 39-44.

58 These are the main types of institutions that Sunde identifies on which legal culture is based. See JØ Sunde 'Champagne at the funeral- An introduction to legal culture' in JØ Sunde, KE Skodvin (eds) *Rendezvous of European legal cultures* (2010) 11-28.

59 See discussion in Chapter 5, section 5.4.8.

60 Zartner, D 'The Culture of law: Understanding the influence of legal tradition on transitional justice in post-conflict societies' (2012) 22 *Indiana International & Comparative Law Review* 297.

61 Above.

For Nigeria, like Uganda, the courts do not play a very important role in day to day lives of people and their decisions are not strictly respected, and as such engaging people and other institutions more may be more helpful. According to Mureinik, all the different aspects of legal culture are interconnected such that when one fails, all the others follow. He gave the example of judges who need to be conscientious, since then lawyers will be able to make conscientious arguments before them, lecturers to research and pose new questions, and for students to study, or for the public to trust the legal system with cases for that matter.[62] The whole system is interlinked, and so where the norm making institutions are disrespected, the whole system is disrespected and not credible. In such circumstances, litigation may not yield the necessary results. Therefore, to make strategic litigation work in situations where the legal culture does not favour litigation, strategic litigation must be buttressed by strong advocacy efforts aimed at changing peoples' mindsets.

7.2.2 Engaging with the transnational factors

International actors – both international organisations and other states – have some leverage with which to influence developments at the domestic level. LGB activists need to be able to leverage these factors if LGB strategic litigation is to lead to social change. The suggested ways in which this can be done are described below:

a) Engaging with different organs at the international level

Besides treaty bodies and other channels at the international level, there are many more opportunities that can be used by LGB activists to engage states at the international level. These are especially about engaging the different political mechanisms at the different levels, and in the different human rights systems.

One of the important ways of engagement is through alternative reporting to the treaty bodies. Civil Society Organisations can submit alternative reports to the different treaty bodies showing how the state is living up to its obligations. This is again something that is allowed by the different treaty bodies. At the United Nations level for example, article 40 of the ICCPR requires states to submit reports to the Human Rights Committee within one year of ratification of the treaty on the steps they have taken to implement their obligations under the treaty. Thereafter, they report as the Committee determines, which is usually after four or five years.[63] The Human Rights Committee has consistently made decisions to the effect that LGB persons are protected under their respective treaties.[64] The African Commission has on various occasions made

62 Mureinik E 'Dworkin and Apartheid' in Corder H (ed) *Essays on law and social practice in South Africa* (1988) 181, 182.

63 Centre for Civil and Political Rights (CCPR) 'Periodic reports' http://ccprcentre.org/ccpr-state-reporting (accessed 15 July 2018).

64 See for example the *Toonen* case (n 11) on sexual orientation being protected as part of 'sex' in articles 2(1) and 26 of the ICCPR; *Young v Australia* (No. 941/2000, ICCPR) and HRC, *X v Colombia,* Communication No. 1361/2005, 6 August 2003 where the HRC

recommendations on sexual orientation, for example during the concluding remarks on Cameroon's report in 2005,[65] and commending Mauritius for including sexual orientation as a protected ground against discrimination in its Equal Opportunities Act of 2008.[66]

Other avenues are through the Universal Periodic Review (UPR) process, which is a mechanism by which states periodically (every four years) review the progress made by other states towards fulfilling their human rights obligations.[67] LGB activists should take part in the domestic processes to ensure that the LGB rights situation is clearly reflected in the UPR report. Indeed, this is done and is reflected by LGB issues making it to the final UPR reports of all the five selected Common Law African countries.[68] At the African Union level, the African Peer Review Mechanism (APRM) is the near equivalent of the UPR process,[69] and although it does not specifically address human rights, it is an important complement to the human rights mechanisms of the African regional human rights system.[70]

Four of the selected countries have signed up to the APRM and have undergone review and human rights issues have indeed been raised in their reports. This process gives activists space to raise LGB issues and ensure that they make it to the report. For Uganda's last review, the need to investigate cases of violence against LGB persons was noted, [71] as well as the fact that the Anti-Homosexuality Act had been challenged in court because of its human rights deficiencies.[72] Kenya's APRM reports make no mention of LGB rights at all,[73]

found sexual orientation was covered by the 'other status' ground of article 26 of the ICCPR.

65 African Commission on Human and Peoples' Rights 'Concluding observations on the first periodic report of Cameroon' adopted at the Commission's 39th ordinary session (11-25 May 2005) para 14.

66 African Commission on Human and Peoples' Rights '*Concluding Observations and Recommendations on the 2nd, 3rd, 4th and 5th fourth periodic reports of the Republic of Mauritius,*' adopted at the Commission's 45th ordinary session (13-17 May 2009), para 15.

67 See UN Office of the High Commissioner for Human Rights 'UN Human Rights Council: Universal Periodic Review' https://www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx (accessed 15 July 2018).

68 LGB issues were raised during all the reviews of all countries. For Botswana's latest review see UN Human Rights Council 'Report of the working group on the Universal Periodic Review: Botswana' 11 April 2018 A/HRC/10/69; for Kenya, see Human Rights Council 'Report of the working group on the Universal Periodic Review: Kenya' 26 March 2015 A/HRC/29/10; for South Africa, see Human Rights Council 'Report of the working group on the Universal Periodic Review: South Africa' 18 July 2017 A/HRC/36/16; and for Uganda, see Human Rights Council 'Report of the working group on the Universal Periodic Review: Uganda' 27 December 2016 A/HRC/34/10.

69 For a discussion of the APRM, see Chapter 5 above, section 5.5.1.

70 M Killander 'The African Peer Review Mechanism and human rights: The first reviews and the way forward' (2008) 30 *Human Rights Quarterly* 41.

71 African Peer Review Mechanism 'Uganda country self-assessment report 2017' May 2017 53.

72 Above, 87.

73 See African Peer Review Mechanism, 'Country review report of the Republic of Kenya 29

and those of Nigeria and South Africa largely omit LGB issues.[74] Botswana has not signed on to NEPAD and the APRM. There clearly is more space to engage states on LGB issues through the political peer review processes.

Finally, activists can also utilise the special procedures that are available under the UN system and within the African regional system. These are different experts who are mandated with reporting and advising on specific human rights themes or on country situations.[75] Under the UN system, the most relevant one for LGB persons is the independent expert on protection against violence and discrimination based on sexual orientation and gender identity.[76] This mechanism is mandated to 'assess the implementation of existing international human rights instruments with regard to ways to overcome violence and discrimination against persons on the basis of their sexual orientation or gender identity, while identifying both best practices and gaps.'[77] Other mechanisms are also important and have largely been utilised before the independent expert was specifically created.[78] Under the African Commission, there are a number of rapporteurs and working groups whose mandates are relevant to LGB rights. These include the Special Rapporteur on Human Rights Defenders in Africa, which has indeed taken steps to advance the protection of LGB rights;[79] and the African Commission's Committee on HIV, which has also addressed the situation of LGB persons in its reports.[80]

(2006), http://www.nepad.org/2005/files/aprm/APRMKenyareport.pdf (hereinafter Kenya Report). See also the African Peer Review Mechanism 'Second country review report of the Republic of Kenya' APRM Country review report No. 20 (2017) https://www.aprm-au.org/publications/country-review-report-no-20-kenya-2nd-version/ (accessed 16 June 2018).

74 South Africa's Country Self-Assessment Report only recognises gay, lesbian and transgender people as a vulnerable group and categorises them along with migrant workers and refugees. See African Peer Review Mechanism 'Country review report and plan of action of the Republic of South Africa' (2007) 117. Nigeria's report makes absolutely no mention of LGB persons. See African Peer Review Mechanism 'APRM Country Review Report No. 8: Federal Republic of Nigeria' (2009).

75 United Nations Office of the High Commissioner for Human Rights 'Special procedures of the Human Rights Council' https://www.ohchr.org/en/hrbodies/sp/pages/welcomepage.aspx (accessed 15 July 2018).

76 United Nations Human Rights Council Resolution adopted by the Human Rights Council on 30 June 2016: Protection against violence and discrimination based on sexual orientation and gender identity A/HRC/RES/3/2/2, 15 July 2016, Para 3.

77 Above.

78 For a discussion on how these were used see G MacArthur 'Securing sexual orientation and gender identity rights within the United Nations framework and system: Past, present and future' (2015) 15 *The Equal Rights Review* 40-43.

79 See for example African Commission on Human and Peoples' Rights 'Press release on the implications of the Anti-Homosexuality Act on the work of Human Rights Defenders in the Republic of Uganda' http://www.achpr.org/press/2014/03/d196/ (accessed 16 June 2018) as well as one condemning Nigeria's Same-sex Marriage [Prohibition] Act. See 'Press release on the implication of the Same -sex Marriage [Prohibition] Act 2013 on Human Rights Defenders in Nigeria' http://www.achpr.org/press/2014/02/d190/ (accessed 25 April 2014).

80 For example, it raised concerns regarding violence against LGB persons in Cameroon. See Report of the joint mission of the mechanisms of the special rapporteur on the rights

There is much room within these mechanisms to ultimately help to stimulate social change. LGB activists in the case study African Common Law countries are in a position to consistently report on the state's adherence to these promises at the different levels and to engage these bodies. By taking these steps, LGB cases that have not been heard can be brought to the attention of international actors, which also 'embarrasses' the nation[81] and encourages the state to do what needs to be done.

b) Engaging LGB friendly countries for diplomatic pressure on the state

States influence each other in different ways, and many have leverage over others in different forums. For LGB rights, this is done through socialisation, policy diffusion and global queering.[82] Therefore, it is sometimes necessary that LGB activists tap into these processes in order to cause change at home. The ways through which foreign governments can be engaged in extreme situations is through meetings with staff of the embassies of the said countries and where possible the foreign ministries. Another way is to work with organisations based in other countries to engage with the foreign ministers and other key personnel. For the USA, groups such as the Council for Global Equality[83] are well known in this regard, and can thus be of great help to activists wanting to access the White House or the State Department. Indeed, this approach was used in Uganda to delay the passing of the Anti-Homosexuality Bill, and also its being signed into law.[84] This did not fully work as the President went ahead and signed the Bill into law anyway, but the fact that the Act was hurriedly annulled by the Constitutional Court after many donors had cut aid,[85] and the USA had reviewed its aid support to Uganda and barred unnamed Ugandan officials from entering USA territory[86] at a time when the President was due to travel to Washington DC for the US-Africa Summit[87] points strongly to the view

of women in Africa and the Committee on the Rights of People living with HIV, and those at risk, vulnerable to, and affected by HIV to the republic of Cameroon paras 25 and 30 http://www.achpr.org/files/sessions/53rd/mission-reports/cameroonpromo-2012/misrep_promo_cameroon_2012_eng.pdf (accessed 16 June 2018.

81 Naming and shaming is one of the ways through which international human rights law is enforced, and it usually works. EM Hafner-Burton 'Sticks and stones: Naming and shaming the human rights enforcement problem' (2008) 62:4 *International Organization* 689.

82 See the discussion on multiple commitments at the international level in Chapter 5, section 5.5.

83 See The Council for Global Equality 'About us' http://www.globalequality.org/about-us (accessed 15 July 2018).

84 'Obama condemns Uganda anti-gay bill as "odious"' *Reuters* 4 February 2010 https://www.reuters.com/article/us-uganda-gays-obama-idUSTRE6134EZ20100204 (18 August 2018).

85 'Uganda donors cut aid after president passes anti-gay law' The Guardian, 25 February 2015, https://www.theguardian.com/global-development/2014/feb/25/uganda-donors-cut-aid-anti-gay-law (accessed 22 August 2018).

86 'U.S. cuts aid to Uganda, cancels military exercise over anti-gay law' Reuters, 19 June 2014 https://www.reuters.com/article/us-usa-uganda-gay-announcement/u-s-cuts-aid-to-uganda-cancels-military-exercise-over-anti-gay-law-idUSKBN0EU26N20140619 (accessed 20 August 2018).

87 'Museveni behind gay law victory?' *The Observer*, 4 August 2014.

that in fact foreign pressure must have had a hand in having the Act nullified – or at least in its hurried nullification.[88] Foreign pressure however did not seem to work in Nigeria where the Same Sex Marriage (Prohibition) Act (SSMPA) was passed despite the foreign pressure. Nevertheless, activists still call for international pressure[89] as having the state in the spotlight helps to ward off the worst of repression.

This approach however should only be resorted to in extreme circumstances, when foreign pressure remains almost the only alternative available to ensure that change happens. The Ugandan case was perhaps such a situation, as this was an extreme law which had massive support from the legislature and the general population.[90] The reason for extreme caution in using this approach is because it supports the argument that LGB rights are a western imposition, and that this is a new form of colonialism and imperialism. This argument is valid as some of the ways in which promotion of LGB rights is done is utterly disrespectful of the values and views of African countries.[91] Perhaps what would be more acceptable and safer for LGB persons is to use other African countries such as South Africa to bring the 'African perspective' to the issue, since they have been able to achieve legal change on LGB rights. This is however also no guarantee, given the South African exceptionalism as regards LGB rights in Africa and its own peculiar racial situation, which makes the country's stand on LGB rights appear to many as largely influenced by its white minority. This may however be more palatable than using the USA, although of course South Africa does not have the same influence on Uganda's government that the USA and some European countries have due to their bilateral support to Uganda. Another issue is South Africa's own ambivalence towards LGBT issues in the rest of the continent, shown by its reaction to the Anti-Homosexuality Bill in Uganda, which could almost be said to have been supportive, and recent refusal to condemn violations in that country.[92]

88 Above.

89 B Alimi 'Buhari, LGBT rights, and international pressure' *The Hill*, 29 May 2015 https://thehill.com/blogs/congress-blog/civil-rights/243363-buhari-lgbt-rights-and-international-pressure (accessed 7 September 2019).

90 Interview with Frank Mugisha, n 10 above. See also A Jjuuko 'International solidarity and its role in the fight against Uganda's Anti-Homosexuality Bill' in K Lalor, E Mills, AS Garcia & P Haste *Gender, sexuality and social justice: What is the law got to do with it?* (2016)126, 133.

91 Ssebaggala for example considers forcing Ugandans to discuss same-sex issues as 'morally unconscionable' since they largely do not openly discuss sex at all. R Ssebaggala 'Straight talk on the gay question in Kampala' (2011) 106 *Transition* 50. See also J Oloka Onyango 'We are more than just our bodies: HIV and AIDS and the human rights complexities affecting young women who have sex with women in Uganda' HURIPEC Working Paper No. 36 (2012) 70.

92 See for example "You can't put yourself morally above others' – Mabuza declines to condemn Ugandan anti-gay law' *News24Live* https://citizen.co.za/news/south-africa/government/2201923/you-cant-put-yourself-morally-above-others-mabuza-declines-to-condemn-ugandan-anti-gay-law/ (accessed 28 December 2019).

Another danger lies in the fact that successfully lobbying another state may not necessarily lead to that state doing what the activists want in the exact manner desired. States usually have their own citizens and interests to consider, and are thus more likely to act in self-interest. Dr. Chris Dolan of the Civil Society Coalition on Human Rights and Constitutional Law in Uganda notes instances where the states would ignore the Coalition's advisories on when to speak out.[93] Indeed, in Uganda where activists lobbied the Canadian government to speak out against Uganda's Anti-Homosexuality Act, albeit diplomatically, the manner in which Foreign Minister John Baird accosted Uganda Speaker of Parliament Rebecca Kadaga at a public meeting in Canada had largely negative results for the campaign against the AHB.[94] The public accosting led to the Speaker angrily lashing out at the Canadian Foreign Minister. She was subsequently received as a hero by the anti-gay groups in Uganda, promising to pass the Bill as a Christmas gift.[95] Although as the Speaker she was supposed to be neutral, Kadaga made it a personal agenda to have the Bill passed into law, something the Constitutional Court criticised her for in the *AHA* case.[96]

Another dangerous offshoot of such lobbying is the issue of aid conditions. Many states – particularly those in the global north which give aid to African countries – usually find cutting aid or imposing aid-conditions the best way to sanction a country that violates LGB rights. Unfortunately, this tactic puts LGB persons at risk as they are used as scapegoats for any budgetary constraints and are seen as being against the interests of the country, and may be targeted.[97] They are also resented by other advocacy groups for being somehow 'more important' than others, and thus isolated.[98] A far more serious danger is that aid cuts will affect development and support to key sectors such as health and education, which are crucial for developing countries.[99] And finally, they may also affect LGB persons, as they are part of the same population that misses out when aid is cut, thus further undermining the rights of everyone, including LGB persons.[100] It may also promote violence

93 Interview with Dr Chris Dolan, Director, Refugee Law Project, School of Law, Makerere University and former chairperson of the Steering Committee of the Civil Society Coalition on Human Rights and Constitutional Law (CSCHRCL), Kampala, July 2017. Also see A Jjuuko, n 90 above.

94 'Kadaga, Canadian minister in gay row' *Daily Monitor*, 25 October 2012.

95 As above.

96 'Kadaga wants anti-gay bill tabled' *Daily Monitor*, 16 November 2012.

97 Jjuuko for example links the restrictive NGO Act 2016 to the need to stop LGB groups. See Jjuuko (n 90 above) 126, 134.

98 P Dunne 'LGBTI rights and the wrong way to give aid' (2012) 12 *Harvard Kennedy School Review* 67.

99 For example, the US cutting off support to the Inter-Religious Council of Uganda (IRCU) over its anti-gay stance was said to affect over 165,000 people on ARVs. See 'US cuts aid to religious council over anti-gay law' *Saturday Monitor* 4 July 2014.

100 See for example African Men for Sexual Health and Rights (2011) 'Statement of African social justice activists on the threats of the British government to "cut aid" to African countries that violate the rights of LGBTI people in Africa' http://www.amsher.net/

against LGB persons as they are blamed for the aid cuts.[101] Therefore, this strategy has to be used with extreme caution.

There is no doubt that some countries can have leverage over others regarding LGB rights, and activists can therefore take advantage of this. However, this should be done carefully after weighing all the advantages and disadvantages of such an approach. There should be a process of advising on when certain steps could be taken by the lobbied states in order not to further jeopardise the security and rights of LGB persons.

7.2.3 Taking advantage of the economic factors

Since the economy influences the way the law operates, economic factors need to be taken advantage of if LGB strategic litigation is to stimulate the creation of the necessary social change. It is therefore suggested that LGB activists do the following to take advantage of the prevailing economic factors: file more LGB strategic litigation cases in more capitalistic countries and in countries that are rapidly developing economically, and prioritise economic empowerment of LGB persons.

a) Filing more cases in more capitalistic countries

For the more capitalistic Common Law African countries such as South Africa, and Botswana, there is need to bring more cases before the courts of law on LGB rights. This is because capitalism puts in place the conditions necessary for progressive judgments and the need to attract more investors and private actors through open and progressive court decisions and policies. One of the pillars that the World Competitiveness Report bases on in assessing the growth of any economy is the capacity of institutions, including judicial independence and reliability.[102] These countries are therefore very much interested in the image of progress that they portray to the outside world, and this is a good incentive to protect LGB rights. It is therefore no surprise that again it is South Africa and Botswana that have protected LGB rights more through the judiciary.

b) Filing more cases in rapidly developing countries

LGB strategic litigation is more likely to be effective in situations of increased economic development. Activists need to file more cases in court to take advantage of this. Almost all the selected Common Law African countries are developing[103] and so this gives fertile ground for LGB strategic litigation to be

news/ViewArticle.aspx?id=1200 (accessed 15 July 2018).

101 See also 'U.S. support of gay rights in Africa may have done more harm than good' *The New York Times*, 20 December 2015 https://www.nytimes.com/2015/12/21/world/africa/us-support-of-gay-rights-in-africa-may-have-done-more-harm-than-good.html (accessed 22 August 2018).

102 Above, 29.

103 The World Bank foresees continued development for African economies. See The World Bank 'Global economic prospects: Sub-Saharan Africa' The World Bank, 9 January 2018 https://www.worldbank.org/en/region/afr/brief/global-economic-prospects-sub-saharan-

more effective and meaningful. Botswana and Kenya stand out as countries whose economic development levels are going higher. As such, more opportunities exist that would ensure the success of LGB strategic litigation, implying the need to have more LGB strategic litigation cases filed before the courts of law. Donors that support LGB work could also look at supporting economic development for the different countries as a whole as this would surely create a more accepting and less homophobic society.

c) Prioritising economic empowerment of LGB persons

Since it has been proposed in Chapter 5 above that the more affluent LGB persons there are in a country, the faster LGB strategic litigation will lead to social change, there is a need to create more economic opportunities for LGB persons. Organisations that support LGB persons should thus look into this aspect and be able to provide seed capital, training opportunities, supporting the education of LGB persons, and starting small-scale businesses for them. One of the reasons why the marginalisation of LGB persons continues is their failure to economically support themselves, thus remaining economically disempowered and unable to effectively demand for their rights.[104] Without economic empowerment, even if all LGB cases were won, people would not be empowered enough to take advantage of the resulting benefits, and the victories and legal changes would largely be in vain. According to Funeka Soldaat of Free Gender in South Africa,

> 'Even if you know how the constitution works, you don't know how to use it to protect yourself. If you don't have money, you don't have access to the justice system.'[105]

In the selected countries, there are barely any groups that support the economic empowerment of LGB persons,[106] with more assistance being focused on legal and health services. Economic empowerment is however equally important, along with education, since education empowers people, enables access to employment and improves social status. When LGB persons remain poor, they are easily susceptible to involvement in petty crime, and this contributes to the common myth that LGB persons are naturally miscreants and drug addicts.[107] They also do not make good role models whom young

africa-2018 (accessed 22 August 2018).

104 Why economic justice is central to LGBT rights' *Huffington Post* 5 July 2012 https://www.huffingtonpost.com/chi-mgbako/why-economic-justice-is-central-to-lgbt-rights_b_1479601.html (accessed 17 July 2018).

105 Crisis in South Africa: The shocking practice of "corrective rape" – aimed at "curing" lesbians' *Independent UK* 4 January 2014 http://www.independent.co.uk/news/world/africa/crisis-in-south-africa-the-shocking-practice-ofcorrective-rape–aimed-at-curing-lesbians-9033224.html (accessed 12 February 2015).

106 An example of such group is the Coalition for Advancement of Lesbian Business in Africa (CALBiA), which provides start-up capital for small and medium businesses for lesbians.

107 See Southern Poverty Law Centre '10 anti-gay myths debunked' 27 February 2011,

members of the community can look up to and follow in order to build a better life. In South Africa, many prominent persons have come out as gay, which has helped to change minds and demonstrate that LGB persons too can be like everyone else and can become useful members of the community and good role models.[108] Economic disempowerment of LGB persons slows down social change in favour of LGB equality.

7.2.4 Engineering the social factors

Social factors are critical to how LGB strategic litigation creates social change. This is because they determine how people perceive each other, communicate with each other and generally relate to one another. These factors therefore need to be influenced by activists if LGB strategic litigation is to lead to social change. These factors are discussed below:

a) Supporting liberal religious groups and figures

Extremist religious groups need to be countered with a more moderate and inclusive message. LGB groups need to join and support religious groups that are more welcoming to LGB persons, and develop religious discourse around inclusion and love, which are indeed hallmarks of every religion. Such groups include: the World Council of Churches[109] and the Metropolitan Community Churches.[110] This support should go beyond Christian groups to other religions, including Muslims. An example of an inclusive mosque is the People's Mosque in Cape Town, which welcomes LGB persons.[111]

Leading liberal figures in the more established religious groupings should also be lobbied to speak out against discrimination. For example, the Pope's message about not judging[112] and his comment to a gay man that 'God made you like this,'[113] were important as they showed that the Catholic Church

https://www.splcenter.org/fighting-hate/intelligence-report/2011/10-anti-gay-myths-debunked (accessed 16 July 2018).

108 See discussion on economic changes in Chapter 4, section 4.5.

109 The World Council of Churches is a worldwide fellowship bringing together over 350 churches. See World Council of Churches 'About us' https://www.oikoumene.org/en/about-us (accessed 17 June 2018). They are also more open to LGB inclusion. See for example World Council of Churches 'Churches' response to human sexuality' 14 February 2006 https://www.oikoumene.org/en/resources/documents/assembly/2006-porto-alegre/3-preparatory-and-background-documents/churches-response-to-human-sexuality (accessed 17 June 2018).

110 The Metropolitan Community Churches (MCC) were established in 1968 and specifically reach out to LGB persons among other groups. See https://www.mccchurch.org/ (accessed 17 June 2018).

111 A Bruce-Lockhart 'Meet the imam of Africa's first gay-friendly mosque' *World Economic Forum* 4 May 2017 https://www.weforum.org/agenda/2017/05/gay-lgbt-mosque-imam-muhsin-hendricks/ (accessed 14 April 2018).

112 For the details and a discussion of this comment, see MJ O'Loughlin 'One key to understanding Pope Francis? His approach to judgment' *The Jesuit Review* 27 February 2018, https://www.americamagazine.org/faith/2018/02/27/one-key-understanding-pope-francis-his-approach-judgment (accessed 15 July 2018).

113 'LGBT community cheers Pope's 'God made you like this' remark' *Chicago Tribune*

did not outrightly condemn LGB persons and could actively welcome them. Another way of engaging religious leaders can be through lobbying liberal leaders such as Archbishop Desmond Tutu of South Africa,[114] Bishop Christopher Ssenyonjo of Uganda,[115] and Reverend Thabo Otukile Mampane of the World Council of Churches in Botswana to speak out against hate and discrimination in the name of religion.

There is a need for more studies on how the religious right channels its support to anti-gay groups in Africa, and how this bolsters domestic anti-gay campaigns. This would build further on the research and documentation done by Reverend Kapya Kaoma.[116] His exposure of such ties was important in bringing cases such as *SMUG v Lively* (the *Scott Lively* case)[117] which brought attention to the role of US pastor Scott Lively in spreading anti-gay hate in Uganda and elsewhere. Working with progressive church leaders helps to send clear signals that not all churches or faiths condemn people who are LGB, and also brings to light the activities of anti-gay groups aimed at spreading hate. The collaboration of progressive churches helps to change minds and thus helps to enable LGB strategic litigation to spur social change.

b) Holding 'foreign' anti-gay supporters accountable

The support of radical evangelicals from the USA and elsewhere makes a significant contribution to the anti-gay rhetoric in many African countries. Their contribution has been widely documented and discussed in this volume.[118] The example from the *Scott Lively* case in Uganda[119] has shown that where these activities cross the line into the international crime of persecution of LGB persons, then activists based in Africa can successfully file a lawsuit in a US court under the Alien Torts Statute challenging such actions.[120] The lesson learnt from the *Scott Lively* case[121] is that more effort should be made to point out the actions done on US soil that constitute persecution, in order

21 May 2018 http://www.chicagotribune.com/news/nationworld/ct-pope-gay-comment-20180521-story.html (accessed 15 July 2018).

114 Archbishop Emeritus of Cape Town, South Africa. He has spoken out openly in support of LGB rights. See for example D Tutu Foreword to P Germond & S de Gruchy *Aliens in the household of God: Homosexuality and christian faith in South Africa* (1997).

115 Bishop Christopher Ssenyonjo is the former Anglican Bishop of West Buganda Province who was defrocked because of his inclusion of LGB persons. He went ahead to continue his support for LGB persons through Integrity Uganda and the Saint Paul's Reconciliation and Equality Centre in Kampala. See generally, C Ssenyonjo *In defense of all God's children* 2016.

116 Rev Kaoma is a Zambian priest who has extensively researched these connections. See Political Research Associates 'Author archives: Kapya Kaoma' http://www.politicalresearch.org/author/kkaoma/#sthash.F81nvkOB.dO2kgiUR.dpbs (accessed 17 June 2018)

117 C.A. No. 12-cv-30051-MAP (Scott Lively case).

118 See discussion on the extent of religious extremism in Chapter 5, section 5.7.

119 n 117 above.

120 As above.

121 As above.

to satisfy the test laid down earlier by the US Supreme Court in *Kiobel v Royal Dutch Shell Petroleum Co*.[122]

Despite the judgment ultimately failing to hold Scott Lively liable, it made it clear that conspiring with others and actively supporting legislation that is aimed at curtailing the rights of LGB persons would constitute persecution under US law. It also showed that US courts are willing to enforce their jurisdiction under the Alien Torts Statute, provided the right conditions are met. This decision puts such evangelicals on notice that their actions, which demonise, intimidate and injure LGB persons, would attract sanctioning under international law. Indeed in Uganda, there has been a marked reduction of the number of evangelicals who come into the country and hold large rallies against homosexuality.[123] Even Scott Lively himself is in the process of closing his Abiding Truth Ministries,[124] which is regarded by the Southern Poverty Law Centre as a hate group.[125] The bad publicity from this case is arguably one of the reasons this happened. Therefore, the Ugandan example of challenging the actions of Lively in a US court shows that if supporters of hate groups are brought to book in their own countries, where stronger legislation combatting hate crimes exists, this helps to stem the tide of anti-gay hate. It also helps to weaken their local supporters in-country. For example, hitherto outspoken Ugandan anti-gay pastor, Martin Sempa, went quiet for a time after the US court issued a subpoena against him as a US citizen to appear and testify on matters regarding his communications with Scott Lively.[126] This strategy therefore needs to be replicated elsewhere where US evangelicals continue to spread hate.

Another related strategy is to track the money trail as well as establish hate lists to track and expose the individuals/entities who actually support the anti-gay groups. This is because many of the funders of anti-gay groups do not do so openly.[127] According to Kapya Kaoma, this is possible because the laws in the

122 133 S. Ct. 1659 (2013).

123 Interview with Frank Mugisha, n 10 above.

124 C Santoscoy 'Anti-gay Scott Lively closing down 'hate group' Abiding Truth Ministries' *On Top Magazine* 31 May 2018 http://www.ontopmag.com/article/43757/Anti_Gay_Scott_Lively_Closing_Down_Hate_Group_Abiding_Truth_Ministries (accessed 16 June 2018).

125 See for example Southern Poverty Law Centre 'Anti-LGBT hate group leader Scott Lively garners enough votes for Massachusetts gubernatorial primary' 7 May 2018 https://www.splcenter.org/hatewatch/2018/05/07/anti-lgbt-hate-group-leader-scott-lively-garners-enough-votes-massachusetts-gubernatorial (accessed 16 June 2018).

126 'Pastor Ssempa summoned by US court' *Daily Monitor* 22 May 2016 Also see 'Where is Pr. Dr. Martin Ssempa?' 3 January 2017 *Christian News Uganda* http://ugchristiannews.com/where-is-pr-dr-martin-ssempa/ (accessed 17 June 2018).

127 Kapya Kaoma found evidence that evangelical groups gave money to anti-gay groups in Uganda, including the Anglican Church. See Kapya Kaoma 'The US christian right and the attack on gays in Africa' *Huff Post*, 18 March 2010 https://www.huffingtonpost.com/rev-kapya-kaoma/the-us-christian-right-an_b_387642.html?guccounter=1 (accessed 22 August 2018).

USA and those in many African countries do not require them to declare how much they donate.[128] It is also worth noting that funding of anti-gay groups in Africa by US right wing evangelicals is a recent development meant to further the culture wars in the US. According to the *Scott Lively* decision, funding of efforts to demonise and injure LGB persons would, if done on US soil, amount to aiding and abetting the persecution of LGB persons.[129] Publicly exposing anti-gay supporters would have the effect of limiting the amount of support, particularly from those individuals/groups within the USA, which would then run the risk of prosecution for aiding and abetting persecution in light of the Scott Lively decision.

In addition, tracking who such supporters are and exposing them helps to force such groups to come out in the open and declare whether they still support such activities.[130] The Southern Poverty Law Centre maintains a hate list and the role that groups on that list play in spreading anti-gay hate.[131] Such lists should be widely disseminated. For example, as a result of the exposure of Saddleback Ministries' Rick Warren's connections with Pastor Martin Ssempa, he openly severed ties with the latter after he was placed under pressure to explain his influence in Uganda and his stance on the Anti-Homosexuality legislation.[132] Having such supporters on the defensive is a key factor in stemming the export of US cultural wars to Africa.

With reduced US and other western support, radical evangelicals in Africa would remain with no external moral and financial support, which would cripple their ability to widely spread anti-gay hatred, and undermine their ability to oppose cases. In reducing resistance spurred by anti-gay groups, a better environment will be created for successful LGB strategic litigation to spur social change.

c) Publicising positive aspects of 'traditional' culture

Rather than seeing culture as an impediment to LGB equality, its more positive components that are supportive of LGB equality should be identified and explained. There are many ways in which LGB persons were treated culturally without necessarily punishing them. In many traditional African societies, homosexuality was neither condoned nor criminalised.[133] Indeed,

128 K Kaoma, *Globalising the culture wars: US conservatives, African churches and homophobia* Political Research Associates, 2009, 9-11.

129 n 117 above.

130 Southern Poverty Law Centre 'Extremist files' https://www.splcenter.org/fighting-hate/extremist-files (accessed 15 July 2018).

131 Southern Poverty Law Centre 'Hate map' https://www.splcenter.org/hate-map (accessed 16 August 2018).

132 'Rick Warren denounces Uganda's anti-gay bill' *Time* 10 December 2009 http://content.time.com/time/world/article/0,8599,1946921,00.html (accessed 2 July 2018).

133 See for example S Tamale 'Out of the closet: unveiling sexuality discourses in Uganda' http://www.feministafrica.org/index.php/out-of-the-closet (accessed 20 September 2011).

the criminalisation of homosexuality was imported by colonialists,[134] together with the other written laws generally. Traditional culture also emphasised *ubuntu*, the concept that 'I am because we are, and since we are, therefore I am.'[135] This principle was focused on everyone being part of the society and therefore not to be discriminated against or excluded. In Botswana, *botho* was defined to mean 'fellowship of mankind, co-operation, selflessness, compassion, and a spirit of sharing.'[136] These are certainly well recognised concepts in communitarian societies across Africa. These can be given as examples and brought to the knowledge of the masses, and may help change mindsets, a factor which is key to LGB court victories convincing people that change needs to happen. Indeed, in Botswana, LEGABIBO has been working with chiefs to engage them on the need to promote inclusion and acceptance of LGB persons.[137] This helps to change societal perceptions and make it easier for LGB strategic litigation to stimulate social change.

d) Cautiously continuing to do LGB litigation despite court losses or backlash

There is need for activists to continue doing LGB strategic litigation. This is important in order for the courts to get used to LGB issues and issues of marginalisation and discrimination generally and to build a jurisprudential base for future cases. LGB strategic litigation should continue even if there are losses in the courtroom as well as backlash and counter mobilisation. However, in such circumstances, there is need to change tactics and do strategic litigation differently. El Menyawi argues in the context of Egypt that in the current environment of the backlash against LGB persons, 'stonewall' strategies such as publicly demanding for LGB rights, which indeed includes strategic litigation, are counterproductive. He therefore advocates for other approaches, which he refers to as 'activism from the closet', that include engaging religious leaders within the framework of the Quran and other tenets of religion.[138] For Common Law Africa, where there is backlash and continued losses such as the case is currently in Uganda, there is need to revisit the strategy and instead of challenging the laws criminalising same-sex conduct, challenges should be instituted against other laws that directly affect LGB persons but which also apply to other groups generally, such as the laws on being rogue and vagabond, to address other legal impediments to the rights of LGB people without putting the sexuality question in issue. In Malawi, for example, there was a successful challenge to a provision criminalising being 'rogue and vagabond,' a provision that also affects LGB persons, and yet the

134 Amnesty International 'Making love a crime: Criminalisation of same-sex conduct in sub-Saharan Africa' (2013) https://www.amnestyusa.org/files/making_love_a_crime_-_africa_lgbti_report_emb_6.24.13_0.pdf (accessed 17 June 2018).

135 See J Mbiti *African religions and philosophy* (1969) 108–109.

136 See Republic of Botswana, n 45 above.

137 Interview with Bradley Fortuin and Botho Maruatone, n 48 above.

138 El Menyawi, n 4 above.

case was never expressed as an LGB case at all.[139] Indeed, such cases do not even have to be brought by LGB persons or have LGB rights mentioned. This was the situation in Uganda in the *Equal Opportunities case*, where a lawyer who did not identify as LGB successfully challenged a provision of the Act which affected LGB persons and other minorities. What should matter is the nullification of the offending law rather than how it comes about. Therefore, there is no need to stop LGB strategic litigation even in the context of backlash and counter mobilisation. All that is required is that activists be more innovative about their demands in order to achieve change without creating backlash where this can be avoided by using alternative strategies.

In situations where a direct case must be brought, such as the case was in challenging Uganda's AHA, then ways in which the case could be narrowed down to ensure a win, while at the same time reducing the possibility of harm arising from backlash, have to be discussed. In Uganda, it was found important to challenge the AHA at the East African Court of Justice as it was then thought that the Ugandan Courts would delay. However, when the Ugandan courts decided the matter before the EACJ did, the case at the EACJ was revised to seek a declaration that would ensure that the parliament would never have carte blanche to pass such discriminatory laws in Uganda, as well as the other East African countries. A strategising meeting involving East African activists had to be held to discuss how this was to be done, and that is when it was decided that the challenge should be limited to only three provisions as well as the action of passing the Act into law in the first place.[140] Therefore, retreating and restrategising is not failure, but rather recognition of the prevailing circumstances and working within them to create change. Nigerian activists have taken this advice when planning a challenge to the SSMPA and have withdrawn a case in order to plan better.[141] As such in Uganda, after the loss in the Lokodo case, activists decided to bring cases of enforcement of LGB rights to the Uganda Human Rights Commission rather than the courts.[142] Such an approach would minimise the effects of unsuccessful court decisions and counter-mobilisation on LGB persons and reduce the possibility of legislative backlash.[143]

e) Increasing the prospects of favourable judicial decisions

Although it is true that strategic litigation is not all about winning, court victories are nevertheless important and critical and should be aimed at in

139 *Gwanda v S* Constitutional Cause No. 5 of 2015.

140 Interview with Patricia Kimera, Head, Access to justice Division, Human Rights Awareness and Promotion Forum (HRAPF), Kampala, 24 April 2018.

141 Skype Interview with Pamela Adie, Executive Director, Lesbian Equality and Empowerment Initiatives (LEEI), 9 September 2019.

142 Interview with Patricia Kimera, n 140, above.

143 See generally, TM Keck 'Beyond backlash: Assessing the impact of judicial decisions on LGBT rights' (2009) *43 Law and Society Review* 151.

all cases. However, in a context where homophobia prevails, a successful outcome can rarely be guaranteed. One way of ensuring that cases succeed is to adequately plan for all the internal factors that affect the case and try to effectively speculate and plan for the external influences on the case. To avoid losses reversing gains already made, it is advisable not to reopen issues where cases on the particular matter had already been won.

Activists need to bring cases testing/challenging one aspect of the law or conduct at a time before courts so that a decision in one case does not bar subsequent cases from being brought. Another way is to ensure that courts that are likely to bar further appeals are avoided at the early stages of the litigation. An example of such a court is the Ugandan Constitutional Court, which has original jurisdiction in constitutional matters, but with very limited room for appeal, as its decisions can only be appealed to the Supreme Court. The High Court on the other hand gives two levels of appeal – to the Court of Appeal and then the Supreme Court, thus giving a chance to more judges to engage with the issue. By managing losses at an early stage, the litigation can continue, registering small gains as the general environment in which the cases are heard becomes more favourable. A complete shut down of litigation should therefore be avoided at all costs. Indeed, it is quite clear that in Common Law Africa, as well as outside Common Law Africa, it is only in countries where strategic litigation has been continuous that social change has been registered.

f) Responding to counter mobilisation of elites

Finally, as far as exogenous factors are concerned, there is need to respond to counter mobilisation. This is where counter-mobilisation of allies and the community against LGB persons after court victories is countered with LGB groups doing their own mobilisation among neutral but influential allies and other persons. An important group that can be targeted to help create change are the parents of LGB persons. Parents are a powerful voice as they are usually drawn from the communities and at the same time have experienced the kind of discrimination that is visited upon families of LGB persons. Such groups would be speaking from real life experience and their stories are likely to change people's views, while their evidence in court is also likely to influence how the judges decide the cases.

Another group to mobilise are friendly religious leaders who can counter the message of the anti-gay religious groups. Another group are leading politicians who are not afraid to put their careers on the line. In Uganda, Prof. Ogenga Latigo, the former leader of the Opposition in Parliament, regained his seat even after being a petitioner in the AHA case. He stated the reasons why he supported the case, grounding them in human rights and science.[144] Member of Parliament and former Presidential Legal Advisor, Fox Odoi, also took

144 '120 legislators lose parliamentary seats' *New Vision* 21 February 2011; 'Battle of scientists as gay law storm persists' *The Observer* 16 March 2014.

a stand for LGB rights, even if this may ultimately have contributed to his losing his seat. The profiles of such actors helped draw attention to the case and it was eventually won. The fact that prominent politicians took such a stand in a situation where the evangelicals had mobilised support and largely had the President on their side was unforeseen, and it helped buttress the case and draw the necessary attention to it.

Therefore, the exogenous factors need to be leveraged, taken advantage of, managed or otherwise exploited to create the conditions that would enable LGB strategic litigation to lead to social change. Once this is done, LGB strategic litigation can lead to social change even in situations where the factors have not completely changed into the perfect change-fostering conditions. In Common Law Africa, South Africa is a good example of how these factors were well managed and eventually significant social change achieved in situations of pre-existing and ongoing homophobia and biphobia.

7.3 Controlling the endogenous factors

While the exogenous factors are largely beyond the control of LGB groups, the endogenous factors are almost entirely within the control of the groups. LGB activists therefore have much more leeway in influencing them. This section explores the role of activists over the four-phased life cycle of litigated cases: the development of the overarching strategy, the pre-litigation phase, the litigation phase and the post-litigation phase.

7.3.1 Influencing the factors that go to the overarching litigation strategy

At the level of the overarching litigation strategy, LGB activists set the long-term strategic objective and how to achieve it, taking into consideration the likely obstacles and potential measures to overcome them. At this level, the following measures are identified as potential accelerators to induce lasting social change in the selected Common Law African countries:

a) Setting the long term strategic objective at complete social integration

Whereas the current struggles in all the selected Common Law African countries besides Botswana and South Africa is decriminalisation, South Africa is a good reminder that there is a lot more to be achieved beyond decriminalisation. Indeed, decriminalisation is very important, as it is 'an essential first step towards establishing genuine equality before the law.'[145] However, it is not an end in itself but rather a means to an end, and that end is complete cultural integration- the highest level on Kretz's seven stage spectrum.[146] What is required is not just the first step but full equality and

145 M Bogner 'Decriminalizing homosexuality is an essential first step towards establishing genuine equality before the law' Op-ed, Office of the High Commissioner for Human Rights, regional office for the Pacific, 11 October 2011 http://pacific.ohchr.org/statements.htm (accessed 2 July 2018).

146 See A Kretz 'From "kill the gays" to "kill the gay rights movement": The future of

acceptance for LGB persons. As such, there is need to clearly set the overall strategic objective for litigation at complete social integration, even if it currently appears to be a far off goal. Beyond decriminalisation is marriage equality, from which issues such as joint custody of children and succession rights would almost automatically follow. Although there is a school of thought within the LGB movement that looks at same-sex marriages as legitimising the institution of patriarchy and mimicking the very exploitative institutions that equality activists want to do away with,[147] it is important that it remains an option that is open to homosexual persons just as it is for heterosexual persons if full equality is to be achieved. After that, the remaining stage would be complete social integration. The danger of setting the target at decriminalisation or just same sex marriages is that after these are achieved, the movement may not be adequately prepared to go to the next stage of the struggle, as the situation is in South Africa. Therefore, the overall objective should be clearly stated as complete social integration, and then specific objectives such as achieving decriminalisation and getting same-sex marriages recognised should also be stated and plans made to achieve them in the short term and the medium term, while aiming at the overall objective in the long term. What is clear is that the struggle for LGB equality in Common Law Africa still has a long way to go, and activists have to be ready for a long-term struggle.

b) Adopting a formal strategy to pursue the litigation

Having a formal, well-known and countrywide strategy is by and large more effective in ensuring that LGB strategic litigation contributes to social change than having informal *ad hoc* strategies. Activists therefore need to adopt formal litigation strategies clearly laying out all the different ways in which they can achieve their aims. All the selected countries that are yet to achieve full legal equality need to revise their strategies, make them more formal and seek views and opinions of different stakeholders. This can be done through meetings about strategy with all the different stakeholders present to discuss what is to be done, and how it is to be done. Indeed, strategies do not have to be inflexible. Rather, they need to be revised from time to time to reflect the changing realities. Ugandan activists give the best example of this through the CSCHRCL, which was a platform where broader strategies were developed and reviewed.

c) Establishing formal coalitions to support the litigation

Formal coalitions ensure that there is enough popular support for the cases and significant buy-in into the overarching litigation strategy as well as into the individual cases. The Ugandan CSCHRCL would be the best model to follow as it brought together both LGB and mainstream human rights groups

homosexuality legislation in Africa' (2013) 11 *Northwestern Journal of International Human Rights* 207, 211-216. The seven stages are discussed in detail in Chapter 4 above.

147 See discussion on same-sex marriages in the USA in Chapter 3 above, section 3.2.

in order to oppose the Anti-Homosexuality Bill. However, the success and longevity of that coalition can also be said to have been restricted by its narrow vision of defeating the AHB. After this goal was achieved, the Coalition disintegrated and its different elements reverted to their previous activities.

Another model is that of the National Coalition for Gay and Lesbian Equality (NCGLE) in South Africa, which brought together different LGB groups to work towards equality. Having formal coalitions helps to more easily mobilise and attract elites, and they also present a united front that is difficult to intimidate. Such an approach makes the state and the courts aware that this is not simply a person or a few individuals seeking change, but rather a bigger group with varied interests. Nevertheless, the eventual collapse of both the CSCHRCL and the NCGLE shows that coalitions should not be formed to last forever but rather to work towards a certain goal. Once achieved, the coalition can be disbanded.

7.3.2 Controlling factors at the pre-litigation phase

At this stage, activists can do the following to ensure that a case succeeds or that, even if it fails, it is nevertheless able to create positive change: increase consultations when building a case and increase local fundraising.

a) Increasing consultations when building a case

All the countries surveyed in the study need to ensure that consultations are meaningful, wide and address both the merits and the strategic aspects of the case. This is because consultations help in coming to a decision on the best approach to take and thus give activists and litigants an opportunity to prepare adequately to enable the case to stimulate social change. A well-planned case requires broad consultations with different stakeholders as this builds legitimacy.[148] The consultations should also extend to corporate entities that may be willing to support such work, as well as different state institutions. Such consultations help to identify allies that one may not have been able to recognise beforehand, and to build consensus as well as to explain to those who may think that the case is against them that there are broader concerns and interests. In Uganda, the Equal Opportunities Commission was initially hostile to the fact that a case had been brought challenging section 15(6)(d) of the Equal Opportunities Commission Act. However, after engaging them during the time the case was in court, they were able to see the benefits of the petition.[149] The lesson learned was that it was better to consult them before filing the case, such that all parties were clear as to the intention of the case. Consultations are a crucial foundation to the adequate planning of a case in order to ensure victory and to gain support for the case.

148 See D Feldman, 'Democracy, the rule of law and judicial review' (1990) 19 *Federal Law Review* 1-30, 23-30.

149 Interview with Patricia Kimera, n 140 above.

b) Increasing local fundraising

Financially contributing to a case makes one feel like an integral component of the case. This implies that the more people who are willing to support and fund a case, the more mobilisation that is done, and the more successful and popular a case is likely to be. Foreign funding on the other hand takes away ownership of a case from the community members, and also reduces the need for accountability to the community by lawyers and organisers. Foreign fundraising makes the planners of the litigation largely have the foreign funders as the persons to account to, and not the community.

Even if a victory is secured in a case where few people have an interest, it would have little impact on the ground, as the actual beneficiaries did not actively participate and do not own the cases. Studies in the USA show that LGB persons actually contribute more, financially, to causes than the general populations.[150] This may be due to the need to do something to improve the situation of other LGB persons, and the general population, having undergone discrimination themselves. As such, activists in African countries need to consider local fundraising. While it is correct that many LGB persons in the different Common Law countries are considerably poorer, complementing donor support with local support, however minimal, still helps to ensure that the community owns the cases and supports them. This ultimately ensures social change as the cases have adequate support.

7.3.3 Controlling factors at the litigation stage

The litigation stage is where the success of the individual case is determined. The factors at this stage are fully within the control of the activists as they usually are the ones filing the case. At this stage, the following need to be done in order to ensure that LGB strategic litigation stimulates social change:

a) Ensuring that cases go all the way to the highest courts

Highest courts ensure the finality of cases, and therefore it would be clear that what that particular court states is the final position of the law and cannot be reversed. Victory at the lower courts is important, but unsuccessful cases at that stage should be appealed until the highest level of the judicial system. Care should however be taken to ensure that bad precedents do not get confirmed as law, and therefore the decision to appeal a lost case should not be taken lightly. Also, in countries such as Uganda where a different court of first instance exists for constitutional matters,[151] care has to be taken when

150 See for example Garvey, JC *Creating communities: Giving and volunteering by gay, lesbian, bisexual and transgender people* (1998) 7-11.

151 The Constitutional Court is the court of first instance for constitutional interpretation, and appeals therefrom go to the highest Court, the Supreme Court. On the other hand, the High Court is the right court to go to for enforcement *(Ismail Serugo v Kampala City Council & Attorney General,* Constitutional Appeal No. 2 of 1998), and this approach gives two appeals- to the Court of Appeal, and to the Supreme Court.

choosing the court to approach. Whereas constitutional interpretation ensures finality, it can also close the way for further progress, as there are fewer appeals than in enforcement cases, which start at a lower level. Therefore, cases have to be designed in such a way that only matters that must go for constitutional interpretation, such as interpretation of statutes, go to that court, and the rest go for enforcement. That way, the window of the number of appeals before a case gets to the highest court remains relatively wide.

In the case of Botswana, Kenya, Nigeria and South Africa where the high courts also hears constitutional matters, this issue does not arise as either way, cases end up at the highest court through appeals. In the case of South Africa, cases where legislation has been struck down by lower courts must be confirmed at the highest level.[152] Therefore, regardless of the judicial system in place, activists should aim for the highest courts in the system.

b) Properly timing the filing of the cases

The right time is all-important to ensure that a case creates the necessary impact. It is fundamentally important to know the right timing for such litigation. Activists should look out for events that shock and attract publicity such as the Rolling Stone magazine's calling for the hanging of gay people in Uganda,[153] as well as the signing of the AHA into law.[154] These create publicity for the case well before it is filed and help to bring the issues to the judges' attention as well as that of the general public. However, not every such event may be a good opportunity to litigate. One of the dangers is that as such a matter would be well known and, if discussed within a homophobic setting, it may prejudice the judges. The other danger is that there is usually no adequate planning for cases that arise out of such incidents, and a half-baked and poorly thought out case may be presented, which may lead to more losses and backlash.

Another aspect to timing concerns the decision of when to institute an appeal or another case in which similar issues are considered following an unsuccessful case. Where a judge's decision is widely criticised, the judiciary is much more alive to the dynamics and public reactions that ensue and may thus reverse the decision when an appeal or another case is filed. The Supreme Court of the USA received significant backlash with the decision in the case of *Bowers v Hardwick*,[155] and was able to correct this when it finally got a chance in the

152 Section 172(2)(a) of the Constitution of the Republic of South Africa provides that an order of constitutional invalidity has no force unless it has been confirmed by the Constitutional Court.

153 Which led to the case of *Kasha Jacqueline, David Kato Kisuule & Pepe Julian Onziema v The Rolling Stone Newspaper & Giles Muhame*, Miscellaneous Cause No. 163 of 2010 (*Rolling Stone* case)..

154 Which led to the case of *Prof. J Oloka-Onyango & 9 Others v Attorney General* Constitutional Petition No. 008 of 2014 (Constitutional Court of Uganda) (*Anti-Homosexuality Act* case).

155 478 US 186 (1986).

case of *Lawrence v. Texas*.[156] However, such correction is never easy to come by as it takes time for cases to reach the upper courts.[157] A properly timed case is more likely to succeed, and even if it does not, it is more likely to create publicity and discussion of the rights litigated onb\, eventually leading to social change.

c) Mobilising elites

Activists should ensure that elites and opinion leaders are well mobilised to be part of the case and to actively and publicly support the case. Despite the homophobia and the potentially negative impact on the reputation of such elites, there are some who are willing to take the risks. Having these groups of people supporting cases is very important. In South Africa, elites took the lead in LGB strategic litigation and were the voices calling for change.[158] The petitioners themselves in the *Du Toit* case and the *Satchwell* case were respected members of the legal fraternity. This fact contributed to the speed and success of the journey from decriminalisation to marriage equality in South Africa. In Uganda, the unexpected joining of the *AHA* case by a ruling party Member of Parliament, a former leader of the opposition in Parliament and a renowned journalist helped to give the case the clout that was needed to regard it as important. The fact that the lead petitioner was also a respected law professor gave the case much-needed traction. All these joined the case due to the lobbying efforts of the activists under the CSCHRCL. Therefore, the extent to which elites are mobilised to join cases adds value to the case, draws attention to it, and thereby increases its potential to succeed and stimulate social change.

d) Effectively mobilising the LGB community and allies

The people who are affected by the laws should be given an opportunity to share their stories and explain how the status quo is affecting their day-to-day lives. Going to court without LGB persons supporting a case could also be largely detrimental to the case because it creates the impression that there are no affected people. This is still important even when the case itself does not require showing actual impact of the law or the action on the affected groups, as the case was in the *Equal Opportunities case* in Uganda.[159] In the

156 539 US 558.

157 E Bazelon 'Why advancing gay rights is all about good timing: Lessons for same-sex marriage from the Supreme Court's terrible decision in *Bowers v. Hardwick*' Oct. 19 2012, http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2012/10/the_supreme_court_s_terrible_decision_in_bowers_v_hardwick_was_a_product.html (accessed 16 June 2018).

158 According to Prof David Bilchitz, one of the reasons for this is the fact that elites are more protected from physical violence at the hands of the community in a way that grassroot activists are not. Skype interview with Prof. David Bilchitz, Director of the Southern African Institute for Advanced Constitutional, Human Rights, Public and International Law (SAIFAC), University of Johannesburg, 10 July 2018.

159 Above, n 15 above.

selected Common Law countries where even the very existence of LGB persons is questioned, such visibility is crucial. It is crucial that despite all the differences within the broader LGB, transgender and intersex movements, groups should be seen to be working together and not against each other. The Kenyan incident where one organisation acted unilaterally in spite of the broader coalition's plans to institute a joint case is an example of lack of unity.[160] The image that the movement portrays to the public is crucial.

However, while community mobilisation is key to the achievement of strategic litigation success, security concerns for LGB persons should not be underestimated. Strategic litigation is a public strategy and the cases are most likely to be publicised on television and various other media. As such, there must be strategies in place to protect LGB persons who may not want to be visible during the hearing of cases. One way that it was done in Uganda was to warn all those intending to attend the court hearings and advocacy campaigns while the Bill was still under consideration about the presence of media.[161] Of course this did not necessarily stop many from coming, and indeed the media visibility contributed to the outing of many individuals, and also contributed to the massive departure of LGB persons to foreign countries in the aftermath of the passing of the AHA into law.[162] Therefore, whereas members of the LGB community are clearly needed in court and at other case-related events, there is a need to be alive to their security. Only by ensuring their security and privacy will such support continue, and stimulate social change in favour of LGB persons.

e) Using multiple petitioners

Where possible, activists should ensure that the petitioners are multiple with multiple interests and, wherever possible, repeat petitioners should be avoided. Key among such petitioners would be persons directly affected by the law being challenged, who would certainly be LGB persons. Having multiple and different petitioners helps to show the court and the general public the importance of the case as many persons are standing up to be counted, and also does away with the narrative of a few individuals being 'paid' or otherwise influenced to spread the 'gay agenda', thereby facilitating LGB strategic litigation to stimulate social change.

f) Having a multiplicity of respondents whenever strategic

Every person who can reasonably and practicably be added as a respondent should be added to the case. This helps to make all the others realise that it is not just the state but also private individuals or persons abusing power that can be brought to book over LGB violations. It may also be important

160 See discussion in chapter 6 above, section 6.3.3.

161 Interview with Patricia Kimera, n 140 above.

162 G Zomorodi 'SOGI-related migrations in East Africa, fleeing Uganda after the passage of the Anti-Homosexuality Act' Global Philanthropy Project (2015) 21.

to have multiple respondents such that, where the case is severed and some of the respondents are declared by the court as not liable while the rest are declared liable, the petitioner still has an effective remedy. For example, in the case of *Victor Mukasa & Yvonne Oyoo v Attorney General* in Uganda,[163] although the applicants had considered the Attorney General as representing the local council authorities together with the police, the judge declared that the Attorney General cannot be held liable vicariously for the actions of the local council authorities.[164] As a result, the orders for compensation that the judge made were only directed at the violations suffered at the hands of the police and the atrocities committed by the local council authorities could not be addressed.

In the *Lokodo* case, the judge also held that the Minister who was cited as a respondent in his personal capacity was not personally liable. Nevertheless, the fact that a Minister could be dragged to court over actions affecting LGB people was an important element of the publicity surrounding the case. However, caution should be exercised since suing officials in their personal capacity may be interpreted as a personal affront, and they may take it upon themselves to pursue a campaign against LGB persons. This is indeed what seems to have happened in Uganda after the *Lokodo* case was lost. The Minister went on the offensive by closing down more LGB events.[165] Another challenge would be that if there are so many respondents, this will increase the magnitude and impact of a negative costs order and may make people cautious about instituting further LGB strategic litigation cases. Therefore, whereas it is important to have multiple respondents, these respondents have to be selected with care, and thought should be given to the possible ramifications of suing each of the individuals or institutions.

g) Engaging interveners and amicus curiae

Interveners and *amici curiae* are important as regards showing the court different opinions and viewpoints. They bring to the court matters that the court would otherwise not be aware of. Although the parties cannot entirely control *amicus curiae*, identifying and asking institutions or individuals to apply to join the case as *amicus curiae* is important. This worked well in Uganda for the *HRAPF* case.[166] Thus, UNAIDS, which was one of the four applicants, was eventually admitted as *amicus curiae*. The joining of the case by an international body such as UNAIDS considerably raised its profile.[167]

163 (2008) AHRLR 248 (High Court of Uganda).

164 Above, para 39-40.

165 See for example, 'No gay promotion can be allowed': Uganda cancels pride events' 21 August 2017. https://www.theguardian.com/global-development/2017/aug/21/no-gay-promotion-can-be-allowed-uganda-cancels-pride-events-lgbt (accessed 14 April 2018).

166 n 30 above.

167 Interview with Fridah Mutesi, member of the legal team appearing before the EACJ in the *HRAPF* case, 28 April 2018, Kampala.

Inversely, there is a need to adequately prepare for opposing groups, particularly evangelical groups who are almost guaranteed to intervene or join cases as *amici*. Their arguments should be readily anticipated and an appropriate defence formulated. This trend has been seen in the three selected African Common Law countries besides Botswana and Nigeria.

h) Selecting the best suited lawyers

Different cases require different sets of expertise. Community lawyers or cause lawyers are best placed to argue LGB cases as that is their specific area of specialisation. However, in the selected Common Law African countries, there are often no such lawyers who are dedicated to LGB cases. As such, this reality needs to be considered, and recourse may thus need to be made to lawyers in private practice. Lawyers working with friendly public interest litigation organisations and international lawyers could assist.

However, where possible, international lawyers should be kept in the background and mainly provide research and other technical support. The actual litigation of the cases should be left to local lawyers, in order to avoid fuelling the anti-gay groups' propaganda that LGB rights are a foreign agenda. Foreign lawyers would be frowned at even if they were legally allowed to represent clients in these countries. Therefore, in light of this reality, highly respected senior lawyers should be used as lead lawyers. Community lawyers should also actively be involved. This will increase the likelihood of cases being won and, even if they are lost, it ought to spur enough debate to stimulate social change in favour of LGB persons.

i) Relying on tested human rights arguments

Some human rights arguments have been clearly tested as regards LGB strategic litigation cases. As such, these are the arguments that should continue to be relied upon in such cases. However, care should be taken to rely on human rights arguments that have been used before elsewhere in LGB cases. These include non-discrimination arguments particularly in countries where the constitution is more open, the right to dignity, and the right to privacy where these rights are framed clearly in the country's constitution. These are arguments that have been relied on before and which thus would be helpful to ensure that the cases succeed.

Of course cases that by their very nature give rise to other arguments such as constitutionally laid down procedures and quorum, as it was in the *AHA* case in Uganda, ought to have such arguments raised. Cases decided by the particular country's highest courts should be primarily relied on, as they are binding precedents. These should be followed by cases from countries which have a similar legal culture or social-economic set up like the country in question. Persuasive precedents from other African Common Law countries would also be good. Decisions from courts in other countries and international

courts can also be used. The Common Law system still has precedent as a key feature and therefore, it makes it easier to argue cases where precedents exists, and LGB precedents are building up all the time, as do general human rights precedents. However, care should be taken that the jurisprudence is comparable, as for example precedents from India where rights like the right to love can be implied from other rights[168] may not be as persuasive to some of the common Law African countries as those from comparable African jurisdictions. Nevertheless, carefully constructed arguments with precedents to support them help to ensure success of the cases, and also to support the legitimacy of the decisions and eventually stimulate social change. However, the recent SMUG registration case in Uganda shows that both foreign precedents and local precedents may be easily distinguished by the courts and not lead to what is desired.

j) Making detailed prayers for remedies

Courts usually grant prayers and remedies that have been asked for by the lawyers. As such, the lawyers should always make detailed prayers for remedies in order to enable the court to issue detailed orders in case of success. The South African cases should be taken as examples in this regard as they indeed pay attention to the issue of remedies. All constitutions frame the remedies which courts are authorised to make in an open way and this leaves space for lawyers to ask the courts to do much more than make declarations where necessary. Structural interdicts in particular need to be tried as an effective way of ensuring that what the court orders is done.

However, care should be taken not to put the courts in a situation where they are expected to make orders that will be seen as counter-majoritarian to the point of being rendered illegitimate. This is a consideration that was given much attention when the *HRAPF* case was taken before the East African Court of Justice.[169] The legal team was careful to place the Court in a position where it was required to make declarations on clear points in respect of human rights. Similarly, legal teams would prefer framing relief sought as a declaration of the existence of a human right in accordance with the Constitution, rather than requesting an open-ended remedy requiring constitutional interpretation.[170] Where courts and tribunals have made orders that are strongly opposed by prevailing political powers, the consequences have been dire, as was seen with the Southern African Development Community (SADC) Tribunal.[171] In 2008, the Tribunal made a ruling that the government of Zimbabwe's interference with white farmers' ownership of

168 As was done by the Supreme Court of India in the case of *Navtej Singh Johar and Ors vs Union of India* (Supreme Court) WP(Crl) No.76 of 2016.

169 Interview with Fridah Mutesi, n 167 above.

170 Interview with Patricia Kimera, n 140 above.

171 L Nathan 'The disbanding of the SADC Tribunal: A cautionary tale' (2013) 35:4 *Human Rights Quarterly* 871.

property violated the SADC Treaty principles of non-discrimination and the rule of law.[172] In response to this ruling, the Assembly of the Heads of State, the highest organ of the SADC, called for a review of the role of the tribunal[173] and did not appoint judges to it, which amounted to the *de facto* suspension of its operations. A new Protocol to establish a new court with only the mandate to hear interstate complaints[174] is yet to come into force.[175]

k) Trying to ensure that cases come before experienced and liberal judges

The background of judges is usually reflected in how they make their decisions. As such, it is important to study which judges sit in which courts and to ensure that the LGB cases go to the more liberal judges. Usually, judges that sit on more specialised constitutional courts, such as those in Kenya's Constitutional Division of the High Court, Uganda's Constitutional Court and South Africa's Constitutional Court, appreciate constitutional matters more than their counterparts who sit on courts that hear all matters. This is largely a matter of experience as such judges have handled many such cases before. Generally, not many judges have handled LGB issues before, and thus finding such judges may prove a challenge. Nevertheless, activists and lawyers should try and ensure that the cases are allocated to the judges who are more experienced in human rights matters and may thus be more liberal. Having a case going to liberal judges increases the chances of success, which may speed up the rate at which social change happens. When a case is allocated to a less experienced and less liberal judge regarding human rights, the lawyers and activists have to be much more prepared to come up with persuasive arguments.

l) Avoiding condemnation in costs

Although it is important to obtain costs in a case, for LGB strategic litigation, orders as to costs should be avoided. A loss which also requires the payment of costs may make it difficult for an organisation to continue doing litigation. One of the ways that have been tried in Uganda to avoid being condemned in costs is not to pray for them and to expressly state so.[176] This is because the lawyers are usually paid by the petitioners at agreed rates and it would not be necessary for them to recover costs. Not asking for costs however does not always guarantee that the court will not award them but at least it would be

172 In *Mike Campbell (Pvt) Ltd v The Republic of Zimbabwe*, Case 2 of 2007 (*Campbell* case). Article 21(b) of the Protocol on the Tribunal in the Southern African Development Community, 2000.

173 Southern African Development Community 'Communiqué of the 30th Jubilee Summit of SADC Heads of State and Government' (2008) para 32 http://www.sadc.int/files/3613/5341/5517/SADC_Jubillee_Summit_Communique.pdf.pdf (accessed 25 April 2014).

174 Southern African Development Community 'Protocol on the tribunal in the Southern African Development Community' http://sadctribunalcoalition.org/sadc-tribunal/protocol/2014-sadc-tribunal-protocol/ (accessed 25 April 2014).

175 See Southern African Development Community 'SADC tribunal' https://www.sadc.int/about-sadc/sadc-institutions/tribun/ (accessed 17 July 2018).

176 Interview with Patricia Kimera, n 140 above.

clear that they were not sought. An example is in the *Anti-Homosexuality Act* case where costs were not prayed for but nevertheless the court awarded half the costs to the applicants.[177]

Another way to avoid costs is to ensure that the arguments raised in the case are good enough so that a win is more or less guaranteed or such that, even where a case is not won, the arguments were solid enough that costs are not awarded against the petitioners as a penalty for frivolous or vexatious litigation. This however may not always be pre-determined. Nevertheless, activists should prepare the best possible case, and avoid asking for costs or state that they prefer that each party covers their own costs. This may be put into consideration by the courts. LGB strategic litigation should be about creating precedents and ensuring legal change rather than as a way of remunerating lawyers.

m) Backing LGB cases with advocacy efforts

The court efforts should be backed up with the lobbying of legislators, engaging the executive and interfacing with the public, wherever possible. This helps to gain publicity for the case, secure allies, mobilise elites and community members and inform the public about the case and why it has been brought. These are very important factors in influencing the success of the case, but also to ensure buy-in from all the different actors. It also helps to stem opposition from those who may think the case targets them. In all countries, summaries of cases are shared with many persons explaining what the case is about, a practice that should continue.

7.3.4 Controlling the factors at the post-litigation stage

At this stage, the decision if a case was successful needs to be enforced, and if unsuccessful, appeals and other ways of engagement and building up on the case should be planned. At this stage, LGB activists can control the factors by:

a) Ensuring the enforcement of successful decisions

Langford *et al* have noted that far too many successful social rights cases are left unimplemented.[178] Successful decisions have to be enforced, primarily by government, and this has to be done in a way that allows the public to know that enforcement took place. Of course, the issue of enforcement is not always directly under the control of the activists, as it depends on the nature of the cases at hand. Activists and their lawyers can however play a key role in reminding the persons directed to implement the decision. If the decision requires an action to be taken by the executive, activists and lawyers should reach out to the office in question and demand for the specific action to be done. This is what activists in Botswana did to have LEGABIBO registered.

177 n 154 above.

178 M Langford *et al* 'Introduction: From jurisprudence to compliance' in M Langford *et al* (eds) *Social rights judgments and the politics of compliance: Making it stick* (2017) 3-5

They delivered the court order and the documents to the registrar and went through the processes of registering LEGABIBO.[179]

For actions that require the legislature to pass a law, such as in the *Fourie* case in South Africa, the activists also need to lobby for such a law to be passed. For declarations that do not require anything to be done, such as those nullifying a law, activists need to test how state organs act in the aftermath of the decision. For example, following the *Equal Opportunities* case in Uganda, the need arose to test the Equal Opportunities Commission by filing a case that clearly concerns LGB persons.[180]

Another way in which compliance can be enforced is through engaging international human rights mechanisms. The most important mechanisms in this regard are the political bodies, the UN Human Rights Council and its Universal Periodic Review (UPR) process and special mechanisms as a well as the African Commission and its special mechanisms.

Therefore, ensuring compliance goes a long way toward creating a favourable environment in which the effect of LGB strategic litigation on societal attitudes can be amplified.

b) Appealing lost cases

Cases that have been lost need to be appealed such that the negative precedent does not remain binding. The Kenyan case of *COL* was appealed as it allowed anal examinations to go on, and luckily the negative precedent was overturned.[181] However, the decision on filing an appeal should also depend on the nature of the case. For example the *HRAPF* case at the EACJ was not appealed while the *Lokodo* and *SMUG* cases were. The tactical decision not to appeal the *HRAPF* case took account of the fact that the case had reached a dead-end and in any case, it had been designed in such a way that the Court's refusal to hear the case would have no direct impact on LGB persons in Uganda.[182]

For the *Lokodo* and *SMUG* cases however, the impact on LGB persons is direct and disastrous as in essence it allows any state agency to refuse to do anything for LGB persons simply based on the criminalisation of same-sex conduct. Failing to appeal such decisions to the highest national, regional and even international fora would be irresponsible and dangerous. Where a case has been grounded in proper legal arguments, appeals are likely to succeed and should be pursued. Activists should always be ready to appeal.The other side of appeals is defending appeals filed by the respondents in cases that have been won. This is what happened in the *Attorney General v Thuto Rammoge*

179 Interview with Caine Youngman, Gaborone, 10 October 2017.

180 n 36 above.

181 'Anal exam to test homosexuality illegal, court finds' *Daily Nation* 23 March 2018 https://www.nation.co.ke/news/Appeals-court-rules-forced-anal-tests-illegal/1056-4353800-r7qqs8/index.html (accessed 2 July 2018).

182 Interview with Fridah Mutesi, n 167 above.

& 19 Others (2014) case[183] in Botswana. Usually, activists do not initially plan for such appeals. However, it is important that appeals in successful cases are properly defended to avoid a reversal of the successes initially obtained to the detriment of LGB persons. Appeals need to be brought or defended as and when necessary.

c) Documentation of lessons learnt

There is a need to document the lessons learnt during litigation if LGB strategic litigation is to lead to social change. A record of experiences and lessons accumulated over time is necessary to enable activists that will come after to understand what the earlier group went through and how they solved the challenges they confronted. It is also helpful in terms of other people understanding what the struggle is about and thus ensuring that the struggle is seen as important and legitimate. With the exception of South Africa, little has been written about the litigation efforts and struggles in the other countries forming part of this study.[184] More documentaion needs to be done if at all the litigation is to change minds.

7.3.5 Engaging the media as a cross cutting factor

Engaging the media cuts across all the different stages of a strategic litigation case. The media is a powerful tool that changes mindsets. Newspaper and other media editors need to be engaged on the need to avoid sensational reporting on LGB issues. The media has the power to change how people think about particular issues. Sensational reporting leads to moral panics, which worsen the situation for LGB persons as they are regarded as monsters out to harm society. Such sensational reporting was displayed by the Rolling Stone newspaper in Uganda, which claimed that homosexuals were after children and intended to recruit them into homosexuality, and called upon the public to hang them.

Another way in which the media may affect a case is by not reporting about it at all. Again Uganda has the example of the biggest media house, the Vision Group, whose editorial policy excludes the publication of news or advertisements on homosexuality except if they come from the President, parliament or the judiciary.[185] However, even when they report on cases, the stories are usually short and devoid of detail or narrative which would evoke empathy with the LGB persons involved. At the same time negative stories are sensationalised. Engaging such media houses on the different cases needs to begin right from

183 CACGB-128-14.

184 Notably, Ugandan Activists have documented the processes in the AHA case and earlier cases. See Jjuuko and Mutesi (n 3 above). Also see A Jjuuko 'The incremental approach: Uganda's struggle for the decriminalisation of homosexuality' in C Lennox & M Waites (eds) *Human rights, sexual orientation and gender identity in the Commonwealth: Struggles for decriminalisation and change* (2013) 381.

185 Vision Group (2014) 'Editorial Policy' https://issuu.com/newvisionpolicy/docs/243661083-editorial-policy-complete (accessed 24 July 2017).

the time the case is being planned, at the point of filing, during the hearing, on judgment day and during the enforcement process. Engagement should be by way of inviting them to press conferences, buying space for press releases and statements and training the different editors on LGB rights. In this way, they would be in position to give the public news as well as avoid sensationalising stories against LGB persons. This is important for changing perspectives and ensuring that LGB strategic litigation stimulates social change.

Another important component of the media to consider is the non-traditional media, or social media. This is extremely popular as it is cheaper and easier to access than traditional media, and everyone is able to distribute news. LGB activists need to be able to use social media to influence the narrative about the cases and invoke conversations and discussions about them. However, care should be taken to avoid the outing of LGB persons and to ensure protection against cyber-harassment and bullying. Also, in countries that unduly restrict the use of computers such as Uganda,[186] there is a need to ensure that such reporting is not regarded as computer misuse. In Uganda, the case of Dr. Stella Nyanzi of Makerere University who uses social media to do political commentary and criticism using sexual imagery helps to illustrate the dangers that using social media for activism can bring about. She was arrested and convicted under the Computer Misuse Act for calling the President of Uganda, 'a pair of buttocks' on her Facebook page.[187] Also, a number of LGB persons have been arrested and charged under this Act for posting LGB content on social media.[188] One therefore has to be careful when using social media for LGB advocacy in countries that restrict freedom of expression. The extent to which LGB activists engage both traditional and social media goes a long way in determining how LGB strategic litigation stimulates social change.

7.4 Other strategies that can complement strategic litigation

Besides adequately planning for strategic litigation, the court case itself should not be taken as the ultimate, and a lot more should be done whether there is a case or not. Some of what needs to be done is:

a) Participating in law-making processes

One avenue available for citizens is to engage in the law-making process. There are many laws that have a direct impact on LGB persons and therefore

186 Uganda's Computer Misuse Act, 2011 in its section 25, criminalises the use of electronic media to 'disturb the peace' of an individual, defining it in deliberately vague terms and yet it imposes a heavy penalty for this crime.

187 For details of the case see S Nyanzi '#PairOfButtocks: Uganda v. Stella Nyanzi' in Human Rights Awareness and Promotion Forum (HRAPF) 'The Computer Misuse Act, 2011: Yet Another Legal Fetter to the Basic Rights and Freedoms of Marginalised Persons' (2017) 4 *The Human Rights Advocate* 46-49.

188 A Jjuuko 'Editor's note' in Human Rights Awareness and Promotion Forum (HRAPF) 'The Computer Misuse Act, 2011: Yet another legal fetter to the basic rights and freedoms of marginalised persons' (2017) 4 *The Human Rights Advocate* 4-5.

ensuring inclusive language in such laws is crucial. In South Africa, LGB activists supported the passing of laws that built upon the court victories. In Botswana this also happened despite the loss in the Kanane case. On the other hand in Kenya, Nigeria and Uganda, legislative processes have been used to further criminalise same-sex relations, with full success in Nigeria, part success in Uganda and attempts in Kenya.[189] Activists actively campaigned against these and eventually won in both countries. Nevertheless, restrictive provisions that obviously target LGB persons have been included in several other laws. This has largely been common in Uganda, and the relevant laws include: the Anti-Pornography Act, 2014; the Computer Misuse Act 2016; and the Non-Governmental Organisations Act, 2016. Each of these laws has provisions that would in effect import some of the repressive provisions of the AHA.[190] One way in which the anti-gay groups have been able to fight LGB groups in Uganda is through constitutional amendments, having successfully lobbied for a prohibition on same-sex marriage to be included in the 2005 Constitutional amendment.[191] The anti-gay group Family Life Network made submissions to the Legal and Parliamentary Affairs Committee of Parliament to include the prohibition of homosexuality in the Constitution during the recent amendment process in 2015.[192] Therefore, it becomes necessary for the LGB groups to respond in similar fashion and engage in the law-making process. If the law changes through the legislative process, there would be no need to do LGB strategic litigation. Indeed, it has been argued that using the legislature to change laws is the more democratic and thus most legitimate way to effect change than judicial review of parliamentary action.[193] Wherever

189 In Nigeria, the SSMPA became law. In Uganda these efforts succeeded, as the Anti-Homosexuality Act became law, even if it was later nullified. For Kenya, August 2014, the Liberty Party proposed a bill in similar terms to the Ugandan Anti-Homosexuality bill before the National Assembly, although it was never debated. See 'New bill wants gays stoned in public' *The Star* 12 August 2014, http://allafrica.com/stories/201408120968.html accessed 7 June 2015.

190 For analyses of some of these laws see: Human Rights Awareness and Promotion Forum (HRAPF) 'The Computer Misuse Act, 2011: Yet another legal fetter to the basic rights and freedoms of marginalised persons' (2017) 4 *The Human Rights Advocate* (for the Computer Misuse Act); Human Rights Awareness and Promotion Forum 'Legal Analysis of the NGO Bill, 2015 (2016) and Human Rights Awareness and Promotion Forum 'The Likely implications of the Non-Governmental Organisations Act 2016 on marginalised groups' (2016) 3 *The Human Rights Advocate* (for the NGO Act 2016).

191 For a discussion of how this prohibition came to be included in the Constitution, see JD Mujuzi 'The absolute prohibition of same-sex marriages in Uganda' (2009) 23 *International Journal of Law, Policy and the Family* 278.

192 Parliamentary Watch 'Meeting with Family Life Network' May 20th, 2015 http://parliamentwatch.ug/meeting/meeting-family-life-network/#.WybXP6l9h0s (accessed 17 June 2018).

193 See for example R West 'Progressive and conservative constitutionalism' (1990) *Georgetown Public Law and Legal Theory* Research Paper No. 11-46; J Waldron 'The core of the case against judicial review' (2006) 115 *The Yale Law Journal* 1346; and LD Kramer *The people themselves: Popular constitutionalism and judicial review* (2004) 128, 144.

possible, this avenue should be tried. Activists in Kenya, South Africa, and Uganda are in a much better position to lobby lawmakers, as adequate consultations are part and parcel of the law-making process. [194] Even for Botswana and Uganda, which do not have express constitutional provisions requiring public consultations, there is still space for engagement in the legislative process, and indeed such consultation are usually done in practice.

b) Engagement in subsidiary legislation and policy-making processes

Another important but often-overlooked part of the law is subsidiary legislation and policy. At this level, ministers and other government officials make laws giving effect to the principal legislation. In other cases, it may be helpful to ensure that the subsidiary laws or policies provide more details and expressly comment on LGB issues, which can ensure protection. Usually, the relevant ministries allow the public to get involved in the development of these policies and LGB activists need to take advantage of these processes and ensure that progressive and protective provisions for LGB persons are included.

c) Engaging the executive

The executive branch has the power of the 'sword and the purse' and is therefore critical in the process of creating social change. The heads of state need to be engaged in order to change their minds as regards LGB rights. However, like Ugandan activists found out, this is not always an easy task as access to such officials by sexual minority groups is largely closed.[195] However, other country's leaders can also easily lobby such persons, and therefore there is a need to involve such persons as was done in Uganda.[196] The President may be hostile to LGB rights, but there are many technocrats who may be friendlier towards gay rights. All these need to be engaged within their own capacities and powers. Those who are friendly should be mapped and then targeted. In Uganda, activists engaged the Minister of Health until he issued Ministerial Guidelines on non-discrimination in service provision.[197] They also

194 For Kenya, articles 118 and 196 of the Constitution require Parliament and county assemblies to consult the public while making laws. For South Africa, the requirement for public consultations is in section 59(1)(a); 72(1)(a); and section 118(1)(a) of the Constitution of South Africa. This was held to be mandatory in law making processes in *Doctors for Life International v the Speaker of the National Assembly & Others* 2006 (12) BCLR 1399 (CC). For Uganda, the Constitution in the National Objectives and Directive Principles of State Policy requires public participation in governance, and as such people have to be consulted in the law making process. *Male H Mabirizi v Attorney General* Constitutional Petitions Nos. 49 of 2017, 3 of 2018, 5 of 2018, 10 of 2018, and 13 of 2018.

195 A Jjuuko 'The incremental approach: Uganda's struggle for the decriminalisation of homosexuality' in C Lennox & M Waites (eds) *Human rights, sexual orientation and gender identity in the Commonwealth: Struggles for decriminalisation and change* (2013) 381, 401-403.

196 As above.

197 Republic of Uganda, Ministry of Health 'Ministerial directive on access to health services without discrimination' (2014) https://www.scribd.com/document/233209149/MoH-Ministerial-Directive-on-Access-to-Health-Services-Without-Discrimination-19-June-14

engaged the Inspector General of Police and since then, the training of police officers on LGB rights have been able to actively go on and the police have even accepted that such training takes place within the force.[198] However, the down side of the strategy is that it is hugely dependent on individuals rather than systems, and as such when an individual is removed from office, the gains may very easily be reversed. An example is the stopping of the police trainings on LGB rights in Uganda soon after the former Inspector General of Police, Kale Kayihura was replaced.

Kenyan activists have been able to actively engage the Ministry of Health on LGB issues.[199] South African activists have also lobbied their country's representatives at the UN Human Rights Council, reminding them of their country's laws and the need for South Africa to take the lead in the protection of LGB rights on the continent.[200] Therefore it would be better to work with rather than against the government in order to achieve LGB rights. Even in the most repressive state, there will be a few government functionaries willing to engage on LGB rights.

d) Engaging law enforcement officials on LGB issues

Even if individual police or judicial officers may be hostile to LGB issues, going through their formal command structure is something that has proved effective in countries like Uganda.[201] The trainings help the police officers and the judges/magistrates interface with LGB persons and understand first hand their experiences. This means that when cases come before such judges or police officers, they understand what to do. Indeed, activists in Uganda have been training both the police and the judiciary, and they have received feedback from both agencies with many of the trained individuals referring cases or sharing stories of the more respectful ways in which they treated the suspects as a consequence of the trainings.[202] Such a change of minds goes a long way in ensuring that social change happens.

e) Use of national human rights institutions (NHRIs) and related bodies

NHRIs have the mandate to protect and promote human rights within the country, and this certainly includes LGB rights regardless of what the current holders of the offices may think. They thus need to be reminded of this duty

(accessed 8 September 2017).

198 'Police organise workshop on how to protect gays' *Daily Monitor* 15 November 2017.

199 Interview with Lorna Dias and the GALCK team, n 6 above.

200 'LGBTI activists praise South Africa's UN vote to "fight discrimination everywhere"' Mail & Guardian, 22 Nov 2016 https://mg.co.za/article/2016-11-22-lgbti-activists-praise-south-africas-un-vote-to-fight-discrimination-everywhere (accessed 17 July 2018).

201 Interview with Patricia Kimera, n 140 above.

202 The Consortium on Monitoring Violations Based on Sex Determination, Gender Identity and Sexual Orientation and Human Rights Awareness and Promotion Forum (HRAPF) 'Uganda report of violations based on sexual orientation and gender identity, 2015' (2016) 22-24.

and encouraged to engage the state organs on LGB issues. The SAHRC is an example of an active NHRI that even got engaged in litigation in favour of LGB persons.[203] The Kenya Human Rights Commission is also supportive of LGB persons in Kenya, and has specifically devoted efforts on intersex persons, within the broader context of human LGBTI rights.[204] It intervened in favour of intersex persons in two cases on the rights of intersex persons as *amicus curiae* in one (*R.M vs. Attorney General & 4 others*).[205]It also sits on the Taskforce on Policy, Legal, Institutional and Administrative Reforms regarding Intersex persons.[206]

The Uganda Human Rights Commission is another NHRI that has been actively speaking out in favour of LGB persons, and which has also trained magistrates, public prosecutors and civil society actors on LGB rights.[207] The UHRC also submitted before Parliament opposing the Anti-Homosexuality Bill. The Network of African National Human Rights Institutions (NANHRI) in which the NHRIs of Kenya, Nigeria, South Africa and Uganda, are members has a sexual orientation and gender identity programmes and it has been training and engaging its membership on LGB issues.[208] However, the NHRIs that have tribunals that investigate the violation of rights should be utilised by bringing LGB cases before these tribunals. So far two cases involving violations of the rights of LGB persons have been brought to the UHRC in Uganda.[209] Decisions by these bodies on the rights of LGB persons go a long way in making it clear that such persons also deserve protection.

Other bodies that play similar roles to those of NHRIs should also be engaged. Indeed in South Africa, the Equality Courts established under the Promotion of Equality and Prohibition of Unfair Discrimination Act (PEPUDA),[210] have been used to vindicate the rights of LGB persons.[211] The *Commission*

203 *Sodomy* case; *South African Human Rights Commission v Rev OP Bougart* (Equality Court, Cape Town).

204 See Kenya Human Rights Commission 'Special interest Groups; Intersex persons' https://www.knchr.org/Our-Work/Special-Interest-Groups/Intersex-Persons-in-Kenya (accessed 7 September 2019).

205 [2010] eKLR, Petition No. 705 of 2007. Kenya, High Court.

206 KNHRC, n 204 above.

207 The author has facilitated at four such trainings.

208 Network of African National Human Rights Institutions (NANHRI) 'Sexual orientation, gender identity and expression' https://www.nanhri.org/our-work/thematic-areas/sogie-project/ (accessed 7 September 2019).

209 The two cases brought before the Uganda Human Rights Commission are *Mukasa Jackson & Mukisa Kim v Attorney General* UHRC No. CTR/24 of 2016 and *Shawn Mugisha and 6 Others v Attorney General and the District Police Commander (DPC)*, Kabalagala Police Station, UHRC No. CTR/06/2017.

210 Act, No 4 of 2000.

211 See for example South African Human Rights Commission & 3 Others v *Jon Qwelane* matter (*case* number 44/2009EQ) in which the former South African Ambassador to Uganda Jon Qwelane was found guilty of hate speech against LGBT persons. Most recently is the case of *South African Human Rights Commission v Oscar Peter Bougardt* EC 13/2018 in which the Equality Court made a contempt of court order against a pastor who

for *Gender* Equality stablished in terms of Section 187 of the Constitution of the Republic of *South Africa* also has also been active in LGB litigation including in the *Immigration* case.[212] In Uganda, activists have engaged the Equal Opportunities Commission and it has been involved in work on LGB rights.[213] This is thus an avenue that can still be used effectively.

f) Influencing popular culture

One of the ways through which activists in the USA and other countries were able to mobilise and 'normalise' LGB issues was through music and movies, and otherwise influencing popular culture.[214] To some extent South Africa's many popular figures who are gay has also helped shape mindsets in that country. LGB activists in the other countries need to exploit this more and engage music and movie stars, as well as other persons that shape popular culture, to start speaking out against LGB violations. They can also point out homophobic statements by artists and bring this to the attention of the public. This for example worked in Uganda, where music star and current Member of Parliament and presidential hopeful Hon. Robert Kyagulanyi Ssentamu (Bobi Wine) blasted LGB persons on his social media pages,[215] and after receiving public backlash, including his shows being cancelled in London and an anti-gay song he wrote being blocked on YouTube, [216] he apologised, and he is now largely regarded as pro gay.[217]

There is a risk that such music, videos and shows or books may be censured or cancelled for 'promotion of homosexuality' as has been the case in Uganda in the past.[218] Activists in South Africa and Botswana have been able to do such shows however, highlighting the difference between Uganda and Botswana in that respect. South Africa also recently banned 'Inxeba-The Wound' over its depiction of homosexuality, although the Film Certification Board officially used pornography as the reason for the x-rating.[219] Kenya also recently banned the movie 'Rafiki' over the depiction of lesbian love.[220] Where possible, LGB

failed to comply to an agreement to desist from hate speech against LGB persons.

212 *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* (1999) ZACC 17.

213 Interview with Patricia Kimera, n 140 above.

214 See for example S Kornhaber 'The *Modern Family* effect: pop culture's role in the gay-marriage revolution' *The Atlantic* 26 June 2015 https://www.theatlantic.com/entertainment/archive/2015/06/gay-marriage-legalized-modern-family-pop-culture/397013/ (accessed 17 June 2018).

215 'Bobi Wine speaks out on homosexuality' *Daily Monitor* 30 July 2014.

216 'Bobi Wine's anti-gay song blocked on YouTube?' *Daily Monitor* 15 August 2014.

217 'Singer Bobi Wine Apologises to Ugandan LGBTI over Previous Backlash' *Kuchu Times* 12 January 2016 https://www.kuchutimes.com/2016/01/singer-bobi-wine-apologises-to-ugandan-lgbti-over-previous-backlash/ (accessed 17 June 2018).

218 See discussion on status on criminalisation of consensual same-sex relations in chapter 4, section 4.2.1 above.

219 'Homophobia wins as 'Inxeba (The Wound)' effectively banned in SA' *Mamba online* 14 February 2018 http://www.mambaonline.com/2018/02/14/breaking-outrage-fpb-effectively-bans-inxeba-wound/ (accessed 17 June 2018).

220 'Banned gay film 'Rafiki' film reveals Kenya's sexuality progress' *Daily Nation* 8 May

activists should endeavour to influence the message sent to the public through popular culture such that it correctly depicts the truth and reality about LGB persons, and thus helps to spur social change.

g) Including human rights in training institutions' curricula

Comprehensive Sexuality Education (SE) has proved to be controversial in many countries of recent due to concerns about children and the issue of alleged 'recruitment'.[221] However, discussions on human rights generally and the principles of equality and non-discrimination are much less controversial and should be taught as part of the school curriculum. Where this is not possible, activists themselves should engage training institutions to include it. This can even be done without mentioning LGB rights, as human rights apply to all and the message would still be the same. Some of the training institutions to be targeted are: leadership institutes, lawyers training institutions, medical institutions and those for journalists. These would help to ensure that persons who graduate out of these schools and institutions understand the importance of equality and non-discrimination for all, persons including LGB persons. Such trainings are entirely legitimate as this is a constitutional principle that every constitution protects. There is no way LGB rights will be properly appreciated without first appreciating the whole concept of human rights and how it applies to all persons.

7.5 Is there an 'African' way of engaging in LGB strategic litigation?

Much has been made of the argument that Africans need to adopt 'African' ways of engagement on LGB issues, rather than using foreign approaches, if at all they are to attain social change in favour of LGB persons.[222] strategic litigation is one of those approaches that are considered foreign and un-African as it did not originate in Africa, just like the terminology that is used to describe LGB persons.[223] The argument goes that if successful, such foreign approaches will also deliver foreign solutions – solutions that are not applicable to local conditions and thus largely impractical.[224] South Africa is an example of a country in which court victories delivered legal change but social acceptance has remained largely illusory.[225] Among the strategies suggested

2018 https://www.nation.co.ke/news/What-ban-of-gay-film--Rafiki--indicates-about-Kenya/1056-4549802-r5p0flz/index.html (accessed 17 July 2018).

221 For example, it was banned in Uganda by the Ministry of Education and Parliament in 2016 after a moral panic arose when books were found portraying 'sexual orientation and a non-negative portrayal of masturbation.' A new policy has been unveiled that is 'cultural, religious sensitive and age appropriate.' 'Education ministry approves sexuality education *framework*' *The Daily Monitor* 25 March 2018.

222 See for example ZZ Devji 'Forcing paths for the African queer: Is there "African" mechanisms for realising LGBTIQ rights?' (2016) 60 *Journal of African Law* 343. Also see El Menyawi, n 6 above.

223 Devji, above, 344.

224 El Menyawi (n 4 above).

225 Devji (n 222 above) 349.

is 'going back to the closet' and using the privacy discourse that the local communities and leadership understand.[226] However, Devji suggests more litigation, which should be combined with greater visibility, and then seizing the political moment and using HIV and AIDS based arguments.[227]

Fritz also supports taking note of African realities and thus not putting courts in situations where they would be clamped down upon the way the SADC tribunal was.[228] On the other hand, Haste and Thierry Gatete suggest that there should be less emphasis on individual rights as regards LGB rights, specifically within the context of Rwanda. This is based on their observations that there is 'strategic silence' by the government on LGB issues, which the LGB community has also learnt to work with.[229]

This book adopts the view that rather than being considered as 'African approaches' to LGB social change, the concerns above would be best addressed by measures that are context-responsive and effective. Current political, social and economic realities, rather than vague notions of an overarching 'African' approach, should frame the struggle for LGB social change. Calling for the abandonment of strategic litigation and other such so-called 'stonewall' strategies in favour of more African ways, may not be practical. All the countries have adopted democracy and the separation of powers as the way government runs and therefore put in place avenues to engage the state, which are largely effective. Therefore, there would be no reason not to use these. Also, the non-binding nature of the so-called African approaches makes it difficult to know for sure that change has been obtained. Again, what are called 'African approaches' are in fact already embedded in the current mechanisms. The judicial system supports alternative dispute resolution, there is respect for the law and for due processes, and respect for each other even within the adversarial system. Therefore, the main values embedded within the African approaches are values that have also found their way into the current strategic litigation system and are therefore not alien. Demonstrations, riots and such other violent means of conflict resolution have been castigated as un-African in favour of dialogue, but they are also not necessarily foreign in origin as violence has at different times been used everywhere to resolve issues. It depends on the circumstances and the level of oppression.

Strategic litigation is not a foreign approach to resolving issues. Rather, it is an approach that has been developed over time despite its origins. It now

226 El Menyawi (n 4 above).

227 See generally Devji, n 222 above.

228 N Fritz 'Human rights litigation in Southern Africa: not easily able to discount prevailing Public opinion' (2014) *International Journal on Human Rights* 193-198.

229 See generally P Haste and TK Gatete 'Sexuality, poverty and politics in Rwanda' April 2015. https://opendocs.ids.ac.uk/opendocs/bitstream/handle/123456789/6062/ER131_SexualityPovertyandPoliticsinRwanda.pdf;sequence=1 (accessed 21 July 2018).

fits within the local circumstances of each country as the judiciary has been designed and equipped for local conditions. Whereas it is true that every country should adapt its own approach towards strategic litigation to its local circumstances, at the end of the day it remains about what works where and what does not. The 'African approaches' mantra should not be used simply to castigate anything that may not have originated in Africa. Even though strategic litigation originated outside Africa, it must be accepted that cultures enrich and feed into each other, and this is a normal process.

7.6 Conclusion

LGB strategic litigation remains a viable way of stimulating social change in favour of LGB persons in Common Law Africa. As such, there is a need for activists to manage the exogenous factors and to effectively control the endogenous factors in their favour. There is a further need to do much more beyond the cases. Strategic litigation is about using litigation in combination with other strategies, and therefore the more deeply strategising is done, the better. Activists should endeavour to remain in control of all the processes and beware of what to do in all circumstances. The most important thing is that the LGB movement should not work in isolation. Difficult as it is, the movement must work to create linkages with other movements and also fight for other causes beyond their own. The struggle for equality is a struggle for everyone. African Common Law countries need to be sensitive to their own peculiarities and local conditions and work within these. A prescribed 'African approach' to doing things is unrealistic and impractical. What is important is to use what is available in a way that is conscious of the realities of the specific communities in order to spur change. The views, beliefs and concerns of the general community and the state must be listened to, weighed and responded to in an appropriate manner. Strategic litigation is not done simply for its own sake but to change minds, and this takes time and the right approach. The right approach must be determined on a case-to-case and trial-and-error basis. Different approaches have been tested elsewhere yielding different results, and the lessons drawn from within and outside Common Law Africa can be adequately applied to the situation to boost positive results from LGB strategic litigation.

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About the Author

Dr. Adrian Jjuuko is a Ugandan human rights lawyer, researcher and consultant. He is the founder and Executive Director of Human Rights Awareness and Promotion Forum (HRAPF). HRAPF operates the first and only specialised legal aid clinic for marginalized persons in Uganda, and has been instrumental in carrying out advocacy and strategic litigation against laws that violate or threaten the rights of LGBTI persons and other minorities in Uganda.

Dr. Jjuuko holds an LLD from the University of Pretoria, and his research LLD thesis is titled 'Beyond court victories: Using strategic litigation to stimulate social change in favour of lesbian, gay, and bisexual persons in Common Law Africa.' He also holds an LLM in Human Rights and Democratisation in Africa from the University of Pretoria, an LLB from Makerere University Kampala, Uganda, and a postgraduate Diploma in Legal Practice from the Law Development Centre, Kampala.

Dr. Jjuuko is the author of three books, five journal articles and a contributor to an encyclopedia. He has delivered talks/lectures on his work at leading universities around the world, including Harvard Law School, University of Pretoria, University of Toronto and University of Bergen. He is a consultant facilitator at human rights and trainings in Uganda and outside abroad. His research interests are in the areas of: LGBTI rights, democracy and human rights, the right to health, and children's rights.

There has been a rise in the use of strategic litigation related to seeking equality for lesbian, gay, and bisexual (LGB) persons. Such developments are taking place against the backdrop of active homophobia in Africa. The law and the general public should, argues the author, treat LGB persons in the same way that heterosexuals are treated. In the past two decades, 30 strategic cases have been filed by LGB activists in the Common Law African countries, Botswana, Kenya, Nigeria, South Africa, and Uganda. While the majority of the cases have been successful, they have not resulted in significant social change in any of the countries. On the contrary, there has been active backlash, counter-mobilisation, and violence against LGB persons, as well as the further-criminalisation of same-sex relations and constitutional prohibitions on same-sex marriages in some of the jurisdictions. The author argues that activists in Common Law Africa have to design LGB strategic litigation in such a way as to fit within the actual social and political conditions in their countries if strategic litigation is to spur social change.

Adrian Jjuuko is an exceptional scholar. A rare combination of intellectual brilliance, commitment and hard work. The book is born of this. It reflects his incisive analytical skills, anchored in solid knowledge of the law and jurisprudential developments in the field. His ventures into political theory, philosophy, and the social sciences give the analysis additional clarity and empirical grounding.

— Siri Gloppen, Norwegian political scientist, professor of Comparative Politics at the University of Bergen and Director of the CMI-UiB Center on Law and Social Transformation

Adrian Jjuuko's meticulously researched examination of the use of strategic litigation not only celebrates the many victories which have been realized in a range of African courts of law, it also reviews and critiques the losses. He demonstrates that the law can be both an effective tool for liberation, just as it can consolidate minority oppression, gender injustice and sexual tyranny. This book is a deeply engaging and highly recommended text for those interested in shaping the evolving rights and struggles of sexual minorities on the continent for decades to come.

— J. Oloka-Onyango, Professor of Law, Makerere University School of Law

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